FEDERAL COURT OF AUSTRALIA

Hocking v Director-General of the National Archives of Australia [2019] FCAFC 12

Appeal from:	*Hocking v Director-General of National Archives of Australia* [2018] FCA 340
File number:	NSD 530 of 2018
Judges:	**ALLSOP CJ, FLICK AND ROBERTSON JJ**
Date of judgment:	8 February 2019
Catchwords:	**ADMINISTRATIVE LAW** – applicant sought access under the *Archives Act 1983* (Cth) (the **Act**) to records, being the 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 – whether those records a "Commonwealth record", being records that were the property of the Commonwealth, such that public access to them was governed by Div 3 of Pt V of the Act **CONSTITUTIONAL LAW** – consideration of relationship between the Governor-General and the Commonwealth – consideration of relationship between the Governor-General and The Queen of Australia
Legislation:	*Archives Act 1983* (Cth) ss 2A, 3, 5, 6, 31, 33, 36, 56, 58 *Australian Constitution* ss 2, 61
Cases cited:	*Kline v Official Secretary to the Governor General* [2013] HCA 52; 249 CLR 645 *Nixon v Sampson* 389 F. Supp. 107 (1975) *Sue v Hill* [1999] HCA 30; 199 CLR 462 *United States v First Trust Company of St Paul* 251 F.2d 686 (1958) Twomey A, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) Watts P and Reynolds FMB, *Bowstead and Reynolds on Agency* (21st ed, Thomson Reuters, 2018)

Date of hearing:	28 November 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	120
Counsel for the Appellant:	Mr B Walker SC with Mr T Brennan
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Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 530 of 2018

BETWEEN:	**JENNIFER HOCKING** Appellant
AND:	**DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA** Respondent
JUDGES:	**ALLSOP CJ, FLICK AND ROBERTSON JJ**
DATE OF ORDER:	**8 FEBRUARY 2019**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs in the sum of $30,000, in accordance with the Registrar's order of 22 June 2018.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ AND ROBERTSON J:

Introduction

1 This appeal is from the order of the primary judge made on 16 March 2018 dismissing an originating application dated 20 October 2016. That application, as amended, concerned "the records indexed at the National Archives of Australia as AA1984/609" (**records**) and sought a declaration that those records were Commonwealth records within the meaning of the *Archives Act 1983* (Cth).

2 It was an agreed fact between the parties that the records comprised six parts which consisted of the 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. It was further agreed that the records comprised letters and telegrams and certain attachments to that correspondence (for example, newspaper clippings and letters), the period of the correspondence being 15 August 1974 to 5 December 1977.

3 The records were lodged with the National Archives of Australia (**the Archives**) on 26 August 1978 by Mr David Smith, as Sir David then was, in his capacity as Official Secretary to the Governor-General.

4 Access by the appellant to those records was refused by letter dated 10 May 2016, that letter stating that the records were not a "Commonwealth record" and were not subject to the access provisions of the *Archives Act*. Relevantly, the letter stated:

> …
>
> **Record AA1984/609**
>
> 5. Record AA1984/609 was deposited on 8 September 1978. It is not a 'Commonwealth record' and is not subject to the access provisions under the *Archives Act 1983* (Archives Act) for the same reasons as Record M4513.
>
> 6. The mere fact that the documents may have connection with office (sic) of the Governor-General does not mean that such documents are the property of the Commonwealth. Nor is it correct to conflate the role of the Governor-General with that of 'the Commonwealth'.
>
> 7. Record AA1984/609 remains under the effective and immediate control of the Office of the Governor-General through the Official Secretary of the Governor-General. The NAA has custody of the record in accordance with

> ss 5(2)(f) and 6(2) of the Archives Act. It does not have power or authority to give access to the record other than in accordance with the instrument of deposit and arrangements specified by the offices of the Queen and the Governor-General.

5 The proceedings at first instance were in the nature of judicial review of the decision dated 10 May 2016, this Court having jurisdiction under s 39B of the *Judiciary Act 1903* (Cth), although the appellant sought a declaration "that the records indexed at the National Archives of Australia as AA1984/609 are Commonwealth records within the meaning of the *Archives Act 1983*."

6 The Court was not at first instance, and is not on appeal, concerned with the merits of the decision or whether it would be beneficial to the appellant or others to have access to the records. Section 43 of the *Archives Act*, allowing for applications to the Administrative Appeals Tribunal for review on the merits of certain decisions, is not applicable.

7 Both at first instance and on appeal the parties agreed it was unnecessary for the Court to examine the records in order to determine the issues.

8 The proceedings concern only the legal correctness of the decision of the Archives that the records were not a "Commonwealth record" as defined in s 3(1) of the *Archives Act* on the basis that the records were not "the property of the Commonwealth". The proceedings do not concern whether the records should be made available as a matter of public interest or whether or not a ground of exemption under s 33 could be made out. It is clear that the records relate to the history and government of Australia.

9 The appeal is to be determined as a matter of Australian law, principally the *Archives Act*, and therefore we have considered and construed the provisions of that Act.

The Notice of Appeal

10 The grounds of appeal were as follows:

> **Grounds of appeal**
>
> 1. The trial judge erred at TJ [107] in deciding that the documents comprising record AA1984/609 ("**Records**") were not the property of the Commonwealth but were rather the personal property of Sir John Kerr, when:
>
> (a) the trial judge should have found that the Records or some of them were the property of the Commonwealth because they were created or received by the Governor-General in the performance of his office and concern the government of the Commonwealth of Australia;
>
> (b) further, and in the alternative, to the extent that the perceptions as to

ownership of the Records of Sir John Kerr, the Queen or the Commonwealth were relevant to determining whether any of the Records were the property of the Commonwealth, as found at TJ [107], the trial judge should have inferred that:

(i) Sir John Kerr, Buckingham Palace and other relevant Commonwealth officials perceived that correspondence between Sir John Kerr acting in his capacity as Governor-General and the Queen was government property; and

(ii) Sir John Kerr, Buckingham Palace and other relevant Commonwealth officials perceived that there existed a governmental convention by which Sir John Kerr as Governor-General and later a former Governor-General was entitled to retain custody of the Australian records of that correspondence and, subject to any contrary direction by Buckingham Palace or the Official Secretary to the Governor-General to determine the conditions upon which access to those records was to be had once custody was transferred to a relevant archival institution.

~~2. The trial judge erred at TJ [155] in relation to the Applicant's alternative case. The trial judge should have found that the National Archives of Australia (**Archives**) had, in error which was jurisdictional, decided that the Records were not the property of the Commonwealth by reference to whether they were a "personal and confidential communication" on the one hand or "a formal or official communication" on the other.~~

Other errors

3. The trial Judge erred at TJ [118] in reasoning that clear and explicit language would be required to produce an outcome which involved significantly different rules of access applying to archival resources of the Commonwealth and the law of the United Kingdom which the trial judge found applied to records of the correspondence between the Governor-General and the Queen.

4. The trial Judge erred at TJ [128] in reasoning that it was not a necessary consequence of his finding that the Records were the personal property of Sir John Kerr that a successor in title to Sir John Kerr has a present entitlement to retrieve from Archives and destroy those Records.

