HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

JENNIFER HOCKING APPELLANT

AND

DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA RESPONDENT

Hocking v Director-General of the National Archives of Australia
[2020] HCA 19
Date of Hearing: 4 & 5 February 2020
Date of Judgment: 29 May 2020
S262/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 8 February 2019 and, in their place, order that:*

   (a) *the appeal to the Full Court be allowed;*

   (b) *the orders of Griffiths J made on 16 March 2018 be set aside and, in their place, it be:*

      (i) *declared that the contents of Record AA1984/609 ("the deposited correspondence") constitute Commonwealth records within the meaning of the* Archives Act 1983 *(Cth);*

      (ii) *ordered that a writ of mandamus issue to compel the Director-General of the National Archives of Australia to reconsider Professor Hocking's request for access to the deposited correspondence; and*

(iii) ordered that the Director-General of the National Archives of Australia pay Professor Hocking's costs at first instance; and

(c) the Director-General of the National Archives of Australia pay Professor Hocking's costs of the appeal to the Full Court.

3. The Director-General of the National Archives of Australia pay Professor Hocking's costs of this appeal.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with T J Brennan for the appellant (instructed by Corrs Chambers Westgarth)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan SC, D M Forrester and J A G McComish for the respondent and the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Hocking v Director-General of the National Archives of Australia

Administrative law (Cth) – Judicial review – Archives – Access to records – Where Governor-General engaged in correspondence with Her Majesty the Queen – Where correspondence described as personal and confidential – Where Official Secretary to Governor-General kept correspondence and made arrangement to deposit correspondence with predecessor organisation to National Archives of Australia ("Archives") – Where correspondence deposited by Official Secretary on instructions of former Governor-General after his retirement – Where *Archives Act 1983* (Cth) subsequently enacted – Where s 31 of *Archives Act* provides that Commonwealth records within care of Archives must be made available for public access when within "open access period" – Where s 3(1) defines "Commonwealth record" as including "record that is the property of the Commonwealth or of a Commonwealth institution" – Where "Commonwealth institution" defined as including "the official establishment of the Governor-General" – Whether correspondence property of Commonwealth or of official establishment of Governor-General – Whether "property" within context of *Archives Act* connoted relationship involving holding of rights corresponding to ownership or possession at common law or connoted existence of legally endorsed concentration of power to control custody of record.

Words and phrases – "administration", "archival resources of the Commonwealth", "Archives", "body politic", "care and management", "Commonwealth institution", "Commonwealth record", "comprehensive expression", "convention", "correspondence", "created or received officially and kept institutionally", "Crown in right of the Commonwealth", "custody", "functional unit of government", "Governor-General", "kept by reason of", "lawful power of control", "legally endorsed concentration of power", "management", "official establishment of the Governor-General", "Official Secretary", "ownership", "personal and confidential", "personal records", "possession", "private and confidential", "property", "property of the Commonwealth or of a Commonwealth institution", "public access", "record", "right to exclude others", "the Commonwealth".

Constitution, covering cll 3, 4, s 2, Ch II.
Archives Act 1983 (Cth), ss 2A, 3, 3C, 5, 6, 62, 64, 70, Pt V.
Governor-General Act 1974 (Cth), s 6.

KIEFEL CJ, BELL, GAGELER AND KEANE JJ.

Introduction

1 The Right Honourable Sir John Kerr held the constitutional office of Governor-General of the Commonwealth of Australia from 11 July 1974 until 8 December 1977. Throughout that tumultuous period in Australian constitutional and political history, Sir John engaged in "personal and confidential" correspondence with Her Majesty the Queen.

2 Following Sir John Kerr's retirement from the office of Governor-General, a sealed package containing contemporaneous copies of correspondence sent by him to Her Majesty and originals of correspondence received by him from Her Majesty was deposited with the Australian Archives. The Australian Archives was an organisation within the Department of Home Affairs which operated under administrative arrangements first laid down during World War II. The package was deposited by the Official Secretary to the Governor-General ("the Official Secretary") under cover of a letter expressing Her Majesty's "wishes" and Sir John's "instructions" that its contents should remain "closed" for 60 years from his date of retirement, so as not to be available for public access until after 8 December 2037. Much later, another letter from the Official Secretary, sent not long after Sir John's death on 24 March 1991, announced that Her Majesty had "reduced" the closed period to 50 years, so as to allow release to the public after 8 December 2027.

3 With the enactment of the *Archives Act 1983* (Cth), to which it will be necessary to turn in some detail, the deposited correspondence became "records" forming part of the "archival resources of the Commonwealth" within the "care and management" of the National Archives of Australia ("the Archives"), the powers of which are exercisable by the Director-General of the Archives ("the Director-General"). The "archival resources of the Commonwealth" consist of "Commonwealth records" and "other material" that are "of national significance or public interest" and that "relate to", amongst other things, "the history or government of Australia".

4 By force of the *Archives Act*, subject to exceptions the potential application of which are not in issue, a "Commonwealth record" within the care of the Archives must be made available for public access once the record is within the "open access period". The open access period for a Commonwealth record that came into existence before 1980 is on and after 1 January in the year that is 31 years after the year of its creation. There is no requirement for public access to archival resources of the Commonwealth that are not Commonwealth records.

5 Professor Jennifer Hocking is an academic historian and writer with a particular interest in the period of Australian constitutional and political history in which Sir John Kerr held the office of Governor-General. On 31 March 2016, she requested access to the file within the custody of the Archives which contains the deposited correspondence. On 10 May 2016, the Director-General rejected her request for access on the basis that the contents of the file were not Commonwealth records. That characterisation of the deposited correspondence was upheld on judicial review by the Federal Court, at first instance (Griffiths J)[1] and on appeal by a majority of the Full Court (Allsop CJ and Robertson J, Flick J dissenting)[2].

6 We would allow Professor Hocking's appeal from the judgment of the Full Court, declare the deposited correspondence to be Commonwealth records within the meaning of the *Archives Act* and order that a writ of mandamus issue to compel the Director-General to reconsider Professor Hocking's request for access.

7 Contrary to the arguments of the parties, the outcome of the appeal does not turn on who might have been the true owner of the correspondence at common law or on expectations held at the time of its deposit with the Australian Archives by reference to constitutional convention or otherwise. The appeal turns rather on the construction and application of the elaborate statutory definition of "Commonwealth record". In particular, it turns on the application to the deposited correspondence of that part of the definition which on its proper construction operates to include records the physical custody of which is within the lawful power of control of specified functional units of government, one of which is the "official establishment of the Governor-General". The determinative consideration is that the correspondence met that part of the definition at the time of its deposit irrespective of its ownership.

8 Explaining why that is so commences best with a description of the deposited correspondence and an explanation of the circumstances of its creation, keeping and deposit followed by an examination of the scheme and legislative history of the *Archives Act*. Issues of construction are then best resolved before turning to note the detail of the arguments of the parties concerning the ownership of the records and moving finally to an elucidation of the determinative consideration.

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1 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1.

2 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1.

The deposited correspondence

9 The parties chose not to put the deposited correspondence in evidence before the Federal Court. The consequence of that forensic choice is that all that can be known for the purposes of the appeal about the contents of the deposited correspondence and about the circumstances of its creation, and of its keeping and deposit, is what appears from facts formally agreed between the parties as supplemented by such inferences as are open to be drawn from other documentary material which the parties did choose to put in evidence.

10 The agreed facts record that the deposited correspondence comprises contemporaneously made copies of letters and telegrams sent by the Governor-General to the Queen together with originals of letters and telegrams received by the Governor-General from the Queen. All of the letters and telegrams were exchanged by the Queen through her Private Secretary ("the Private Secretary"). Most, but not all, of the letters were exchanged by the Governor-General through the Official Secretary. Most, but not all, of the letters "address topics relating to the official duties and responsibilities of the Governor-General". Some of the letters "take the form of reports to The Queen about the events of the day in Australia", and some of the letters which take that form "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".

11 The agreed facts also record that the correspondence was deposited with the Australian Archives by Mr David Smith "in his capacity as Official Secretary to the Governor General" under cover of a letter of deposit dated 26 August 1978. Mr Smith had been appointed to the office of Official Secretary in 1973, when Sir Paul Hasluck still held the office of Governor-General, and went on to hold the office of Official Secretary until 1990, a period which spanned the whole of the periods in which each of Sir John Kerr, Sir Zelman Cowen and Sir Ninian Stephen held the office of Governor-General. At the time of Mr Smith's appointment in 1973, the Official Secretary was an office in the Australian Public Service established under the *Public Service Act 1922* (Cth) within the Prime Minister's Department. Since 24 December 1984, the office of Official Secretary has been a statutory office established under the *Governor-General Act 1974* (Cth)[3].

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3 Section 6(1) of the *Governor-General Act 1974* (Cth), inserted in its original form by the *Public Service Reform Act 1984* (Cth).

12 The letter of deposit which Mr Smith wrote to the Australian Archives in his capacity as Official Secretary was in the following terms:

> "This package contains the personal and confidential correspondence between the Right Honourable Sir John Kerr, AK, GCMG, GCVO, K St J, QC, 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, ie 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."

13 Unchallenged in the appeal is a finding by the primary judge that "[a]lthough Sir John had ceased to be Governor-General when the records were placed by Mr Smith with Australian Archives, it is plain that he was doing so as Sir John's agent and not as the agent of the incumbent Governor-General"[4]. Against the background of the agreed fact that Mr Smith deposited the documents in his capacity as Official Secretary, the finding can only be understood as a finding that, in depositing the correspondence, Mr Smith acted not on the instructions of Sir Zelman Cowen but on the instructions of Sir John, whose affairs as Governor-General Mr Smith was in the process of winding up.

14 More about the contents of the correspondence and about the circumstances of its creation can be gleaned from Sir John Kerr's published autobiography[5] and from his unpublished journals, extracts from both of which are in evidence. The extracts reveal that Sir John engaged in the correspondence in the performance of what he understood to be a "duty" of the office of Governor-General to "keep Her Majesty informed" and that he did so "with the conscious and deliberate thought that the reports would be preserved" in the Australian Archives as a "record" of his "Governor-Generalship". From a personal letter Sir John later wrote to Mr Smith, it appears to have been the practice of Sir John as Governor-General and of Mr Smith as Official Secretary that Mr Smith checked Sir John's correspondence

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4 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 30-31 [114].

5 *Matters for Judgment: An Autobiography* (1978).

before dispatch, from time to time making suggestions as to its content, and commented on "the replies from the Palace".

15 More about the circumstances of the keeping and deposit of the correspondence emerges from other documents which were put in evidence. The most salient of those other documents are conveniently noted in broadly chronological sequence.

16 First in chronological sequence are letters exchanged in late 1976 between Sir John Kerr and the then Private Secretary, Sir Martin Charteris. The letters are both marked "PERSONAL AND CONFIDENTIAL". Initiating the exchange, Sir John wrote to Sir Martin in the following terms:

> "This short letter is of a different kind from our usual correspondence.
>
> I recently had occasion to remake my will. This resulted in my realising that something should be done about my papers. These include, amongst other things, documents relevant to my Governor-Generalship, especially the crisis. They include a lot of diary notes, records of conversations and draft chapters of possible future books. Also included, of course, is my copy of the correspondence between us.
>
> I would want to appoint literary editors to look after all my other papers, and as you would expect, I am under some pressure from libraries to leave my papers in their custody to be opened at some future time fixed by me. The Australian National Library is, of course, the strongest candidate.
>
> I can make the appropriate decisions about papers which are exclusively mine, but our correspondence falls into a different category. We talked to some extent about this in London and you made the obvious point that this correspondence will have to be under embargo for a very long time.
>
> One thing that worries me is, that if I were to die ... someone has to have the custody and control of our letters. Do you have any suggestions about this? I would not wish to leave this correspondence in Government House. Each Governor-General takes with him such material. Having regard to the probable historical importance of what we have written, it has to be, I think, preserved at this end as well as in the Palace. I assume that your records there are carefully preserved.
>
> The alternatives appear to be to allow it to go into the custody of my literary editors, unopened and fully embargoed with instructions for it to be deposited in a bank or some other safe place, or to let it go to, say, the

National Library completely embargoed for whatever period of time you suggest.

I think I should get this matter settled so that there is no doubt what is to be done with this correspondence in the event of my death."

17 Sir Martin Charteris' letter in reply included the following:

"I have given considerable thought as to what would be the most suitable repository for your papers dealing with the Governor-Generalship and particularly the correspondence which has passed between us and I have no doubt in my own mind that the best solution, from The Queen's point of view, would be for them to be deposited in the National Library. This end of the correspondence will, of course, be preserved in the Royal Archives under complete confidentiality.

If you agree to this solution it remains to be decided for what period of time your papers are placed under complete embargo. The figure we usually specify nowadays is 60 years from the end of the appointment concerned. In 1968, when the National Library of Australia tracked down the papers of the first Lord Stonehaven (Governor-General of Australia 1925-30), his son and successor offered to hand them over to that Library subject to The Queen's wishes. On Her Majesty's instructions we stipulated, and the National Library accepted, that they should remain closed until 60 years after the end of the appointment.

It seems therefore very suitable that your papers should be dealt with in the same way."

18 The exchange reveals that, although Sir John Kerr understood the correspondence to have been within his power of disposition, he did not understand his choice as to the disposition of the correspondence to be unfettered. He understood its historical significance to be such that it needed to be preserved in the national interest. And he understood Her Majesty's interest in its confidentiality to be such that he needed to consult with the Private Secretary as to the course he should take.

19 Next in chronological sequence is a letter sent in October 1977 from Mr Malcolm Fraser, as Prime Minister, to Sir John Kerr, as Governor-General. The letter refers to proposed legislation then in the form of a draft of what would become the *Archives Bill* and continues:

"The provisions of the draft Bill, clause 18, relating to compulsory transfer, custody and access provisions do not apply to the records of a

> Governor-General or his Office. It seems to me that a proper distinction should be made between Government House records and the records of executive government and this is reflected in the Bill as drafted.
>
> Government House records nevertheless are part of the history of Australia and it is proper that they should receive all the care and protection possible. For that purpose clause 21 provides that Australian Archives may enter into arrangements with a Governor-General to take custody of records under access rules which a Governor-General may lay down. Royal Household records, including The Queen's correspondence with Governors-General, are protected in Britain under special archives rules. I am sure you will agree that there should be no lesser protection in Australia.
>
> You are probably aware that Lord Casey, and now Lady Casey, and Sir Paul Hasluck have made arrangements in respect of the custody of papers relating to their terms as Governor-General. I hope that it will be possible, when the legislation is passed, for your Office to move promptly to enter into arrangements with the Australian Archives for the protection of records arising from your own period in office. In due course I shall be bringing this matter under the notice of the incoming Governor-General."

20 As will appear from the legislative history of the *Archives Act* to be traced later in these reasons, provisions of the nature described in the Prime Minister's letter were in fact incorporated in the *Archives Bill* in the form in which it was introduced into the Senate in June 1978, but came to be omitted from the *Archives Bill* in the form in which it was ultimately reintroduced into the Senate in June 1983 to result in the eventual enactment of the *Archives Act*. The terms of the letter indicate that the Prime Minister was aware of the existence of correspondence between the Governor-General and the Queen and considered that correspondence to form a special category of records within the general description in his letter of "Government House records". In the penultimate sentence, the Prime Minister was careful to express hope, rather than to give advice, that all Government House records relating to Sir John Kerr's term in the office of Governor-General would soon become the subject of an arrangement between the Governor-General's "Office" and the Australian Archives that would ensure their preservation.

21 Following in chronological sequence soon after the Prime Minister's letter to the Governor-General is a letter sent in November 1977 from the then Director-General of the Australian Archives, Professor R G Neale, to Mr Smith in his capacity as Official Secretary. The letter documents an arrangement the entering into of which can be inferred to have been prompted by the Prime Minister's expression of hope to the Governor-General. Professor Neale confirmed in the letter that, in a conversation between him and Mr Smith on "the question of

the transfer of Sir John's papers", "it was agreed that both the originals and the copies of the papers would be transferred to the custody of the Australian Archives". Professor Neale would wait for Mr Smith to tell him when Mr Smith wished the Australian Archives to take custody of the papers. On "[t]he question of access", Professor Neale added, "[g]iven the nature of the sensitive papers, these would normally be administered by the official policy governing such papers whether in the custody of the Australian Archives or of the Royal Archives at Windsor".

22 Next in chronological sequence are letters sent from Mr Smith to Sir John Kerr after his departure from Government House during the period between his retirement from the office of Governor-General on 8 December 1977 and the deposit of the correspondence with the Archives on 26 August 1978. The letters are handwritten on "Government House" letterhead. They reveal that Mr Smith, acting alone and outside working hours, laboriously made photocopies of the correspondence and then sent those photocopies to Sir John. Mr Smith referred to the correspondence as then on a "file" and described that file as being kept "in my strong-room under absolute security until the task is completed and the original file is in Archives". When the photocopying was completed, Mr Smith wrote to Sir John announcing that "[t]he task is done" and that "[t]he files will now be sealed and lodged with the Director-General of Archives, with instructions that they are to remain closed until after 8 December 2037, ie 60 years after you left office".

23 As to the fate of the photocopies, the agreed facts reveal that a member of the Kerr family arranged for them to be collected by the Archives not long after the death of Sir John's widow on 16 December 1997. Whether or not the photocopies are Commonwealth records is not in issue in the appeal.

24 Also in evidence are documents which indicate that correspondence between Her Majesty and each of Sir Paul Hasluck, Sir Zelman Cowen and Sir Ninian Stephen has come into the care and management of the Archives. The contents of those documents also provide some evidence of the circumstances in which that occurred.

25 In relation to Sir Paul Hasluck, documents comprising his "private notebooks and personal files", itemised to include "copies of despatches written by the Governor-General for the information of Her Majesty the Queen and the acknowledgements made of them by the Private Secretary to the Queen", were deposited with the Australian Archives on 16 December 1974. The deposit was apparently made by Sir Paul himself. Much later, on 29 May 1989, Sir Paul executed an "Instrument of Deposit" in which he stipulated that, except for those which would be exempt under the provisions of the *Archives Act* if they were Commonwealth records, the deposited documents "will be made available for

access by the public when a period of 30 years has elapsed since the end of the calendar year in which they were created".

26 In relation to Sir Zelman Cowen and Sir Ninian Stephen, the "personal and confidential" correspondence between each of them and Her Majesty was deposited with the Archives by Mr Smith in his capacity as Official Secretary under cover of letters of deposit dated 14 June 1984 and 31 August 1990 respectively. The letters are materially identical to the letter of deposit dated 26 August 1978 under cover of which Mr Smith had deposited with the Australian Archives the "personal and confidential" correspondence between Sir John Kerr and Her Majesty. They express the "wishes" of Her Majesty and the respective "instructions" of Sir Zelman and Sir Ninian that the correspondence should remain closed for 60 years from the dates of their retirements, so as not to be released to the public until after 29 July 2042 in the case of Sir Zelman and until after 16 February 2049 in the case of Sir Ninian.

27 Next in chronological sequence of the documents in evidence are letters exchanged in mid-1991 between Mr Douglas Sturkey, who had by then succeeded Mr Smith as Official Secretary, and Mr George Nichols, who was then Director-General. Each wrote in his official capacity.

28 The full text of the letter from the Official Secretary, dated 23 July 1991, is as follows:

> "Under cover of letters dated 31 August 1990, 14 June 1984 and 26 August 1978, my predecessor forwarded sealed packages containing the personal and confidential correspondence of Sir Ninian Stephen, Sir Zelman Cowen and Sir John Kerr respectively with The Queen.
>
> In those letters the requirement that the papers remain closed for 60 years after the end of the appointment of each Governor-General was stated. The Queen has now reduced this period to 50 years, subject to the approval in each case of the Sovereign's Private Secretary and the Official Secretary to the Governor-General.
>
> I have taken this up with Sir Zelman Cowen and Sir Ninian Stephen, both of whom have signified their concurrence in the new arrangements.
>
> Accordingly, the dates of release of the three packages should now be:
>
> Sir John Kerr after 8 December 2027
>
> Sir Zelman Cowen after 29 July 2032

I should be grateful if you could acknowledge receipt of this letter and agree to observe the new requirements."