5. The trial Judge erred at TJ [129] in holding there was no evidence to indicate that any of the 11 cartons lodged by Sir John Kerr with Archives and later withdrawn from Archives by him included correspondence of the character of the documents constituting the Records. The trial judge should have found, on the basis of a file note of the Director-General of Archives dated 22 June 1998 that at least one of those cartons included records of the character of the Records.

…

Only Ground 1 was pressed. Ground 2 was abandoned and Grounds 3-5 were described in the appellant's written submissions at [6] as concerning factual errors of no consequence independent of Ground 1.

The *Archives Act*

11 The *Archives Act* commenced on 6 June 1984. It will be necessary a little later to describe its provenance and history, by reference to extrinsic materials, as a matter of context. But we begin with the text.

12 A central provision is s 3(2) which states that the "archival resources of the Commonwealth" consist of such Commonwealth records and other material as are of national significance or public interest and relate to, amongst other things, the history or government of Australia; the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution; or a person who is, or has at any time been, associated with a Commonwealth institution.

13 "Commonwealth institution" is defined to mean, amongst other things, "the official establishment of the Governor-General". The Governor-General himself or herself is not a "Commonwealth institution" as defined.

14 There is no doubt that the records presently in issue are included in the archival resources of the Commonwealth. The question on which this case turns is whether they are a "Commonwealth record" as defined in s 3(1) as follows:

> ***Commonwealth record*** means:
>
> (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
>
> (b) a record that is to be deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;
>
> but does not include a record that is exempt material.

"Property" is not defined. As we have said, "Commonwealth institution" is defined to mean, amongst other things, "the official establishment of the Governor-General". It is also defined to include "an authority of the Commonwealth". There is no definition of "the official establishment of the Governor-General".

15 The *Archives Act* states its objects:

> **2A Objects of this Act**
>
> The objects of this Act are:
>
> (a) to provide for a National Archives of Australia, whose functions include:
>
> (i) identifying the archival resources of the Commonwealth; and

(ii) preserving and making publicly available the archival resources of the Commonwealth; and

(iii) overseeing Commonwealth record-keeping, by determining standards and providing advice to Commonwealth institutions; and

(b) to impose record-keeping obligations in respect of Commonwealth records.

16 By s 5(2), one of the functions of the Archives is to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth. Another function of the Archives is to determine the material that constitutes the archival resources of the Commonwealth.

17 Some attention was directed in argument to the following powers of the Archives:

6 Powers of Archives

…

(2) Where, in the performance of its functions, the Archives enters into arrangements to accept the care of records from a person other than a Commonwealth institution, those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records and any such arrangements have effect notwithstanding anything contained in Division 3 of Part V.

(3) Where an arrangement entered into by the Archives to accept the care of records from a person other than a Commonwealth institution relates to a Commonwealth record, then, to the extent that that arrangement, in so far as it relates to such a record, is inconsistent with a provision of Part V, that provision shall prevail.

18 By virtue of the transitional provisions in s 70, where records were in the custody of Australian Archives immediately before the commencement of the legislation under arrangements by which the custody of the records was accepted from a person other than a Commonwealth institution by the Commonwealth, those arrangements (including any provision of those arrangements concerning access to or disposal of those records) have effect as if they were made after that commencement by that person with the Archives and s 6(2) applies accordingly. By virtue of s 6(3) a later arrangement which relates to a Commonwealth record is to that extent subject to Part V of the *Archives Act* – Commonwealth records.

19 It is convenient at this point to set out the definition of "authority of the Commonwealth" in s 3(1), as follows:

authority of the Commonwealth means:

(a) an authority, body, tribunal or organization, whether incorporated or

> unincorporated, established for a public purpose:
>
> (i) by, or in accordance with the provisions of, an Act, regulations made under an Act or a law of a Territory other than the Northern Territory;
>
> (ii) by the Governor-General; or
>
> (iii) by, or with the approval of, a Minister;
>
> (b) the holder of a prescribed office under the Commonwealth; or
>
> (c) a Commonwealth-controlled company or a Commonwealth-controlled association;
>
> but does not include:
>
> (d) a court;
>
> (e) the Australian Capital Territory;
>
> (f) a body established by or under an enactment within the meaning of the *Australian Capital Territory (Self-Government) Act 1988*;
>
> (g) the Northern Territory; or
>
> (h) the Administration of an external Territory.

It is clear that the Governor-General is not an authority of the Commonwealth within that definition. By s 2 of the *Australian Constitution*, a Governor-General is appointed by the Queen and is Her Majesty's representative in the Commonwealth. As French CJ, Crennan, Kiefel and Bell JJ said in *Kline v Official Secretary to the Governor-General* [2013] HCA 52; 249 CLR 645 at [33]:

> …The Governor-General is appointed by Letters Patent, pursuant to s 2 of the *Australian Constitution*, and therefore does not hold office in accordance with the provisions of an enactment of the federal Parliament or an Order-in-Council...
>
> (Footnote omitted.)

20 Turning to the operative provisions of the *Archives Act*, s 31 applies to a Commonwealth record that, relevantly, is in the open access period and is in the care of the Archives. By s 3(7) the open access period for a record which came into existence before 1980 is 1 January in the year that is 31 years after the creation year. By s 31(1), subject to Part V, the Archives must cause the record to be made available for public access. No question has yet arisen as to whether or not the records in issue are or contain an exempt record. For example, there has been no determination of whether or not the records contain information or matter the disclosure of which under the *Archives Act* would constitute a breach of confidence within s 33(1)(d). If the records are a Commonwealth record the issue of whether or not they are or contain an exempt record would be for another day.

21 By s 36, where the Archives is required by Part V to cause a record to be made available for public access, subject to that Part, any person is entitled to access to the record.

22 By s 56(1), the Minister may, in accordance with arrangements approved by the Prime Minister, cause all records in a particular class of Commonwealth records not in the open access period to be available for public access. By s 56(2), the Minister may, in accordance with arrangements approved by the Prime Minister, cause Commonwealth records to be made available to a person in such circumstances as are specified in the regulations notwithstanding that the Commonwealth records concerned are not otherwise available for public access under the *Archives Act*. As is evident, both of those provisions depend on whether or not the records in question are Commonwealth records.

23 Section 58 states that nothing in the *Archives Act* prevents a person from publishing or giving access to records otherwise than in pursuance of that Act where he or she can properly do so or is required by law to do so.

History and context

24 The relevant history and context of the *Archives Act* are as follows.

25 Before the enactment of the *Archives Act*, the Australian Archives (formerly the Commonwealth Archives Office) had been operating for over thirty years under administrative arrangements first laid down during World War II.

26 As explained by the primary judge at [30] and following, the *Archives Bill* was introduced in the Commonwealth Parliament in 1978. By that time, as referred to at [62] below, the concept of "Commonwealth record" had moved away in successive draft bills from a functional or administrative provenance definition, then from a custodial definition, to a property definition.

27 In that Bill, "Commonwealth record" relevantly meant "a record that is the property of the Commonwealth or of a Commonwealth institution" but by cl 18(1)(a) it was expressly said that Division 2, headed "Dealings with Commonwealth Records", and Division 3, headed "Access to Commonwealth Records", did not apply to "records of the Governor-General or of a former Governor-General". By cl 18(2), a certificate signed by the Official Secretary to the Governor-General certifying that a record was one of the kind referred to in cl 18(1)(a) established conclusively that it was such a record.