29 The relevant text of the Director-General's response the next month is as follows:

"I refer to your letters of 23 July 1991 concerning the new arrangements decided by The Queen regarding the release of personal and confidential correspondence to her from Australian Governors-General, and Mr Hayden's enquiry whether we hold copies of such correspondence from previous incumbents which might now be released under the new arrangements.

Concerning the sealed packages, held by Australian Archives, of correspondence of Sir John Kerr, Sir Zelman Cowen and Sir Ninian Stephen respectively with The Queen, I have noted the date after which the contents of each package may be released, subject to the approval in each case of the Sovereign's Private Secretary and the Official Secretary to the Governor-General. I will ensure that these requirements are observed.

The Australian Archives holds no records of previous Governors-General which might now be released under the 50-year rule. However, we do hold copies of Sir Paul Hasluck's personal and confidential despatches to The Queen or her Private Secretary while he was Governor-General. We also hold some correspondence of Lord Casey with The Queen or her Private Secretary, including some confidential correspondence.

On his retirement as Governor-General, Sir Paul deposited with the Archives a locked, sealed case containing three categories of records. One of these categories consists of the copies of despatches referred to above. The arrangement agreed between Sir Paul and my predecessor is that the case will be opened in 1999, 30 years after Sir Paul became Governor-General, so that some of the records in the other two categories can be made available for public access on 1 January 2000, in accordance with the 30-year rule. The case is to be opened by the Director-General of the Archives of the day alone with the Official Secretary to the Governor-General as sole witness, so that the copies of despatches referred to above, if exposed, can then and there be resealed and repackaged unread, and the new package endorsed with the action taken and the necessary directions for the future.

> These directions were to be that these papers should remain closed for a period of 60 years after Sir Paul ceased to be Governor-General (that is, until after 11 July 2034), and that thereafter access should only be after consultation with the Sovereign's Private Secretary of the day. It would now be appropriate for the directions to state that the papers should remain closed until after 11 July 2024, and that thereafter access should only be with the approval of the Sovereign's Private Secretary and the Official Secretary to the Governor-General. I assume you will wish to contact Sir Paul to seek his concurrence in the new arrangements, and I would appreciate your further advice in due course.
>
> ...
>
> The National Library's *Guide to Collections of Manuscripts relating to Australia* indicates that the National Library holds papers of Sir Paul Hasluck and Lord Casey, six earlier Governors-General, and one Administrator of the Commonwealth, including Baron Tennyson's secret despatches, Viscount Novar's official despatches to the King and letters to and from the King's Private Secretaries, Viscount Stonehaven's correspondence with the King and the King's Private Secretaries and some papers of Sir Isaac Isaacs. Only some of the Stonehaven papers appear to be affected by the new 50-year rule."

30 Two aspects of the Director-General's response to the Official Secretary are noteworthy. The first is that the Director-General was unequivocal in adopting the position that the Official Secretary's conveyance of the "decision" of Her Majesty was effective to create a "new 50-year rule". The operation of that new 50-year rule was accepted to be effective to reduce the closed periods stipulated by the earlier letters of deposit in which the former Official Secretary had conveyed the wishes of Her Majesty and instructions of Sir John Kerr, Sir Zelman Cowen and Sir Ninian Stephen respectively. It was also accepted to be effective to increase the closed period stipulated by Sir Paul Hasluck in his Instrument of Deposit.

31 The second and more specific of the noteworthy aspects of the Director-General's response is that the then Official Secretary's conveyance of Her Majesty's decision was accepted by him to be effective to reduce the closed period stipulated in the letter dated 26 August 1978 on the instructions of Sir John Kerr even though it was apparent from the terms of the letter dated 23 July 1991 that Sir John Kerr had not been consulted about the reduction and had not consented to the reduction. Indeed, Sir John had died several months earlier. Quite properly, the position adopted by the then Director-General has been maintained by the current Director-General as respondent to the appeal.

32 There remains finally to note an exchange of letters in February 2017 between the Official Secretary, who was then Mr Mark Fraser, and the Private Secretary, who was then Sir Christopher Geidt. The exchange occurred after Professor Hocking had commenced the proceeding for judicial review in the Federal Court and in contemplation of that proceeding. The Official Secretary initiated the exchange by writing to the Private Secretary attaching copies of an earlier letter from the Official Secretary, then Mr Stephen Brady, to the Private Secretary dated 7 April 2011 and of the Private Secretary's letter in reply dated 27 May 2011. In the context of discussing implications of the *Freedom of Information Act 1982* (Cth), those earlier letters had recorded a firm mutual understanding that "correspondence between the Office and the Palace" occurred "in confidence". In the second of them, the Private Secretary had stated "we would assert that such correspondence is covered by a convention of confidentiality due to the constitutional position of the Sovereign and the Monarchy".

33 The Official Secretary's letter to the Private Secretary in February 2017 includes the following:

> "It is the understanding of the Office of the Official Secretary to the Governor-General that it is a matter of long-standing convention that non-official correspondence between the Monarch and Her Governors-General across the 15 Realms outside the United Kingdom are private and confidential communications, not forming part of any official government records. We note that underpinning this convention is 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, we understand communications with the vice-regal representatives of The Queen also fall within the terms of this principle. It is understood that this long-standing convention exists in order for The Sovereign and Her representatives in the Commonwealth Realms to communicate in confidence and thereby permits and facilitates such communications. The confidential nature of such correspondence, including correspondence between the Palace and the Office, has been confirmed in our exchange of letters dated 7 April 2011 and 27 May 2011 respectively ... It appears to be very much a matter of mutual understanding that communications between The Queen and the Governor-General, and the offices of the Private Secretary and the Official Secretary respectively, are made on a confidential basis."

The letter goes on to refer to an understanding on the part of the Official Secretary that "The Queen's correspondence with Governors-General" received protection in

the United Kingdom under "special archives rules" drawing a distinction between the "Royal Archives" and the "National Archives".

34 The material part of the Private Secretary's letter in response to the Official Secretary in February 2017 is as follows:

> "The Royal Household agrees with the assessment outlined in your predecessor's letter of 7th April 2011 that correspondence between the Sovereign and her Governors-General and their respective offices are made in confidence. These are essentially private communications which are inherently sensitive. It has therefore been my understanding, and that of my predecessors, that the records in question are not caught by the Archives Act 1983, but are instead retained on the advice of the Royal Household for a minimum period of 50 years to reflect the uniqueness of the length of a reign. For the avoidance of doubt, I can confirm that the embargo period of 50 years applies in each of Her Majesty's 15 Commonwealth Realms, and the same convention of confidentiality is attached to communications between The Queen and her Ministers in the UK.
>
> As my letter of 27th May 2011 makes clear, it is my strong view that a convention of confidentiality is necessary to protect the privacy and dignity of the Sovereign and her Governors-General, and to preserve the constitutional position of the Monarch and the Monarchy. This is clearly reflected in the special archives arrangements that are in place in the UK for the retention of these records. You are correct in noting the distinction between the Royal Archives at Windsor, which is a private archive not subject to FOI or the Public Records Act 1958, and The National Archives at Kew, which is the national archive for the United Kingdom and a public authority subject to information access legislation.
>
> I hope that the above serves to clarify my agreement with the position outlined in your letter. Given the significance of the principles under examination, I am content for this letter to form part of the official submissions to the Court."

The *Archives Act*

35 The *Archives Act* commenced on 6 June 1984. It has since been amended numerous times. Its object, as now expressed in its text, is "to provide for a National Archives of Australia", the functions of which are stated to include

"identifying the archival resources of the Commonwealth" and "preserving and making publicly available the archival resources of the Commonwealth"[6].

36 To that end, the *Archives Act* mandates existence of the Archives as an "organization", being "a group of persons centrally controlled and acting in concert to perform particular functions"[7], within the Department of the Minister administering the *Archives Act*[8]. Under current administrative arrangements, it is in the Attorney-General's Department[9]. The Archives is therefore not "a legal entity independent of the executive government"[10]. Like the Department in which it is located, it lacks a distinct legal personality.

37 The *Archives Act* mandates too the appointment or engagement under the *Public Service Act 1999* (Cth) of the Director-General[11]. Upon the Director-General it confers a number of specific powers and imposes a number of specific duties and in the Director-General it reposes general authority to exercise any of the powers and perform any of the duties which it confers or imposes on the Archives[12].

38 For the purposes of the *Archives Act*, the "archival resources of the Commonwealth" consist of such "Commonwealth records and other material" as fulfil two conditions. One is that they are of "national significance or public interest". The other is that they "relate to", amongst other things, "the history or government of Australia" or "a person who is, or has at any time been, associated with a Commonwealth institution"[13]. One of the specific powers conferred on the

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6 Section 2A of the *Archives Act*.

7 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 69.

8 Section 5(1) of the *Archives Act.*

9 *Administrative Arrangements Order*, 5 December 2019, Schedule Pt 2.

10 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 57.

11 Section 7(1) of the *Archives Act.*

12 Section 7(2) of the *Archives Act.*

13 Section 3(2) of the *Archives Act*.

Director-General is, in writing, to "determine that a specified Commonwealth record or other material is part of the archival resources of the Commonwealth"[14].

39 The term "material" means "records and other objects"[15]. The term "record" means "a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of" either "information or matter that it contains or that can be obtained from it" or "its connection with any event, person, circumstance or thing"[16]. The term "document" means "any record of information" and includes "anything on which there is writing"[17].

40 The critical expression "Commonwealth record" is in relevant part defined to mean "a record that is the property of the Commonwealth or of a Commonwealth institution"[18] other than a record of that description which is "exempt material" because it is included in a collection maintained by another custodial institution, such as the National Library of Australia[19]. The cognate expression "current Commonwealth record" is defined to mean "a Commonwealth record that is required to be readily available for the purposes of a Commonwealth institution"[20].

41 To understand the definition of "Commonwealth record", it is necessary to refer to the definition of "Commonwealth institution", which is as follows[21]:

> "***Commonwealth institution*** means:
>
> (a) the official establishment of the Governor-General;
>
> (b) the Executive Council;

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14 Section 3C(1) of the *Archives Act*.

15 Section 3(1) of the *Archives Act*, definition of "material".

16 Section 3(1) of the *Archives Act*, definition of "record".

17 Section 2B of the *Acts Interpretation Act 1901* (Cth), definition of "document".

18 Section 3(1) of the *Archives Act*, definition of "Commonwealth record", para (a).

19 Section 3(1) of the *Archives Act*, definition of "exempt material".

20 Section 3(1) of the *Archives Act*, definition of "current Commonwealth record".

21 Section 3(1) of the *Archives Act*, definition of "Commonwealth institution".

(c) the Senate;

(d) the House of Representatives;

(e) a Department;

(f) a Federal court or a court of a Territory other than the Northern Territory or Norfolk Island;

(g) an authority of the Commonwealth; or

(h) the Administration of an external Territory other than Norfolk Island."

42 To understand the scope of the definition of "Commonwealth institution", it is in turn necessary to refer to the definitions of "Department" and "authority of the Commonwealth". A "Department" is either a "Department of the Australian Public Service" established under the *Public Service Act 1999* "that corresponds to a Department of State of the Commonwealth", administered by a Minister of State appointed by the Governor-General under s 64 of the *Constitution*, or a "Parliamentary Department"[22], being a Department of the Parliament established under the *Parliamentary Service Act 1999* (Cth)[23]. The expression "authority of the Commonwealth" is elaborately defined as follows[24]:

"***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 or Norfolk Island;

(ii) by the Governor-General; or

(iii) by, or with the approval of, a Minister;

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22 Section 3(1) of the *Archives Act*, definition of "Department".

23 Section 3(1) of the *Archives Act*, definition of "Parliamentary Department".

24 Section 3(1) of the *Archives Act*, definition of "authority of the Commonwealth".

(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."

43 Last in the sequence of interlocking definitions which bear on the scope of the definition of "Commonwealth institution" are definitions of the expressions "Commonwealth-controlled company" and "Commonwealth-controlled association". A "Commonwealth-controlled company" is "an incorporated company over which the Commonwealth is in a position to exercise control" other than "a company that is declared by the regulations not to be a Commonwealth-controlled company"[25]. A "Commonwealth-controlled association" is "an association over which the Commonwealth is in a position to exercise control" other than "an association that is declared by the regulations not to be a Commonwealth-controlled association"[26].

44 Bearing also on the primary meaning of "a record that is the property of the Commonwealth or of a Commonwealth institution" in the definition of "Commonwealth record" is the circumstance that two categories of records are "deemed to be" Commonwealth records[27]. One comprises records of a "Royal

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25 Section 3(1) of the *Archives Act*, definition of "Commonwealth-controlled company".

26 Section 3(1) of the *Archives Act*, definition of "Commonwealth-controlled association".

27 Section 3(1) of the *Archives Act*, definition of "Commonwealth record", para (b).

Commission" (defined to mean "a Commissioner or Commissioners appointed by the Governor-General in the name of the Queen to make inquiry and report upon any matter"[28]), but only from the time when those records are no longer required for the purposes of the Royal Commission[29]. The other comprises "records of which the Commonwealth or a Commonwealth institution has, or is entitled to have, possession" in "cases or circumstances" specified by regulation[30]. In addition, a record "held by or on behalf of the Parliament or a House of the Parliament" is "taken to be the property of the Commonwealth"[31].

45 Part II of the *Archives Act* specifies the functions and powers of the Archives. The functions of the Archives include to "ensure the conservation and preservation of the existing and future archival resources of the Commonwealth"[32], to "have the care and management of Commonwealth records, other than current Commonwealth records, that ... are part of the archival resources of the Commonwealth"[33], and to "make Commonwealth records available for public access" in accordance with Pt V of the *Archives Act*[34]. By s 5(2)(f), the functions of the Archives also include "to seek to obtain, and to have the care and management of, material (including Commonwealth records) not in the custody of a Commonwealth institution, that forms part of the archival resources of the Commonwealth and, in the opinion of the Director-General, ought to be in the care of the Archives". A record is in the "care" of the Archives if it is in the "custody" of the Archives or in the "custody" of a person under an arrangement with the

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28 Section 3(1) of the *Archives Act*, definition of "Royal Commission".

29 Section 22(2) of the *Archives Act*.

30 Section 3(6) of the *Archives Act.*

31 Section 3(5) of the *Archives Act*.

32 Section 5(2)(a) of the *Archives Act*.

33 Section 5(2)(e)(i) of the *Archives Act*.

34 Section 5(2)(j) of the *Archives Act*.

Archives[35]. The word "custody" in that context plainly refers to physical custody, meaning simply "physical control" even as a bailee[36].

46 Insofar as an arrangement made in the performance of the function conferred by s 5(2)(f) covers access to records accepted by the Archives under the arrangement, the arrangement attracts the operation of s 6(2), which is in turn qualified by s 6(3). The former provides:

> "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."

The latter provides:

> "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."

47 The powers of the Archives enable it to do all things necessary or convenient to be done in connection with the performance of its functions[37]. Specifically included within those powers are to "establish and control repositories or other facilities to house or exhibit" records in its care[38] and to "make arrangements for the acquisition by the Commonwealth of, or of copyright in

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35 Section 3(1) of the *Archives Act*, definition of "care", and s 64 of the *Archives Act*.

36 cf *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 521, 546. See also at 533, 541.

37 Section 6(1) of the *Archives Act*.

38 Section 6(1)(a) of the *Archives Act* read with s 3(1) of the *Archives Act*, definition of "material of the Archives".

relation to, or arrangements relating to the custody of, material that forms part of the archival resources of the Commonwealth"[39].

48 Part V of the *Archives Act* governs the management and preservation of Commonwealth records. Within Pt V, Div 2 is concerned with dealings with Commonwealth records and Div 3 is concerned with access to Commonwealth records.

49 Division 2 of Pt V contains a general prohibition against "the destruction or other disposal of a Commonwealth record", "the transfer of the custody or ownership of a Commonwealth record" and "damage to or alteration of a Commonwealth record"[40] except as "required by any law", "with the permission of the Archives or in accordance with a practice or procedure approved by the Archives", "in accordance with a normal administrative practice" not disapproved by the Archives, or "for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records"[41]. It imposes a duty on "[t]he person responsible for the custody" of a Commonwealth record that is "in the custody of a Commonwealth institution other than the Archives" to "cause the record to be transferred to the care of the Archives in accordance with arrangements approved by the Archives" if the record is determined by the Director-General to be part of the archival resources of the Commonwealth[42].

50 Division 3 of Pt V centrally imposes a duty on the Archives to cause a Commonwealth record, other than an "exempt record", that is in the "care" of the Archives or in the "custody" of a Commonwealth institution to be made available for public access once the record is within the "open access period"[43], and confers a corresponding entitlement on "any person" to access such Commonwealth

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39 Section 6(1)(c) of the *Archives Act*.

40 Section 24(1) of the *Archives Act*.

41 Section 24(2) of the *Archives Act*.

42 Section 27 of the *Archives Act*.

43 Section 31 of the *Archives Act*.

record[44]. Division 5 of Pt V also confers power on the Minister, in accordance with arrangements approved by the Prime Minister, to cause all records in a particular class of Commonwealth records not in the open access period to be available for public access[45]. The open access period for a Commonwealth record that came into existence before 1980, as has already been noted, begins on 1 January 31 years after the year of creation of the record[46].

51 Where, in the ordinary course of the administration of the *Archives Act*, access is given to a Commonwealth record that is required to be made available for public access because it is in the open access period or that is authorised by the Minister to be made available for public access, "no action for defamation, breach of confidence or infringement of copyright lies, by reason of the authorizing or giving of the access, against the Commonwealth or any person concerned in the authorizing or giving of the access"[47].

52 Having the potential to bear on an arrangement entered into by the Australian Archives before the commencement of the *Archives Act* is a transitional provision, s 70(3), which provides:

> "Where, immediately before the commencement of Part II, any records were in the custody of the establishment known as the Australian Archives, as existing at that time, under arrangements by which the custody of the records was accepted from a person other than a Commonwealth institution by the Commonwealth, or by an authority or person acting on behalf of the Commonwealth, those arrangements (including any provision of those arrangements concerning access to or disposal of those records) have effect from that commencement as if they were made, after that commencement, by that person with the Archives, and subsection 6(2) applies accordingly."

53 The relevant effect of s 70(3) is that an arrangement by which the Australian Archives before 6 June 1984 accepted custody of records from a person other than a Commonwealth institution must be given effect under the *Archives Act* as if the arrangement had been made by the Archives in the performance of the function conferred by s 5(2)(f). As spelt out in s 70(3), such a prior arrangement in that way

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44 Section 36(1) of the *Archives Act*.

45 Section 56 of the *Archives Act*.

46 Item 1 of the table set out in s 3(7) of the *Archives Act*.

47 Section 57(1)(a) and (1A) of the *Archives Act*.

attracts the operation of s 6(2). If it attracts the operation of s 6(2), the prior arrangement also necessarily attracts the operation of s 6(3).

Legislative history

54 The parliamentary process which culminated in the enactment of the *Archives Act* was unusually long. The process overlapped with, and at various stages influenced, the sequence of events resulting in the deposit of the correspondence already recounted.

55 The parliamentary process commenced with the introduction of the *Archives Bill* into the Senate in June 1978. There it became the subject of parallel inquiries by the Senate Standing Committee on Constitutional and Legal Affairs[48] and the Senate Standing Committee on Education and the Arts[49], both of which reported in October 1979. However, it lapsed upon the prorogation of the Parliament which preceded the general election of October 1980.