28 The Explanatory Memorandum stated that special provision had been made for the records of the Governor-General, amongst others. It was said that those records may be transferred to the custody of the Archives on terms and conditions agreed on between the Archives and those responsible for their custody.

29 Debate on the 1978 Bill was suspended and it was referred to committee for inquiry and report. The Bill was referred to the Standing Committee on Constitutional and Legal Affairs on the question of access since that Committee was also inquiring into the *Freedom of Information Bill 1978*. There was also a reference to the Standing Committee on Education and the Arts, on the scope of the collection of the Archives.

30 The latter Committee expressed the view at [5.16] that the exclusion of Vice-Regal records was acceptable on the grounds of preserving the traditional independence of that arm of government from the Executive. That Committee sought to allay concerns that the bill extended to personal papers.

31 The Senate Standing Committee on Constitutional and Legal Affairs said this:

> **33.22** In the case of records of the Governor-General other considerations are involved. The Governor-General is in direct correspondence with the Monarch, and consequently identical holdings will exist in Britain and in Australia of the correspondence passing between them. In Britain, royal documents are not made available until sixty years has elapsed since the date of creation (though special access is sometimes given earlier than this date). This consideration will apply to only a very small number of vice-regal documents. Apart from that, however, the Director-General of Archives was not able to suggest additional justifications for the exclusion of these records, indicating to the Committee that it was a matter of government policy that the records described in Part V should be excluded.
>
> **33.23** These explanations *may suggest the need for special treatment to be given to* a few categories of records, such as judges' notebooks and *correspondence with the Monarch*, but they do not to our mind suggest the need for the total exclusion of broad categories of documents from the access provisions of the Bill. The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and of the Judiciary, much as it exists in relation to the operation of departments. We are not dealing in the Archives Bill with contemporary access to records, where there may exist special reasons for allowing organs of the State like the Legislature and the Judiciary to regulate access. Rather we are dealing with access to records that are thirty years of age. To argue that the Legislature and the courts should regulate access to their own documents is to disguise the fact that at the time access is desired the particular legislature or court that would decide upon access is constituted quite differently to that of the time at which the document was created; it is a fiction to suppose that the institution still has some association with, or understanding of, the records that a trained and

> professional archivist would not have.
>
> (Emphasis added. Footnotes omitted.)

32 That Committee relevantly recommended, at [33.29], that Part V, Division 1 of the *Archives Bill* should be amended so that no category of records was excluded from the open access provisions of the Bill.

33 In 1981, an amended form of the *Archives Bill* was introduced into Parliament. The *Archives Bill 1981* retained the definition of "Commonwealth record" and also retained the exclusion from Div 2 and Div 3 of records of the Governor-General or of a former Governor-General: cl 18. It did however contain provision in cl 21 for the regulations to provide that all or any of the provisions of Div 2 or Div 3, in such circumstances and subject to such conditions as were prescribed, were to apply to all or any of the records referred to in cls 18, 19 and 20.

34 According to the Explanatory Memorandum and the Supplementary Explanatory Memorandum to the *Archives Bill 1981*, special provision had been made for the records of the Governor-General. It was said that it would be inappropriate, however, for the more explicit provisions, which gave the Archives, as an arm of the Executive, some degree of regulatory power over the treatment of records, to be made applicable to the records of those arms of the Government which traditionally enjoyed a certain degree of independence and autonomy. The Vice-Regal records were specified as one example. A certificate signed by the Official Secretary to the Governor-General would establish conclusively that a record was a Vice-Regal record.

35 In 1983, the 1981 Bill was amended and reintroduced into Parliament. The *Archives Bill 1983* contained a definition of "Commonwealth institution" to mean, amongst other things, the official establishment of the Governor-General. The specific provision for records of the Governor-General, the former cl 18, was not reproduced. Clause 18 no longer included the exclusion from Div 2 and Div 3 of records of the Governor-General or of a former Governor-General.

36 In the Explanatory Memorandum to the *Archives Bill 1983* (Circulated by authority of the Honourable L.F. Bowen, Deputy Prime Minister and Minister representing the Attorney-General for and on behalf of the Minister for Home Affairs and Environment the Honourable Barry Cohen M.P.) and the Supplementary Explanatory Memorandum (Circulated by authority of the Attorney-General, Senator the Honourable Gareth Evans for and on behalf of the Minister for Home Affairs and Environment the Honourable Barry Cohen M.P.) it was said:

> The provisions of the Bill extend to the records of the official establishment of the Governor-General…

37 The following was said about relevant definitions:

> A "Commonwealth institution" which means the official establishment of the Governor-General …. The Archives legislation concerns itself principally with the records of Commonwealth institutions.
>
> A "Commonwealth record" which means a record, other than a Cabinet notebook, exempt material and certain records internal to the operation of the Archives itself (e.g. the Registers and Guide maintained in accordance with Part VIII), which is the property of the Commonwealth or a record deemed under subclause 3(6) to be a Commonwealth record. It is the purpose of the Archives legislation to provide for the preservation and use of Commonwealth records and for related purposes and to establish the Archives as the Commonwealth institution with the duty to do this.

38 In a revised Explanatory Memorandum, the then new cl 6(3) was explained as follows:

> The purpose of this clause is to ensure that normal government controls over Commonwealth records, will apply to any Commonwealth records which might appear in collections of personal papers deposited with the Archives.
>
> The amendment does not in any way affect the freedom of a donor to determine conditions of access to personal papers.

39 In the Second Reading Speech the Attorney-General, Senator the Honourable Gareth Evans, said:

> The Bill institutes arrangements for the proper management and disposition of the vast body of records generated by Commonwealth agencies. While it breaks some new ground, it is chiefly designed to replace existing ad hoc decisions and conventions which have been relied upon for the last thirty years, with a coherent framework within which comprehensive and accountable arrangements can be made. It provides a statutory basis for the activities of the Australian Archives and confirms that organisation as the agency chiefly responsible for developing and implementing the broad management action which will be necessary.
>
> …
>
> A 'Commonwealth record' is defined as any record which is the property of the Commonwealth, but the term does not extend to such material in a collection maintained by the Australian War Memorial, the National Library of Australia or the Australian National Gallery.
>
> The Australian Archives will have the power to seek the deposit in its custody of other records closely associated with the origin, history and functioning of the Commonwealth Government and to take steps to ensure that such material is properly preserved.
>
> Special provision is made for certain Commonwealth records separate from those of the Public Service and associated Government agencies. **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**… Special arrangements have been made in order that the provisions of the legislation can be applied to records of the Parliament and the courts by means of regulations, in terms consistent with the

> constitutional relationship between the Executive Government and the Parliament and the courts.
>
> (Senate Hansard, 2 June 1983, page 1183 left hand column and page 1184, left hand column.)
>
> (Emphasis added.)

40 It was the *Archives Bill 1983* which was enacted.

The facts

41 It is appropriate first to consider the arrangements by which the records came to be in the custody of Australian Archives as existing before the *Archives Act* came into force in order to consider the operation, if any, of s 6(2).

42 According to the parties' agreed statement of facts, set out by the primary judge at [9]:

> …
>
> 6. On 26 August 1978 Mr Smith, in his capacity as Official Secretary to the Governor General lodged with the Archives the documents contained in Archives record AA1984/609 (**AA1984/609**).
>
> …
>
> 11. Mr Smith by letter covering the original bundle instructed that those papers:
>
> (a) were to remain closed until after 8 December 2037; and
>
> (b) 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.
>
> 12. On 23 July 1991 the then official secretary to the Governor-General, Douglas Sturkey, instructed the Archives that, on the instructions of The Queen, the date of release of the original bundle had been amended to after 8 December 2027, subject to the approval of the Sovereign's Private Secretary and the Official Secretary to the Governor-General.
>
> …

43 The primary judge set out, at [18], the letter of deposit, which stated relevantly:

> This package contains the personal and confidential correspondence between the Right Honourable Sir John Kerr, A.K., G.C.M.G., G.C.V.O., K.St.J., Q.C., Governor-General of the Commonwealth of Australia from 11 April 1974 until 8 December 1977, and Her Majesty The Queen.
>
> In accordance with The Queen's wishes and Sir John Kerr's instructions, these papers are to remain closed until 60 years after the end of his appointment as Governor-General, i.e. until after 8 December 2037.
>
> Thereafter the documents are subject to a further caveat that their release after 60 years should be only after consultation with the Sovereign's Private Secretary of the day and with the Governor-General's Official Secretary of the day.

44 The primary judge, at [3], identified the central question in the proceeding as whether or not the relevant records were Commonwealth records, with the consequence that public access to them would be governed by Div 3 of Pt V of the Act, and not the terms of the instrument (or letter) of deposit.

45 The appeal was conducted on the same basis. That is, if the records were the property of the Commonwealth and thus a Commonwealth record as defined, the effect of the arrangements referred to in s 6(2) would be displaced. The appellant submitted that if she proved ownership by the Commonwealth, s 6(3) was one of the reasons why there should have been review by the primary judge of the approach taken by the Archives.

46 Important to the arguments of the parties, and one foundation of the appellant's submissions, was the following agreed fact:

> 10. The majority of the letters exchanged between the Governor-General (including by means of his Official Secretary) and the Queen (by means of Her Private Secretary) address topics relating to the official duties and responsibilities of the Governor-General. Some of the letters sent by the Governor-General (including by means of his Official Secretary) take the form of reports to The Queen about the events of the day in Australia. Certain of these letters include attachments comprising photocopies of newspaper clippings or other items of correspondence, expanding upon and corroborating the information communicated by the Governor-General in relation to contemporary political happenings in Australia.

47 At [132], the primary judge said that historically and conventionally, a distinction had been drawn between correspondence between a Governor-General and The Queen arising from the performance of the duties and functions of the office of Governor-General and correspondence between the Governor-General and other persons arising from the performance of those duties and functions. The *sui generis* nature of correspondence between The Queen and a Vice-Regal representative was not, however, confined to Sir John himself. It was reflected in the evidence relating to the arrangements made by other Governors-General in relation to such correspondence, including Lord Casey, Sir Paul Hasluck, Sir Zelman Cowen and Sir Ninian Stephen. This view, apparently well-known and accepted by the Executive, was discussed by the primary judge at [117].

The submissions of the parties

48 The appellant submitted that on the facts in this case property could not be at one and the same time the property of both the former Governor-General and of the Commonwealth.

49 It was not left to inference or speculation as to the circumstances in which the pieces of paper with markings on them, that is, the chattels, came into existence. The records as a matter of fact comprised the originals of correspondence from the Queen or her Private Secretary to the Governor-General and copies of the Governor-General's correspondence in the other direction.

50 The appellant drew attention to what the primary judge said at [107], as follows:

> For the following reasons, I find that, at all relevant times, the documents comprising AA1984/609 were the personal property of Sir John Kerr and were not the property of the Commonwealth…

51 What the primary judge said following [107], the appellant submitted, did not comprise reasoning as to what followed as a matter of law in relation to property, including the subspecies of property called ownership, springing from the circumstances of the creation of those chattels. In other words, the appellant submitted, [108] and following were matters which were subsequent to the creation of the documents and which appeared to have been used by the primary judge as a kind of inferential or indirect support for his conclusion. As a matter of method it was striking that, when everything necessary to be known in the ordinary way to ascertain ownership was known, one did not either start or preferably finish with those matters. Although this was not private litigation, when there was in private litigation a dispute about ownership, it was rarely useful and never decisive that one of the disputing parties maintained that they owned the property. Admissions against interest were one thing. Statements simply out of court asserting the contested issue to be determined in favour of the party asserting it out of court was neither here nor there.

52 The appellant submitted that those records, those chattels, became, upon their creation and given the circumstances of their creation, the property of the Commonwealth of Australia. It was a question for a court of law to determine the property, that is, the ownership of papers created in the circumstances such as these were created. The self-evident concern as to the special nature of this correspondence did not speak to property.

53 The appellant submitted that no convention had been shown that Governors-General could take away as their own papers correspondence with The King or The Queen. It was doubtful, the appellant submitted, whether in any factual sense there was any convention of a kind which was either justiciable or capable of being given effect to for the purposes of the justiciable question of property which was the issue here. What was significant was the high political importance with resultant possibilities concerning access or publication of those

communications. This was nothing really to do with property and paper; but to do with the content.

54 The appellant pointed to the following matters as showing Commonwealth property in the records, posing the question: "Do these facts characterise these documents as property of the Commonwealth?":

> (a) ***first,*** the nature and incidents of the office of Governor-General of the Commonwealth are such that all property created or received by the holder of that office in its performance is property of the Commonwealth of Australia;
>
> (b) ***secondly***, ss.2, 3 and 61 of the Constitution operate conformably with the constitutional settlement concerning the public and private property of the Sovereign in England and Wales; and records of a public nature which are the property of the Queen are "Crown property" which cannot be dealt with by the Queen as personal property;
>
> (c) ***thirdly,*** the text, structure and legislative history of the [*Archives Act*] and the secondary materials support a construction of the Act such that all records created or received by the Governor-General in the performance of his or her office are "Commonwealth records"; but which avoids subjecting the Governor-General personally to any obligation to part with possession of such documents including to the National Archives; and
>
> (d) ***fourthly***, the construction for which the Appellant contends is consistent with directly analogous United States authority applying the common law of property and chattels to presidential records which had been decided during the debates concerning enactment of the [*Archives Act*].

55 The appellant relied on *Nixon v Sampson* 389 F. Supp. 107 (1975). In that case Judge Richey of the United States District Court, District of Columbia, held that former President Nixon did not own the "Presidential materials and tape recordings", which were estimated to comprise 42 million items. The court applied the general principle in *United States v First Trust Company of St Paul* 251 F.2d 686 (1958) that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belonged to the government and may not be considered the private property of the official. The court held, relevantly, that former President Nixon's assertion of ownership was refuted by the very concept of the Office of the President in that the President was a servant of the people and did not embody the nation's sovereignty, which remained at all times with the people.

56 The appellant referred to its (so-called) alternative case to the effect that the primary judge erred in creating a false dichotomy between the Governor-General and the official establishment of the Governor-General in order to determine the issue, this being judicial review.

57 The primary judge, the appellant submitted, erred because he should have sent the matter back to the decision-maker to proceed by asking the right question, not informed by a false dichotomy. This was not developed in oral submissions.