56 The Government's response to the reports of the two Senate Committees was incorporated into the *Archives Bill* as reintroduced into the Senate in 1981 before itself lapsing upon the dissolution of the Parliament which preceded the general election of March 1983.

57 Following the change of Government which occurred at that general election, a further revised version of the *Archives Bill* was introduced into the Senate in June 1983. The passage of that version, with amendments, resulted in enactment of the *Archives Act* in November 1983.

58 The three iterations of the *Archives Bill* involved no change to its basic structure. The central concept of the "archival resources of the Commonwealth" as consisting of "Commonwealth records and other material" and the critical definition of a "Commonwealth record" as "a record that is the property of the Commonwealth or of a Commonwealth institution" remained unchanged throughout the parliamentary process. So too did the material terms of the provisions which came to be enacted as ss 5(2)(f), 6(2) and 70(3).

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48 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979).

49 Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979).

59 The provenance of the definition of "Commonwealth record" as "a record that is the property of the Commonwealth or of a Commonwealth institution" was examined by the Australian Law Reform Commission in the context of undertaking a review of the *Archives Act* which it commenced in 1996 and concluded in 1998[50]. The Commission then reported that successive drafts of the *Archives Bill* in 1975 and 1976 had 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". The Commission noted "[a]necdotal evidence from those involved in drafting the legislation" which indicated that the property definition was preferred for a number of reasons. One was that "ownership was a term which was generally understood and which defined clearly a body of material to which the legislation would apply". Another was that "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"[51].

60 Written and oral submissions to the Senate Standing Committee on Education and the Arts by Professor Neale, in his capacity as Director-General of the Australian Archives, shed light on a link between the preference of those involved in the early stages of the drafting of the *Archives Bill* for a "property definition" of "Commonwealth record" and the preference of those involved in those early stages of drafting for the inclusion of the provisions which came to be enacted as ss 5(2)(f), 6(2) and 70(3).

61 Professor Neale explained that the *Archives Bill* contained "no clause whatsoever giving the Archives or the Government the right to recover Commonwealth records" and that the drafting intent was that "[t]he Commonwealth's power to recover Commonwealth-owned records" was to remain as it always had been under the general law[52]. Neither the proposed definition of "Commonwealth record" nor the proposal to make provision for categories of records to be deemed to be Commonwealth records was intended to create a new

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50 Australian Law Reform Commission, *Australia's Federal Record: A review of Archives Act 1983*, Report No 85 (1998).

51 Australian Law Reform Commission, *Australia's Federal Record: A review of Archives Act 1983*, Report No 85 (1998) at 99 [8.13].

52 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 20.

legal right to recovery[53]. Deeming was intended simply to ensure the coverage of records in categories where there might be doubt about the application of the definition[54].

62 Professor Neale also explained that in practice "[t]here are many papers of an undeniably official character which might not satisfy the property test which is used to identify Commonwealth records" and that "given modern copying technology, there may often be real doubt as to where ownership of a particular record resides"[55]. He explained that it was not the policy of the Government "to attempt to recover Commonwealth records ... in the custody of persons or institutions other than Commonwealth institutions" and referred to the historical fact that no legal recovery action had ever been attempted[56].

63 Against that background, the practical difficulty which had confronted the Australian Archives in the past and which would continue to confront the Archives in the future arose from the fact that there was a "grey area between personal and official". The problem was that "some" former "Ministers and officials" regarded as "personal papers" what "others" would call "official papers" and what "others" would call "Commonwealth records in terms of the Bill". Professor Neale was able to "say categorically that in many collections of personal papers there exist official government files"[57].

64 Professor Neale explained that the purpose of the proposed s 5(2)(f) was to enable the Archives to "collect certain material without regard for ownership" so as "to avoid the need to establish ownership before taking custody of official

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53 See eg Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 21, 169-171, 386-387.

54 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 169.

55 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 19.

56 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 21.

57 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 42-43.

material in private hands and to avoid the undesirable splitting of groups of papers where official and private material is inextricably mixed"[58]. He explained that, in combination with the proposed s 6(2), the proposed s 5(2)(f) would provide the Archives with statutory authority to continue the longstanding practice of the Australian Archives of approaching "Ministers and officials" at or around the time of their retirements to offer them the ability to deposit the whole of their collections of papers without "having to decide which papers are Commonwealth-owned". He recounted that "[t]his approach has been made for many years and has been accepted by many former officials, Ministers, Prime Ministers and Governors-General"[59]. He explained that the intention was to ensure "that the Archives can continue to do as it always has done, namely to offer donors the right to state conditions of access on the whole of their deposits"[60].

65 To be emphasised is that Professor Neale's explanation was in the context of the *Archives Bill* as first introduced in 1978. In that original form, the *Archives Bill* contained no clause corresponding to s 6(3) of the *Archives Act*. Moreover, as foreshadowed to the Governor-General by the Prime Minister in his letter of October 1977, the *Archives Bill* in that form contained in cll 18 and 21 provisions which would have operated to exclude "records of the Governor-General or of a former Governor-General" from the application of Divs 2 and 3 of Pt V and to allow a "person having the control of the custody" of such records to enter into an arrangement for the Archives to "have or retain the custody of those records" including by providing for the extent, if any, to which the Archives or any other persons were to have access to them. None of that was altered when the *Archives Bill* was reintroduced in 1981.

66 The *Archives Bill* as reintroduced in 1983, however, took quite a different approach. Whilst retaining substantively unaltered the text which became ss 5(2)(f), 6(2) and 70(3) of the *Archives Act*, it incorporated two significant departures from the earlier versions. One was the deletion of the proposed exclusion by cll 18 and 21 of records of the Governor-General or of a former

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58 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 21.

59 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 368.

60 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 368.

Governor-General from the application of Divs 2 and 3 of Pt V. The other was the insertion of the reference to "the official establishment of the Governor-General" into the definition of "Commonwealth institution". In his second reading speech in the Senate, the Attorney-General explained the relevantly altered policy intent to be that "[t]he 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"[61].

67 Another significant departure from the text of the earlier versions of the *Archives Bill* was then made by amendment moved on behalf of the Government during the committee stage in the Senate. The amendment involved the insertion of the provision which came to be enacted as s 6(3). The policy intent, as explained in a Revised Explanatory Memorandum, was "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" but "not in any way [to] affect the freedom of a donor to determine conditions of access to personal papers"[62].

68 The net result of those departures in 1983 from the *Archives Bill* as first introduced in 1978 and as reintroduced in 1981 was that, although the machinery provisions of ss 5(2)(f), 6(2) and 70(3) were retained in the *Archives Act* as enacted, donors of records were no longer to have what Professor Neale had described as "the right to state conditions of access on the whole of their deposits". Instead, s 6(3) would ensure that Div 3 of Pt V would govern access to any Commonwealth records deposited under any new arrangement with the Archives in the exercise of the function conferred on it by s 5(2)(f) and would govern as well access to any Commonwealth records already deposited under any pre-existing arrangement with the Australian Archives to be given ongoing effect by s 70(3). That was to be so irrespective of the terms of the arrangement. At the same time, the insertion of the reference to "the official establishment of the Governor-General" into the definition of "Commonwealth institution" would both expand the category of "Commonwealth records" and narrow the category of arrangements to be given ongoing effect by s 70(3) as arrangements by which the custody of records "was accepted from a person other than a Commonwealth institution".

69 As will be seen, those changes to the scheme of the *Archives Act* as enacted in November 1983 from the scheme of the *Archives Bill* as first introduced in June 1978 are significant both to the characterisation for the purpose of s 70(3) of the

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61 Australia, Senate, *Parliamentary Debates* (Hansard), 2 June 1983 at 1184.

62 Australia, Senate, *Archives Bill 1983*, Revised Explanatory Memorandum at [1]-[2].

arrangement that had been entered into between Professor Neale in his capacity as Director-General of the Australian Archives and Mr Smith in his capacity as Official Secretary in or about November 1977 and to the characterisation for the purpose of Div 3 of Pt V of the correspondence which Mr Smith in his capacity as Official Secretary had deposited with the Australian Archives pursuant to that arrangement on 26 August 1978. The statutory changes were almost certainly unforeseen by either party to the arrangement.

Four issues of construction

70 To address the ultimate question of whether each item of the deposited correspondence is properly characterised as "a record that is the property of the Commonwealth or of a Commonwealth institution" within the meaning of the *Archives Act*, it is necessary to determine the proper construction of the four principal statutory terms which combine to give that composite expression its relevant content. The four statutory terms are "record", "the Commonwealth" as distinct from "a Commonwealth institution", "the official establishment of the Governor-General" as a Commonwealth institution, and perhaps most importantly, "property".

"record"

71 Two features of the statutory definition of "record" are significant. The first is that a record is an "object" – a tangible thing – which has an existence that is independent of any informational content it may have and that is separate from any copyright in the form of any informational content it may have. In the case of a record that is a document, including a record that is a paper copy of a letter sent or the original of a letter received, the record is the document as a physical thing: the paper on which words are written or copied.

72 The second is that a thing does not become a "record" in virtue of being created or received but in virtue of being "kept by reason of" its informational content or its connection with an event, person or circumstance. To keep a thing for such a reason is to maintain the physical integrity of the thing for that reason. Whether, and if so when, a thing is so kept is an objective question the answer to which must ordinarily turn on the applicable system of record-keeping.

73 For the purposes of the *Archives Act*, a document created or received is therefore not necessarily a "record". Depending on the applicable system of record-keeping, working documents such as notes, aide memoires and preliminary drafts might never become records. Originals of correspondence received and copies of correspondence sent will only become records if and when in fact kept by reason of their informational content or connection with an event, person or circumstance.

Depending again on the applicable system of record-keeping, some correspondence, especially correspondence embodying communications of a routine or transient nature, might not be so kept at all.

"the Commonwealth" and "Commonwealth institution"

74 The term "Commonwealth" in a Commonwealth statute obviously means the "Commonwealth of Australia"[63]. But, of course, "the Commonwealth of Australia" can be used in a Commonwealth statute in different senses, corresponding at least to the several senses in which it is used in the *Constitution*[64].