58 At [142], the primary judge had said:

> …The *Act* plainly draws a distinction between the records of the official establishment of the Governor-General and the Governor-General himself or herself. In my view, the intention was to have the provisions of the *Act*, dealing with such matters as the open access period, apply to records of the official establishment of the Governor-General, but to leave to any particular Governor-General the option of placing his or her private or personal records with Archives under arrangements pursuant to s 6(2). To the extent that any such records were also "Commonwealth records" as defined in s 3(1), s 6(3) was inserted to ensure that the provisions relating to "Commonwealth records" applied to such documents even though they happened to have been included in personal papers deposited with Archives under a s 6(2) arrangement.

59 The respondent submitted that the records were a category of document that at the time the *Archives Act* was framed was very much in the mind of the Parliament and which ultimately found expression in part of the definition in s 3, being the reference to the official establishment of the Governor-General.

60 The scheme of the Act, particularly in the definition of the archival resources of the Commonwealth in s 3(2), acknowledged that there would be documents that should form part of the Archives because they were important to the history or the government of Australia, but were not Commonwealth records. The evidence before the Court was that since Sir John Kerr, all of the Governors-General had proceeded on the footing that their papers were records of that very kind, which was why they had been submitted to the Archives pursuant to s 6(2) of the *Archives Act* to be held by the Archives pursuant to special arrangements, and not subject to the access provisions in Pt V.

61 If the appellant were right, the respondent submitted, then from the moment these records came into existence, it had been within the hands of the Prime Minister and Minister to release them publicly. That was the effect of s 56. But the idea that immediately upon a change of government all of the records of this kind could be disclosed at the discretion of the Executive government of the day was one, the respondent submitted, that should not lightly be embraced.

62 The respondent submitted that some of the appellant's submissions focused upon whether records were of a kind made or received in the conduct of the affairs of the office of the Governor General. This was to adopt the provenance criterion which had been rejected in the

enacted form of the *Archives Act*, as noted by the Australian Law Reform Commission in Report No 85, *Australia's Federal Record: A Review of Archives Act 1983*, as follows:

> 8.13 The use of a property based definition such as that in section 3(1) is not universal in archival legislation. The most common alternative is an administrative provenance definition, such as was proposed in the original drafting instructions for the Archives Bill in 1974. The suggested formula was 'all records of any kind made or received by any Australian [ie Commonwealth] Government agency in the conduct of its affairs'. However, 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. Anecdotal evidence from those involved in drafting the legislation is that the property definition was preferred because
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> - ownership was a term which was generally understood and which defined clearly a body of material to which the legislation would apply
> - as owner of the records the Commonwealth already exercised many of the rights (for example, in relation to custody, disposal and public access) proposed to be included in the legislation
> - if a definition other than that of ownership was to be adopted, confusion might arise between records which fell within the definition in the legislation and those over which the Commonwealth claimed a right of ownership
> - the strong opposition in some quarters to the inclusion in the legislation of provisions for the recovery of Commonwealth records made a property definition desirable so that recovery could be pursued outside the legislation on the basis of common law ownership rights.

63 The kinds of rights that the *Archives Act* identified for particular regulation where a record was a Commonwealth record were possession, disposition, destruction, transfer. Those were the rights that the Act fixed upon as relevant to the regime that it created. The respondent submitted that those were the matters to which the Act directed attention when one asked the question – does particular property belong to the Commonwealth? Was it property of the Commonwealth? Or was it property of someone else, here the Governor-General?

64 The respondent submitted the primary judge looked at a range of considerations that bore upon both how the documents came into existence but also how they had been treated in the past, whether it had been a practice for Governors-General to take these documents with them when they left office. That was, the primary judge thought, persuasive and it was reflective of the notion that the right to possess the document asserted by all of these previous Governors-General as they left office was one important indicium when one looked to ownership.

65 To the extent that the function of the office holder, which would be relevant on a provenance definition, bore on the question, the question was not as stark as: "did the property come into

existence in the performance of a function or duty of the office?" because that would be to shift completely to a provenance based definition. It was not the test that the Act adopted to require the Court or the Archives to look at the content of each document and assess whether what was being written in that document was connected with the discharge of functions. The ownership question was a different one and did not depend upon an analysis of that kind.

66 In paragraph (a) of the definition of "Commonwealth institution", unlike all of the other paragraphs in the definition where the whole of the relevant body was brought within the definition of a Commonwealth institution, Parliament did not choose there to say: means "the Governor-General", but instead: means "the official establishment of the Governor-General". That phrase was not defined in the Act and was not used in any other Commonwealth legislation. It was not a term of art, and could therefore only be sensibly given meaning by reference to the statutory context and legislative history. At [139] of the reasons of the primary judge, the respondent submitted, the Court accepted the submission advanced by the Archives below that the official establishment referred to persons who assisted and supported the Governor-General's performance of official duties, namely, the Official Secretary and his or her staff.

67 The respondent submitted Parliament was contemplating that there would be a demarcation between the official establishment on the one hand and the Governor-General personally on the other.

68 The principal task of statutory construction, the respondent submitted, was to identify where that line was to be drawn. It would not be to read these definitions coherently to say that documents which were not part of the official establishment of the Governor-General nevertheless were brought within the Act because they were property of the Commonwealth objectively.

69 There was a parallel to the *Freedom of Information Act 1982* (Cth), which came in at the same time, where the Governor-General was not an agency, but the Official Secretary of the Governor-General was. Here it was a similar kind of demarcation where the official was in, but the person was out of, the operation of the statutory regime.

70 The respondent submitted that looking at that kind of demarcation and recognising that s 3(2) contemplated that there would be such a thing as property of the official establishment of the Governor-General, the kinds of material that one would ascribe to that category were things

like proclamations, regulations under laws made by the Parliament, records of formal advice to the Federal Executive Council, formal appointments of a Minister of a department of state under s 54 of the *Australian Constitution*, appointments or removals of other officers under s 67 of the *Australian Constitution*, all being a range of powers or functions that the Governor-General exercised in an obviously official way involving a deployment of power. And that would normally be the product of advice submitted to the Governor-General through the office from the Executive government of the day. That was the main significance of the primary judge's finding, at [120], that here the Governor-General was not exercising Executive powers: it had negative significance in that it was not a function of that kind that the Court was now concerned with.

71 The demarcation that had been drawn between the official establishment and the Governor-General included at least personal letters written by the Governor-General to The Monarch. The legislative history showed that it was that category of correspondence that seemed to have been the particular driver for a partial exclusion of the Governor-General from the *Archives Act*. So the category that the Court was concerned with was front of mind for Parliament at the time.

72 The respondent submitted the exclusion might well go further than Palace correspondence: tasks that were undertaken by the Governor-General personally himself or herself without being responsive to advice from the Executive government and without the need for extensive support from the official establishment were the kinds of things that Parliament was endeavouring to recognise were the personal or private property of the Governor-General. That would include not just Palace correspondence but other personal correspondence, diaries the Governor-General might have kept, perhaps speech notes of speeches that the Governor-General wrote for himself or herself. Documents of that kind did not readily fall within the undefined notion of the official establishment that Parliament chose to adopt.