75 The definite noun "the Commonwealth", when not used geographically, sometimes refers to the body politic of the Commonwealth of Australia. Together with the bodies politic of each of the States, the body politic of the Commonwealth of Australia was called into existence upon the proclamation of the *Constitution*. The Commonwealth as a body politic is a distinct legal entity, the legislative, executive and judicial powers of which are conferred and limited by the *Constitution*. The executive power of the Commonwealth as a body politic includes the power to exercise any right of property vested in the Commonwealth as a body politic. That executive power is formally vested in the Queen and exercisable by the Governor-General and is functionally exercisable by the Executive Government of the Commonwealth within the framework of responsible government established by Ch II of the *Constitution*[65], subject always to the capacity for statutory control by the Commonwealth Parliament[66]. When referring to the exercise of the executive power of the Commonwealth through the Executive Government of the Commonwealth, and when referring to its statutory control, the

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63 Section 2B of the *Acts Interpretation Act 1901* (Cth), definition of "Commonwealth".

64 *R v Sharkey* (1949) 79 CLR 121 at 153, quoting Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 73.

65 See *New South Wales v Bardolph* (1934) 52 CLR 455 at 489-490, 501-503, 507-509, 517-519; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 90-93 [115]-[122].

66 *Brown v West* (1990) 169 CLR 195 at 202.

distinct legal personality of the Commonwealth as a body politic has traditionally been expressed as "the Crown in right of the Commonwealth"[67].

76 Sometimes a statutory reference to "the Commonwealth" is more broadly to the central government of the nation understood in accordance with "the conceptions of ordinary life"[68]. In that broader sense, the expression is not confined to the Commonwealth as a body politic but can extend to encompass agencies and instrumentalities of the central government which have their own legal personalities[69]. In that broader sense, it can extend to encompass the holders of constitutional offices of the Commonwealth as a body politic and of statutory offices created by the Commonwealth Parliament in their official capacities[70].

77 The distinction drawn between "the Commonwealth" and a "Commonwealth institution" makes apparent that "the Commonwealth" is used in the *Archives Act* in the narrower sense to refer only to the Commonwealth as a body politic. That usage is confirmed by the interlocking definitions of "Commonwealth institution", "authority of the Commonwealth", "Commonwealth-controlled association" and "Commonwealth-controlled company", to which extensive reference has been made, the operation of which is to bring within the statutory conception of a "Commonwealth institution" some but not all agencies and instrumentalities of the central government and some but not all holders of constitutional and statutory offices.

78 That usage is also specifically confirmed by the deeming of a record kept by a Royal Commission to be a Commonwealth record only when the record is no longer required for the purposes of the Royal Commission and by the prescription that a record held by or on behalf of the Parliament or a House of the Parliament

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67 eg *The Commonwealth v Rhind* (1966) 119 CLR 584 at 599; *Jacobsen v Rogers* (1995) 182 CLR 572 at 585; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 409-411 [31]-[36], 429-431 [105]-[109]; *Sue v Hill* (1999) 199 CLR 462 at 501 [90].

68 *Bank of New South Wales v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 363.

69 eg *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 233; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 142 [10], 143 [14].

70 eg *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 36-43.

is to be taken to be a Commonwealth record. Records held by or on behalf of a House of the Parliament include the *Journals of the Senate* and the *Votes and Proceedings of the House of Representatives* together with documents tabled in, or presented to or created by committees of, the Senate and the House of Representatives[71]. Records of the Senate are typically held in the custody of the Clerk of the Senate[72] and records of the House of Representatives are typically held in the custody of the Clerk of the House of Representatives under the direction of the Speaker of the House of Representatives[73].

79 Holders of constitutional and statutory offices are therefore not "the Commonwealth" for the purposes of the *Archives Act* merely by reason of holding office and acting in the discharge of the functions of office. Amongst the holders of constitutional offices who are not within that statutory conception of "the Commonwealth" are notably Ministers, Senators, members of the House of Representatives and Justices of the High Court and judges of the other courts created by Commonwealth Parliament. Amongst them also is the Governor-General.

80 Moreover, holders of such constitutional offices are not automatically within the statutory conception of a "Commonwealth institution". A Minister who is a member of the Federal Executive Council is not "the Executive Council"; a Senator is not "the Senate"; a member of the House of Representatives is not "the House of Representatives"; a Justice of the High Court or a judge of another court created by Commonwealth Parliament is not "a Federal court". In the same way, the Governor-General is not "the official establishment of the Governor-General". Unless specifically prescribed by a regulation made for the purpose of para (b) of the definition of "authority of the Commonwealth", none of those office holders is a "Commonwealth institution".

81 Exclusion of constitutional office holders from the statutory conception of the Commonwealth, and in the absence of regulation also from the statutory conception of a Commonwealth institution, is comprehensible as a matter of legislative design when regard is had to the relationship between constitutional office holders and components of the definition of a "Commonwealth institution". The relevant components are those which operate to bring within the statutory conception of a Commonwealth institution functional units of government which,

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71 cf *Archives (Records of the Parliament) Regulations 2019* (Cth).

72 Australia, Senate, *Standing Orders*, standing order 44.

73 Australia, House of Representatives, *Standing Orders*, standing order 28.

in the regular course of public administration, are to be expected to have responsibility for the keeping of records created or obtained by the holders of constitutional offices in their official capacities.

82 In the case of a Minister, the applicable functional unit is the Department of the Australian Public Service, which corresponds to the Department of State of the Commonwealth administered by that Minister. The Department is comprised of persons engaged or employed under the *Public Service Act 1999*. Subject to the capacity for direction by the Minister, responsibility for the management of the Department, including responsibility for the management of "property ... that is owned or held by the Commonwealth" within the portfolio administered by the Department, is cast by statute on the Secretary of the Department[74]. As the Solicitor-General of the Commonwealth emphasised in argument, a document created or received by a Minister in his or her official capacity can be expected in the regular course of public administration to be delivered into the control of the Department and kept by the Department on a departmental file. That is routinely so for originals of correspondence received and for copies of correspondence sent by the Minister in an official capacity. There will, of course, be exceptions. An email or memorandum embodying a confidential and politically sensitive communication between Ministers on a matter of government business, for example, if it is kept at all, might well be kept solely by one or other of those Ministers or within what has come to be referred to as the "private office"[75] of a Minister.

83 A notable feature of the design of the *Archives Act* is that ministerial consultants and personal staff engaged or employed under the *Members of Parliament (Staff) Act 1984* (Cth) are not within the definition of a "Commonwealth institution". One consequence is that a document that is kept within the private office of a Minister by reason of its informational content or its connection with an event, person or circumstance is not thereby a record that is kept by the Commonwealth or a Commonwealth institution. Another consequence is that a document created or received by a Senator or member of the House of Representatives is not a record that is kept by the Commonwealth or a Commonwealth institution even if the document is kept by reason of its

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74 Section 57(2) of the *Public Service Act 1999* (Cth) and ss 8 (definitions of "public resources" and "relevant property"), 12 (definition of "accountable authority"), 15 and 16 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

75 Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (2016) at 1-2.

informational content or its connection with an event, person or circumstance within the private office of the Senator or member.

84 In the case of a Justice of the High Court or a judge of another court created by Commonwealth Parliament, the applicable functional unit is the "Federal court" of which the judge is a member. The records of a court in the regular course of its administration can be expected to be kept under the control of its registry insofar as those records concern the exercise of judicial power or its chief executive officer insofar as those records concern matters of administration. The mere fact that a document is created or received by a judge in the discharge of his or her functions of office does not mean that the document is a record of the court of which the judge is a member. That is so even if the document is kept within the chambers of the judge by reason of its informational content or by reason of its connection with a case that is or has been before the court. A memorandum sent from one judge to another expressing a view as to the merits of a case on which both are sitting is unlikely ever to become a record given that the limited purpose and confidential nature of the communication would make it improper for the recipient to retain the memorandum once the case had been determined. But even if the recipient chose to take it upon himself or herself to preserve the memorandum for posterity, the memorandum would not by reason of being so kept by a judge become a record of the court.

85 In the case of the Governor-General, the applicable functional unit of government is "the official establishment of the Governor-General". To the meaning of that expression, it is appropriate next to turn.

"the official establishment of the Governor-General"

86 The word "establishment" within the reference to "the official establishment of the Governor-General" in the definition of "Commonwealth institution" is evidently used in the arcane sense of referring to an organised staff provided at public expense for the assistance of the holder of a public office[76]. The word was used just once before in a Commonwealth statute in a cognate statutory expression in precisely that sense in the *Governor-General's Establishment Act 1902* (Cth), which appropriated funds "[t]o assist in defraying the expenses of the Governor-General's establishment in connexion with the visit to Australia of Their Royal Highnesses the Duke and Duchess of Cornwall and York".

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76 *The Oxford English Dictionary*, 2nd ed (1989), vol 5 at 405, senses 9 and 10.

87 The statutory reference to "the official establishment of the Governor-General" can therefore be taken for practical purposes now to be synonymous with the organisation that the *Governor-General Act* has since 1999[77] referred to as "the Office of Official Secretary to the Governor-General", constituted by the Official Secretary and staff employed by the Official Secretary[78]. The *Governor-General Act* now spells out that "[t]he function of the Office is to assist the Governor-General"[79]. It now places the Official Secretary in relation to the management of the Office of Official Secretary to the Governor-General in like position to that of a Secretary in relation to the management of a Department[80].

88 Whatever the outer limits of the statutory reference to "the official establishment of the Governor-General" might at any earlier time have been, the holder from time to time of the office of Official Secretary must always have been squarely within it. The Official Secretary acting in his or her official capacity could always have been expected to have had responsibility for keeping records created or obtained by the Governor-General in his or her official capacity. The Official Secretary acting in his or her official capacity could also always have been expected to have had responsibility for assisting a newly appointed Governor-General with the transition to office and for assisting a retiring Governor-General with the transition from office.