73 A further textual consideration, the respondent submitted, that bore on the question was that the definition of "Commonwealth record" focused on the property being "the property of the Commonwealth or of a Commonwealth institution" which pointed towards the conclusion that the Act was concerned only to render a Commonwealth record property where the Commonwealth had the full and complete ownership of the record under the general law, rather than some lesser proprietary interest in it.

74 If that were not the case, the Act would operate most strangely because, for example, the Archives had the power under s 6(1)(h) of the Act to authorise the disposal or destruction of Commonwealth records. If the property could be anything other than the exclusive property of the Commonwealth archives, the *Archives Act* would authorise destroying proprietary interests of other persons.

75 The representative function of the Governor-General, the respondent submitted, did not involve any communication of an intergovernmental kind from the British Government to the Australian Government. It was a representative role in relation to the person occupying the hereditary status as sovereign of the United Kingdom identified in covering clause 2 of the *Australian Constitution* and representing that person as The Monarch but as Monarch who had no role and no powers that they could perform within Australia.

76 The respondent submitted the words "person" or "personal" were to be understood in that way. References to "personal" in this context did not mean "private" and did not mean "not in an official capacity". It suggested it was not right to draw a dichotomy between the personal and the functions of the Office. The function of the Office might have a personal dimension in representation of the person as Monarch of Australia. Although the records concerned the way that the Governor-General was carrying out his functions at the time, and in that general sense concerned his functions, they nevertheless correctly carried the description personal and confidential communications with The Monarch.

77 The respondent submitted the special character of the functions of the Governor-General were recognised and examined by the High Court in *Kline*. The respondent submitted the line-drawing exercise that *Kline* was concerned with was of a parallel kind to the problem before this Court. At [34], the High Court recognised that the processes and activities of government which were opened to increased scrutiny by the *Freedom of Information Act* did not include those associated with the exercise of the Governor-General's substantive powers and functions. Some of the functions were of a *sui generis* kind and needed to be exercised in private. The respondent also referred to [77] of *Kline* per Gageler J.

78 The respondent submitted that here, similarly, the evident intention not to bring the Palace records within the scope of the *Archives Act* over the various iterations of the *Archives Bill* prior to its enactment likewise compelled the conclusion that the records should not be held to be Commonwealth records.

79 The source of the pieces of paper did not answer the question and what was more significant was that what the Governor-General was doing was a unique function of a representative kind, but in the unusual representative circumstance that existed as between The Monarch and the Governor-General where there was no capacity to direct and no ongoing function in Australia: that interaction was of a kind that was 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".

80 That, the respondent submitted, was what the primary judge meant when he was talking about the *sui generis* character of the relationship. That was consistent with the way not just that Sir John Kerr regarded what was occurring, but the way that the Palace treated it and the way that the Archives treated it from the start. The respondent submitted the practice of the Archives constituted the Commonwealth acquiescing in the arrangement or the understanding of the source of property in these documents.

81 The respondent referred to the evidence given by Mr Mark Fraser by affidavit affirmed 3 February 2017. Mr Fraser was appointed to the position of Official Secretary to the Governor-General in June 2014. He deposed to his understanding that it was a matter of long-standing convention that correspondence between The Monarch and Her Governors-General across the 15 Realms outside the United Kingdom were private and confidential communications not forming part of any official government [record]. Underpinning the convention was the fundamental British constitutional principle that communications between The Queen and Her Ministers and other public bodies should remain confidential, and that the political neutrality of The Queen and the Royal Family, and the Royal Household acting on their behalf, should be maintained. By extension, Mr Fraser deposed, communications with the Vice-Regal representatives of The Queen also fell within the terms of this principle. This long-standing convention existed in order for The Sovereign and Her representatives in the Commonwealth Realms to communicate in confidence and thereby permitted and facilitated such communications.

82 The respondent submitted that *Nixon v Sampson* was of limited assistance because, ultimately, one had to drill down into the particular duties and functions in question. The fact that there was quite a close connection between the production of the record, on the one hand, and the duties and functions did not answer the property question, even applying the United States principles. Here, there was such a dramatic difference between the role of the Governor-

General, particularly as it related to corresponding with the Monarch, and that of the President of the United States, that the Court's approach to the tape recordings at issue in *Nixon* told this Court little, if anything, as to who owned the Palace correspondence.

83 The respondent also referred to *United States v First Trust Company of St Paul* 251 F.2d 686 (1958), affirming *First Trust Company of St Paul v Minnesota Historical Society* 146 F. Supp. 652 (1956). That litigation concerned certain historical documents, being a series of original writings on miscellaneous scraps of paper of various sizes, describing the Lewis and Clark Expedition's winter encampment near the mouth of the Missouri River in 1803-4 and a part of the Expedition's subsequent exploratory journey on the Missouri River in 1804-5. In the Court of Appeals, Eighth Circuit, the court held that the trial court was not clearly erroneous in finding that the papers were written for Captain Clark's private use only and that accordingly the government had not sustained the burden of proof establishing its claim to them. The court agreed with the opinion and order of the District Court, that the documents in question were the rough notes of Captain Clark, made by him for his personal use in subsequently preparing his own private diary and hence were not an official work product of the Lewis and Clark Expedition to which the United States could claim paramount title. An examination of the 67 documents in question indicated that while they did contain much data such as President Jefferson requested Captain Lewis to gather in his official record, they also carried a great many personal and private notations. Although Captain Lewis sent the Clark journals to President Jefferson, he gave him instructions as to limitations on their use which the President observed. The Court of Appeals said, at 691, that apparently not only Clark himself but Lewis and Jefferson believed the papers to be the personal property of Captain Clark.

Consideration

84 As a matter of first impression, it may seem strange that the *Archives Act* proceeds by reference to whether or not a record is the property of the Commonwealth. The matter was not argued on the basis of the ownership of the paper on which the records were written. Nor was it argued on the basis of copyright: compare *Moorhouse v Angus & Robertson (No. 1) Pty Ltd* [1980] FSR 231; and, on appeal, *Moorhouse v Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700. It was not suggested that the Commonwealth owned the copyright in the unpublished literary works, as made by, or under the direction or control of the Commonwealth: see Pt VII of the *Copyright 1968* (Cth).

85 We have set out above at [62] the background to the statutory choice that was made by the Parliament.

86 In our opinion, the primary judge was correct, at [119], to reject the appellant's submission that the records should be viewed as the property of the Commonwealth simply because their subject-matter related to the performance of the Governor-General's role and function. To found a conclusion as to property on such a functional approach would be to introduce an administrative provenance definition, when that alternative had been rejected some years earlier.

87 There are contexts (such as the records of an agency relationship: see Watts P and Reynolds FMB, *Bowstead and Reynolds on Agency* (21st ed, Thomson Reuters, 2018) p 284 [6-093]) where the law will provide a rule as to ownership of or access to documents by reference to the relationship of parties and their obligations and duties towards each other. In a unique constitutional, governmental and Vice-Regal context such as the office of the Governor-General, the question of property in documents is not answered by some simple rule transposed from other contexts.

88 To accept the appellant's proposition of functional performance would be to hold that every record written by the Governor-General may, as a result of s 56, be made available by the Minister, or a person authorised by him or her, for public access. Such a result would be at variance with the objects and purpose of the *Archives Act*, in light of the relevant context we have summarised at [24]–[40] above.