"property"

89 Property is not "a monolithic notion of standard content and invariable intensity"[81]; it is not "a term of art with one specific and precise meaning"[82]. It is "a term that can be, and is, applied to many different kinds of relationship with a subject matter". The relationship with a subject matter is in some contexts best

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77 *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth).

78 Section 6(2) of the *Governor-General Act*.

79 Section 6(3) of the *Governor-General Act*.

80 Section 6(4) of the *Governor-General Act*.

81 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [19], quoting K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15 at 16.

82 *Kennon v Spry* (2008) 238 CLR 366 at 397 [89].

understood in terms of a "bundle of rights". In other contexts, it is best understood in terms of a "legally endorsed concentration of power"[83].

90 Accordingly, property is not for all purposes to be equated with "full beneficial, or absolute, ownership"[84]. Indeed, a proprietary relationship can have the quality of relativity. Especially is that so in relation to property in tangible things. It is an old and well-known application of common law doctrine, for example, that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner"[85].

91 The doctrine of the common law has been explained in terms that physical possession of a tangible or "corporeal" thing, in the sense of actual physical custody of the thing, "is not merely evidence of absolute title: it confers a title of its own, which is sometimes called a 'possessory title'". The possessory title that derives from lawful physical possession "is as good as the absolute title as against, it is usually said, every person except the absolute owner"[86]. Though the doctrine has been so much encrusted with technicalities that any exposition of it must be hedged with qualifications[87], a slightly more complete statement of it might be that lawful physical possession is as good as absolute title against every person except someone "who can show a better right to possession"[88].

92 The question, however, is not as to the content of the common law concepts of "possession" or "possessory title" but as to the meaning of "property" within the context of the *Archives Act*. The two are not the same.

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83 *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]-[19]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

84 *Yanner v Eaton* (1999) 201 CLR 351 at 367 [22].

85 *Armory v Delamirie* (1722) 1 Stra 505 at 505 [93 ER 664 at 664].

86 *Russell v Wilson* (1923) 33 CLR 538 at 546.

87 eg *Moors v Burke* (1919) 26 CLR 265 at 268-269; *Willey v Synan* (1937) 57 CLR 200 at 217-219.

88 Holdsworth, *A History of English Law* (1925), vol 7 at 449. See *The Winkfield* [1902] P 42 at 55-56; *Gatward v Alley* (1940) 40 SR (NSW) 174 at 180; *Gollan v Nugent* (1988) 166 CLR 18 at 30-33, 48-49.

93 Within the definition of "Commonwealth record", "property" obviously connotes a relationship between a record – a tangible thing – on the one hand and either the Commonwealth as a body politic or a Commonwealth institution as a functional unit of government on the other hand. The nature and intensity of the requisite relationship is a question of statutory construction the resolution of which is informed by the statutory context.

94 Despite the focus of those involved in the early stages of the drafting of the *Archives Act* on the "ownership" of a record, the inclusion within the definition of "Commonwealth institution" of Departments of State of the Commonwealth and of other functional units of government which lack legal personality necessarily means that the connoted relationship cannot be confined to the holding of rights. Much less can it be confined to the holding of rights corresponding to ownership or possession at common law. The relationship connoted can only be understood in terms of a legally endorsed concentration of power. The question becomes as to the nature and intensity of the requisite concentration of power.

95 Purposively construed in the context of the *Archives Act*, the relationship between a record and either the Commonwealth as a body politic or a Commonwealth institution as a functional unit of government connoted by "property" is best understood as a legally endorsed concentration of power to control the physical custody of the record. The power might arise from a capacity to exercise a common law or statutory right arising from ownership or possession. But it need not so arise. The power might be exclusive. But it need not be.

96 The paradigm of a Department of State of the Commonwealth rather indicates that the concentration of power can arise from a capacity to control the physical custody of the record that is conferred and is exercisable as a matter of management or administration rather than as a matter of the recognition and vindication of rights of ownership or possession at common law. The *Archives Act* is not concerned to vindicate the incidents of ownership or possession at common law such as the right to destroy or the right to alienate the property. A record which is kept in the control of a Department in the course of the management and administration of the affairs of the Commonwealth is sensibly described as property of the Commonwealth for the purposes of the *Archives Act* whether or not another person – such as the author of the record – may have a claim to ownership or possession of the record under the general law.

97 The paradigm of a Department of State of the Commonwealth also indicates that the power to control the physical custody of the record need not depend on the capacity to assert any right of ownership or possession at common law given that the Department is not an entity capable of bearing or enforcing legal rights. Nor need the power of control extend to the ultimate power to dispose of the record.

The power can be constrained, including by rights of ownership or possession vested in the Commonwealth as a body politic or in another legal person. The exercise of the power can be subject to a power of direction in another – in the case of a Department, most obviously its Minister.

98 That contextual understanding of the statutory reference to "property" furthers the legislative purpose of enabling the Archives to preserve and make publicly available the archival resources of the Commonwealth. It does so by ensuring that the Archives is able to assume the custody of a Commonwealth record of national significance or public interest without needing to concern itself with questions of the ultimate ownership or possessory title.

99 Underlying the legislative scheme is an expectation that a record the physical custody of which is within the lawful power of control of the Commonwealth as a body politic or of a Commonwealth institution as a functional unit of government will in the regular course of administration be kept in the actual physical custody of a Commonwealth institution. Within the Commonwealth institution there will be a "person responsible for the custody of the record". That person will be compelled to transfer the record to the Archives if the record is determined by the Director-General to be part of the archival resources of the Commonwealth. The circumstance that a record is in fact kept in the actual physical custody of a Commonwealth institution lacking in legal personality makes it highly likely that the true owner of the record will be the Commonwealth as a body politic. But the circumstance cannot exclude the possibility that the true owner of the document is some other person.

100 Informed by the experience of the Australian Archives as recounted to the Senate Standing Committee on Education and the Arts by Professor Neale, the legislative contemplation is also that a record the physical custody of which is within the lawful power of control of the Commonwealth or a Commonwealth institution might on occasions in fact be found in the actual physical custody of a person outside a Commonwealth institution. The person might even claim to be its owner. The function conferred by s 5(2)(f) enables the Archives in those circumstances to seek and obtain the physical custody of the record by entering into an arrangement with the person without necessarily resolving the question of ownership. If the record is not a Commonwealth record at the time the Archives obtains custody of it under the arrangement, s 6(2) will ensure that the terms of the arrangement will prevail over the access regime in Div 3 of Pt V. If the record is a Commonwealth record at the time the Archives obtains custody of it under such an arrangement, s 6(3) will ensure that the access regime in Div 3 of Pt V will prevail notwithstanding the terms of the arrangement.

101 By whichever of those two methods the Archives obtains custody of a record, the result in terms of ownership is the same. For the Archives to take the record into its physical custody does nothing to affect the ownership of the record or to alter any legal right of property in the record that might be vested in anyone. The Archives, after all, is nothing more than a grouping of officers of the Australian Public Service who act in concert under the supervision of the Director-General within a Department of State of the Commonwealth, which is currently the Attorney-General's Department.

102 The true owner of a Commonwealth record that has been transferred to the Archives from a Commonwealth institution or obtained by the Archives under an arrangement with a person outside a Commonwealth institution might or might not be the Commonwealth as a body politic. If the true owner is not the Commonwealth as a body politic, the true owner might well have a common law cause of action in detinue[89] against the Commonwealth for the recovery of the record from the Archives. If the true owner were to recover physical custody of the record from the Archives, then the record would cease to be in the lawful physical custody of the Attorney-General's Department as a Commonwealth institution. It would at that time cease to be a Commonwealth record, with the consequence that the access regime in Div 3 of Pt V would no longer apply to it. For so long as the record remains in the lawful physical custody of the Archives, however, it remains a Commonwealth record and the access regime in Div 3 of Pt V applies to it irrespective of its true ownership.

Property of the Commonwealth?

103 On the appeal, as at first instance in the Federal Court and in the Full Court, the principal focus of Professor Hocking and of the Director-General has been on attempting to establish the ultimate ownership of the deposited correspondence. There has been no dispute between them that legal title to a physical copy of correspondence that is made before the correspondence is sent ordinarily vests at common law in the creator of the copy at the time of its creation[90] and that legal title to the original of correspondence that is received ordinarily vests at common law in the recipient at the time of its receipt[91]. There has also been no dispute between them that the creator or recipient of each item of the deposited

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89 *Gollan v Nugent* (1988) 166 CLR 18 at 25.

90 *In re Wheatcroft* (1877) 6 Ch D 97 at 98.

91 *Pope v Curl* (1741) 2 Atk 342 at 342 [26 ER 608 at 608]; *In re Dickens; Dickens v Hawksley* [1935] Ch 267 at 292-293.

correspondence was Sir John Kerr and that each act of creation or receipt was in his capacity as Governor-General. Where issue has been joined between them has been as to whether legal title at the time of creation or receipt vested in the Commonwealth as a body politic or in Sir John as an individual.

104 Both parties place reliance, in different ways and to different ends, on the constitutional nature of the offices held by the correspondents and on the constitutional nature of the relationship connoted by the prescription in s 2 of the *Constitution* that "[a] Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth". Both accept that the nature of the relationship between the Governor-General and the Queen during the period in which Sir John Kerr held the office of Governor-General had been shaped by developments that had occurred in the constitutional relations between the United Kingdom and Australia in the three-quarters of a century which had by then elapsed since the enactment of the *Constitution* in the last year of the reign of Queen Victoria. Those developments included recognition in the Balfour Declaration of the Imperial Conference in 1926 that the Governor-General "is not the representative or agent of [Her] Majesty's Government in Great Britain or of any Department of that Government", acceptance from at least the time of the appointment of Sir Isaac Isaacs as Governor-General in 1931 that the Monarch would act on the advice of the Australian Prime Minister in appointing the Governor-General[92], and ascription to Her Majesty by the *Royal Style and Titles Act 1973* (Cth) for use in relation to Australia of the title "Queen of Australia"[93].