89 A straightforward example to illustrate the point would be a personal diary. Such a diary might well relate to the author's performance of his or her role or functions but that without more would not make the diary the property of the Commonwealth. In so saying we do not limit our consideration to the position of the Governor-General: it would extend to Ministers and other officers of the Commonwealth.

90 Relevant to the conclusion so far as concerns the Governor-General is the width of the proposition put by the appellant which would treat in the same way records relating to the wide range of powers and functions of the Governor-General, as referred to in *Kline* by French CJ, Crennan, Kiefel and Bell JJ at [11] and [38]:

> Section 61 in Ch II of the *Australian Constitution* vests the executive power of the Commonwealth in the Queen and provides that such power is exercisable by her representative in Australia, the Governor-General. The grant of honours, once regarded

> as part of the prerogative of the Crown, is now encompassed in the executive power conferred by s 61. These proceedings are not concerned with any of the many powers or functions of the Governor-General which involve acting on the advice of the Executive Council. Whilst it is accurate to describe the role of the Governor-General as having evolved since Federation, Governors-General have exercised a range of constitutional, statutory, ceremonial and community responsibilities. The Governor-General's role in respect of the Order reflects ceremonial and community responsibilities, as well as the Governor-General's constitutional position as the representative of the Sovereign in Australia.
>
> …
>
> The Governor-General, in common with judges, takes an oath to undertake his or her functions without fear or favour. However, as mentioned, the position of the Governor-General calls for the exercise of a multiplicity of powers and functions, many (but not all) of which are undertaken in public, and some (but few) of which involve making decisions other than on the advice of a Minister or the Executive Council.
>
> (Footnotes omitted.)

91 No doubt some of the records written by the Governor-General would be the property of the Commonwealth and one general example may be records of the exercise by the Governor-General of the executive power of the Commonwealth within the meaning of s 61 of the *Constitution*. It is to be recalled that, by that section, "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

92 We would however place less emphasis than did the primary judge on what the Governors-General and their heirs and successors did in relation to the records relating to their office over the entirety of the period since Federation. This is because both the relationship between Australia and the United Kingdom and the relationship between The Queen and the Governor-General has developed over that period. The Balfour Declaration illustrates the point: and see *Sue v Hill* [1999] HCA 30; 199 CLR 462 at [76] per Gleeson CJ, Gummow and Hayne JJ.

93 It is to be recalled that the Balfour Declaration contained the following:

> We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor-General as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.
>
> In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by

> His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.
>
> (Footnote omitted.)

94 As we have said, it is clear that the *Archives Act* includes within its field of operation a record that is the property of a Commonwealth institution, relevantly the official establishment of the Governor-General.

95 By analogy with *Kline*, we construe the legislation as not including as property of the Commonwealth what may be referred to, somewhat loosely, as the private or personal records of the Governor-General. The language is loose, and potentially misleading, because it suggests that the word "private" might mean no more than "confidential".

96 We consider the primary judge was correct to conclude that the correspondence, and therefore the records under consideration, arose from the unique representative character of the relationship between The Monarch and the Governor-General where there was no capacity on the part of The Monarch to act or to direct. We would include in the Governor-General's role and function the appointment and removal of a Prime Minister: see Twomey A, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) at p 740, where Professor Twomey also observes: "The flow of power, however, does not work in reverse." We understand that The Monarch, on the advice of the Prime Minister, appoints the Governor-General as her representative and may, on the advice of the Prime Minister, dismiss the Governor-General, but this does not affect our analysis of the nature of the relationship between The Monarch and the Governor-General while it subsists.

97 We accept the submission on behalf of the respondent that that interaction was of a kind that was personal, not in the sense that it did not involve the undertaking of actions referable to the respective status or office held by the participants, but because the particular body performing the act was doing so personally and not officially, in particular given the absence of capacity in the Monarch herself to act or to direct the Governor-General. We reject the approach 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.

98 We do not express a concluded view on whether or not all records that are records of the Governor-General, but are not records of the official establishment of the Governor-General, are not the property of the Commonwealth.

99 For these reasons, we do not accept that the records are the property of the Commonwealth for the reasons contended for by the appellant.

100 We reject the submission that the nature and incidents of the office of Governor-General are such that all records created or received by the holder of that office in its performance is property of the Commonwealth. Some records may be the property of the Commonwealth but the records presently under consideration are not.

101 We reject the submission that ss 2, 3 and 61 of the *Constitution* operate conformably with or reflect the constitutional settlement concerning the public and private property of the Sovereign in England and Wales. We see no utility in such a comparative exercise. As we have said, the answer to the present question is to be found in Australian law.

102 We reject the submission that the text or context of the *Archives Act* support a construction of that Act such that all records created or received by the Governor-General in the performance of his or her office are "Commonwealth records". In our opinion, the *Archives Act* proceeds on the basis that the records presently under consideration were, at the time of the creation or receipt, and remain, the property of the person then holding the office of Governor-General and not the property of the Commonwealth.

103 The approach that we take as to the premise of the operation of the *Archives Act* accords, broadly, with the views of those participating in the contemporaneous events. What people think about who owns property, or who is entitled to property may or may not be decisive, or relevant, to answering any particular legal problem. Sometimes, an operative legal rule (whether statutory or belonging to the general law) will determine questions of ownership, irrespective of belief or assumption. Absent some supervening rule, however, 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.

104 Given our conclusions as to the central importance of the nature of the relationship between the Governor-General and The Queen, self-evidently the decision in *Nixon*, on which the appellant relied, is of no assistance: see [55] above.

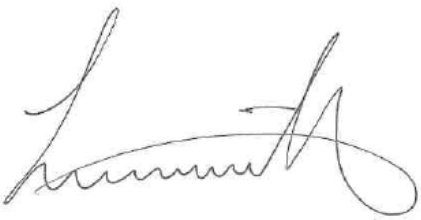
105 We agree with what the primary judge said in this respect at [121] to the effect that different constitutional and statutory considerations, as well as well as different conventions, inform the view which has been taken there as to the position of the President: see [55] above.

106 It is not necessary to consider the appellant's alternative argument as our conclusion does not depend on a dichotomy involving the official establishment of the Governor-General but upon the records in issue not being a Commonwealth record as defined. We are not persuaded that the primary judge did reason by reference to a false dichotomy at [135] and following. We note the conclusion of the primary judge, at [155], that there was nothing in the statement of reasons to suggest that the Archives viewed the characterisation of records as being "administrative records of the official establishment of the Governor-General" as relevant to its decision on access.

Conclusion and orders

107 We would dismiss the appeal. The appellant should pay the respondent's costs in the sum of $30,000 in accordance with the Registrar's order of 22 June 2018.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justice Robertson.

Associate: 

Dated: 8 February 2019

REASONS FOR JUDGMENT

FLICK J:

108 The fundamental question dividing the parties is whether the documents in issue – being the documents contained in Archives record AA1984/609 – are properly to be characterised as "*Commonwealth records*" for the purposes of the *Archives Act 1983* (Cth), namely whether the documents are the "*property of the Commonwealth*". The relevant facts, together with the legislative background to the form of the current legislation, has been set forth by both the primary Judge and in the joint reasons of the majority. It need not be again repeated.

109 The documents in issue have been described in fairly general terms in the facts agreed between the parties. It is nonetheless on the basis of those agreed facts that the primary Judge (and this Court on appeal) is called upon to determine the proper characterisation of the documents. Those documents contain correspondence between the Governor-General and the Queen of Australia between 15 August 1974 and 5 December 1977. The majority of the letters "*address topics related to the official duties and responsibilities of the Governor-General*". The description in the agreed statement of facts provides that at least some of the documents contain "*personal and confidential correspondence*" between the former Governor-General and the Queen, some of the letters taking "*the form of reports to The Queen about the events of the day in Australia*". "*Certain of* [*the*] *letters*", it has been agreed, "*include attachments comprising photocopies of newspaper clippings or other items of correspondence, expanding upon and corroborating the information communicated by the Governor-General in relation to contemporary political happenings in Australia*". The documents relate to the period of time which includes the dismissal on 11 November 1975 by the Governor-General of a former Prime Minister of this country.

110 It is with great diffidence that concurrence cannot be expressed with the conclusions reached by the primary Judge or the majority. The conclusion of the majority that these documents "*remain … the property of the person then holding the office of Governor-General and not the property of the Commonwealth*" (at para [102]) is, with great respect, a conclusion which is not self-evidently correct. It is, with respect, difficult to conceive of documents which are more clearly "*Commonwealth records*" and documents which are not "*personal*" property. The documents include correspondence between a former Governor-General of this country, written in his capacity as Governor-General, to the Queen of Australia in her capacity as Queen

of Australia, concerning "*political happenings*" going to the very core of the democratic processes of this country.

111 Any conclusion, be it the conclusion of the majority or the present conclusion, is one which is primarily to be reached by reference to the legislative context under consideration, namely the *Archives Act* and the *Constitution of Australia*. Any consideration of the historical context in which property may be regarded as the personal property of the Queen or of her Governors-General may be interesting but is ultimately not decisive.

112 No provision of the *Archives Act*, as finally enacted, expressly addresses the question of whether records of the Governor-General fall within the ambit of that *Act*. Nor does the legislative history preceding the *Act* provide any assistance in the resolution of that question. Although the position occupied by Governors-General and the manner in which their correspondence with the Queen has been treated over the years was the subject of consideration, no part of either the second reading speeches which preceded former *Bills* or the second reading speech preceding the *Bill* which became the current version of the *Act* provide any real support for the conclusion of the majority. Nor does the report of the *Senate Standing Committee on Constitutional and Legal Affairs* concerning aspects of the *Archives Bill 1978*.

113 Such legislative background provides no reason, with respect, to construe the statutory phrase "*Commonwealth record*" as defined in any manner other than in accordance with the natural and ordinary meaning that that phrase would otherwise convey – read in the context and consistent with the purpose of the *Archives Act* – and certainly not in any restrictive manner or in any manner dependent upon distinctions not drawn by the *Archives Act* itself.

114 Nor does the position occupied by the Governor-General provide any reason to reach a contrary conclusion. Under the *Constitution*, the office of the Governor-General is established by s 2 as being the Queen's "*representative in the Commonwealth*" and "*subject to* [*the*] *Constitution*" the Governor-General may exercise "*such powers and functions of the Queen as Her Majesty may be pleased to assign to him*". The Governor-General nevertheless performs many functions, some of which may be traced back to the *Constitution* and some of which may be more ceremonial, having no *Constitutional* or statutory source: cf. *Kline v Official Secretary to the Governor-General* [2013] HCA 52 at [11], (2013) 249 CLR 645 at 653 per French CJ, Crennan, Kiefel and Bell JJ. Other than by reference to an agreed fact that some of the correspondence is characterised as "*personal and confidential*", there is no evidence (and

certainly no agreed fact) that there was any relationship between the Queen and the then Governor-General other than that set forth in the *Constitution*.

115 Although it may readily be accepted that the Queen has no capacity to control or influence the Governor-General in the exercise of *Constitutional* functions (cf. *Sue v Hill* [1999] HCA 30 at [78] and [82], (1999) 199 CLR 462 at 496 to 497 per Gleeson CJ, Gummow and Hayne JJ), the fact remains that there is a relationship between the Queen and the Governor-General established by the *Constitution*. Nor does the position occupied by the Governor-General or any absence of any ability to control the exercise of *Constitutional* functions throw any light on whether a communication is a "*personal*" communication. If anything, the position itself and the subject matter (it is considered) would more clearly indicate that the correspondence remain records of the Commonwealth.

116 Concurrence cannot be expressed with the submission of the Respondent, being the submission accepted and relied upon by the majority, "*that that interaction* [*between the Queen and the Governor-General*] *was of a kind that was personal, not in the sense that it did not involve the undertaking of actions referable to the respective status or office held by the participants, but because the particular body performing the act was doing so personally and not officially*" (at para [97]). Other than by reason of the fact that correspondence was between the Queen and the person who for the time being occupied the position of Governor-General, there is no real explanation or reason for concluding that they were writing "*personally*". To accept that some of the correspondence was described as "*personal and confidential*" is not a sufficient basis to conclude that the correspondents were acting in their personal and not official capacities. Indeed, to accept a submission that the Queen and the Governor-General were not "*acting ... officially*" seems to deny the very positions each occupied. And the dichotomy advanced in submissions between "*property of the Commonwealth*" and "*personal property*" is apt to mislead. There is no reason why correspondence which has been written in a "*personal*" capacity may not also be the "*property of the Commonwealth*".

117 Not all documents or correspondence exchanged between Governors-General and the Monarch are necessarily, however, "*Commonwealth records*". The title or position of the correspondents and the understanding or intention of those engaging in such correspondence is not determinative. Nor is the subject-matter of the correspondence determinative.

118 With the benefit of hindsight, it is respectfully considered that the question now to be resolved may not have been best resolved by reference to an agreed statement of facts. Much may

depend upon the manner in which such correspondence is expressed and the precise subject matter being addressed. One or other of the documents in question may be potentially characterised as "*personal property*". A conclusion that "*newspaper clippings*" sent to the Queen are "*personal*" property is a conclusion with little merit. "[*R*]*eports*" to the Queen and correspondence addressing "*political happenings*" attract different consideration. Without separately considering each such document, it is difficult to characterise the documents as "*personal*" rather than as documents going to the very heart of the *Constitutional* system of government of the Commonwealth and forming part of the records of the Commonwealth. Whether any particular document is an "*exempt record*" by reason of s 33 of the *Archives Act* because disclosure may (for example) "*constitute a breach of confidence*" (s 33(1)(d)) is an entirely separate question and a question which did not, and does not, arise for present determination.

119 Notwithstanding the constraint imposed by the manner in which the proceeding progressed, it is nevertheless concluded that the documents and correspondence, considered as whole and as described in the agreed statement of facts, remain "*Commonwealth records*". That conclusion is reached by reference to the positions occupied by the Queen and the Governor-General; the functions being discharged by the Governor-General; the nature of the correspondence as described in the agreed statement; the subject matters being addressed; and the importance of that subject matter to the *Constitutional* system of government of this country. To regard those documents as "*personal*" property, with great respect to those who hold a contrary view, is a conclusion which cannot be supported.

120 The appeal should be allowed.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 8 February 2019