105 The argument for Professor Hocking at its widest, however, does not rely on the particular position of the Governor-General or on the particular relationship between the Queen and the Governor-General. The argument at its widest is that legal title to anything created or received by the holder of any constitutional or statutory office in his or her official capacity automatically vests in the Commonwealth as a body politic at the time of creation or receipt, and is accordingly immediately within the purview of the exercise of the executive power of the Commonwealth. The argument is sought to be supported by reference to cases which illustrate that a secret profit or private gain made by the holder of a

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92 *Sue v Hill* (1999) 199 CLR 462 at 495 [74].

93 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261.

public office from misuse of that office can be held on constructive trust for the body politic to which the public office is appurtenant[94].

106 A moment's reflection on the adverse consequences the asserted doctrine would have on the separation of judicial power, and on the capacity of Senators and members of the House of Representatives to discharge their constitutional duties of holding the Executive Government of the Commonwealth to account[95], is sufficient to reject it. The case law on which the argument relies does nothing to support it. Necessarily implicit in recognition that a person who is the holder of a public office can be held liable to account by way of constructive trust for a secret profit or private gain is recognition that legal title to the profit or gain can vest in the person as an individual.

107 Concentrating on the uniqueness of the constitutional position of the Governor-General and on the peculiarity of the constitutional relationship between the Queen and the Governor-General, the narrower version of the argument for Professor Hocking is that the centrality of that relationship to the functioning of the Commonwealth as a body politic means that communications between the Queen and the Governor-General are inherently communications of the Commonwealth as a body politic. They are communications the content and means of which must fall within the purview of the Executive Government of the Commonwealth within the framework of responsible government established by Ch II of the *Constitution*. For those communications to be considered personal to the individuals involved, and for the physical embodiments of those communications to be privately owned by the individuals involved, is constitutionally unthinkable. An argument to that effect was accepted by Flick J in dissent in the Full Court[96].

108 The argument for the Director-General, presented by the Solicitor-General of the Commonwealth, is that legal title to a thing created or received by the holder of a constitutional office in his or her official capacity automatically vests in the Commonwealth as a body politic at the time of creation or receipt only if the holder of the constitutional office is then acting as an "emanation of the Commonwealth"

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94 eg *Reading v Attorney-General* [1951] AC 507; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

95 *R v Boston* (1923) 33 CLR 386 at 401.

96 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 22-24 [110]-[118].

in creating or receiving the thing. Otherwise, the vesting of legal title is a matter of objectively determined intention. The Solicitor-General invokes in that respect the approach taken by the United States Court of Appeals for the District of Columbia in *Nixon v United States*[97] to conclude that "through mutually explicit understandings and uniform custom, Presidents retained an exclusive property interest in their presidential papers". The Solicitor-General points out that amongst the "presidential papers" held in that case to be owned by Richard M Nixon were "correspondence of the President and his staff"[98].

109 The Solicitor-General argues that, in circumstances where neither the Governor-General nor the Queen wrote as an emanation of the body politic, the "personal and confidential" labelling of the particular correspondence between them indicated their mutual objective intention to be that correspondence created or received by the Governor-General was not to be within the immediate purview of the Executive Government of the Commonwealth at the time of creation or receipt and therefore that legal title to the correspondence was not to vest in the Commonwealth as a body politic but rather in the individual who held the office of Governor-General. The Solicitor-General goes further to argue that such a mutual objective intention was not confined to the Governor-General and the Queen: "each relevant office-holder – whether at the Palace, Government House, the Lodge or the Archives – considered, and acted on the basis that, the [correspondence] belonged privately to Sir John and [was] not property of the Commonwealth". An argument much to that effect was accepted by Griffiths J at first instance[99] and by Allsop CJ and Robertson J in the majority in the Full Court[100].

110 The Solicitor-General seeks to support the inference of that objective intention by submitting that this Court should recognise the existence, now and throughout the period in which Sir John Kerr held the office of Governor-General, of a "longstanding convention that communications between the Governor-General and the Queen are confidential, and do not form part of the official records

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97 (1992) 978 F 2d 1269 at 1282.

98 (1992) 978 F 2d 1269 at 1270.

99 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 29-31 [107]-[116].

100 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 17 [80], 20-21 [95]-[103].

of government". The convention, to which it is submitted that all relevant office holders can be found to have regarded themselves as bound[101], is said to be as spelt out in the exchange of letters in February 2017 between the then Official Secretary and the then Private Secretary. Echoing the language of the Private Secretary, the convention is said to be observed "in each of Her Majesty's 15 Commonwealth Realms" and to be "necessary to protect the privacy and dignity of the Sovereign and her Governors-General, and to preserve the constitutional position of the Monarch and the Monarchy".

111 Whether a constitutional convention pertaining to the ownership of confidential communications with Her Majesty exists in the United Kingdom or in relation to any other country is neither necessary nor appropriate for this Court to decide. Whether such a constitutional convention exists or has at any relevant time existed in the outworking of the Australian *Constitution* is not satisfactorily established merely by an exchange of letters between the Official Secretary and the Private Secretary and is not unambiguously borne out by the practices of Governors-General revealed by the other documents that are in evidence. Though recognition of a constitutional convention cannot depend on formal proof by admissible evidence on the balance of probabilities, the Court would not be justified in taking cognisance of an asserted constitutional convention unless convinced on adequate material of the convention's existence[102].

112 Even aside from the difficulty of taking judicial cognisance of the asserted constitutional convention, the issue of the ownership of the deposited correspondence has an unavoidable constitutional dimension. As such, it is an issue appropriate to be determined only if its resolution is truly necessary to the outcome of the appeal[103]. It is not.

113 If, on the one hand, the Commonwealth as a body politic was the true owner of the correspondence at the time it was deposited with the Australian Archives, it would follow that each item of correspondence would have been the property of the Commonwealth and therefore a Commonwealth record. If, on the other hand, Sir John Kerr as an individual was then the true owner of the correspondence, each item of correspondence would still have been a Commonwealth record if it was

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101 cf *Re Resolution to Amend the Constitution* [1981] 1 SCR 753 at 888.

102 *Maloney v The Queen* (2013) 252 CLR 168 at 299 [353]; *Re Day* (2017) 91 ALJR 262 at 269 [23]-[24]; 340 ALR 368 at 375.

103 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Knight v Victoria* (2017) 261 CLR 306 at 324 [32].

the property of the official establishment of the Governor-General. The appeal can, and therefore should, be determined through the resolution of that issue alone.

Property of the official establishment of the Governor-General?

114 The focus of the parties on the ownership of the correspondence resulted in the significance of the circumstances in which the correspondence came to be deposited with the Australian Archives not being brought to the attention of the Federal Court. The significance is as follows.

115 The sequence of events that has been recounted makes apparent that, at least from the time of Sir John Kerr's departure from Government House upon his retirement from office on 8 December 1977 until the time of the deposit of the correspondence on 26 August 1978, the correspondence was in the lawful physical custody of Mr Smith in his capacity as Official Secretary. During that period, Mr Smith in his private capacity made copies of the correspondence for Sir John in his private capacity. But that does not detract from the fact that Mr Smith held the correspondence throughout the period in the proper performance of his functions as Official Secretary. He did so in order to fulfil the arrangement he had made in his capacity as Official Secretary with Professor Neale in his capacity as Director-General of the Australian Archives in November 1977 to deposit the correspondence with the Australian Archives. The making of the arrangement had been suggested by Mr Fraser as Prime Minister to Sir John as Governor-General and the arrangement was undoubtedly made with the knowing approval of Sir John when he was still Governor-General. On Sir John's instructions, Mr Smith then went on to fulfil the arrangement by depositing the correspondence with the Australian Archives in his capacity as Official Secretary after Sir John's retirement.

116 The very actions of Mr Smith in making and fulfilling in his capacity as Official Secretary the arrangement by which the correspondence came to be deposited with the Australian Archives are sufficient to demonstrate that lawful power to control the physical custody of the correspondence then lay with Mr Smith in his capacity as Official Secretary. The quality of that power to control the physical custody of the correspondence is not affected by the finding that Mr Smith acted on the instructions of Sir John Kerr in making the deposit in his capacity as Official Secretary just as it is unaffected by the inference that the arrangement was entered into by Mr Smith in his capacity as Official Secretary with the knowing approval of Sir John when he was still Governor-General.

117 The inference that Mr Smith in his capacity as Official Secretary had lawful power to control the physical custody of the correspondence is compelling. It is, after all, the power that was actually exercised by the unit of government in whose physical custody the correspondence was in fact kept. The nature and significance

of the correspondence was such that it was only to be expected that the correspondence would be kept within the official establishment of the Governor-General as the functional unit of government responsible for keeping records created or obtained by the Governor-General in his or her official capacity. With respect to the majority in the Full Court, we cannot see how the correspondence could appropriately be described, however "loosely", as "private or personal records of the Governor-General"[104] even allowing for the ambiguity of the description of "private or personal". It cannot be supposed, for example, that Sir John Kerr could have taken the correspondence from the custody of the official establishment and destroyed it or sold it, and the sequence of events which resulted in its deposit with the Australian Archives demonstrates that such a possibility was never contemplated.

118 The inference is sufficient to conclude that the correspondence was properly characterised at the time of deposit as property of the official establishment of the Governor-General. The conclusion follows irrespective of whether the Commonwealth as a body politic or Sir John Kerr as an individual was the true owner of the correspondence as a matter of common law.

Conclusion

119 The conclusion that the correspondence was the property of the official establishment of the Governor-General at the time of deposit with the Australian Archives is sufficient to lead to the ultimate conclusion that each item of the deposited correspondence was then a Commonwealth record, and remains a Commonwealth record in the care and management of the Archives.

120 There is accordingly no need to resolve the controversy about whether the Commonwealth as a body politic or Sir John Kerr as an individual was the true owner at the time of its deposit with the Australian Archives. If Sir John was the true owner, his rights of ownership were unaffected by the deposit, were unaffected by the subsequent enactment of the *Archives Act*, and enured for the benefit of his estate. The mere existence of those rights would have no effect on the characterisation of each item of the deposited correspondence as a Commonwealth record or on the application of Div 3 of Pt V to the deposited correspondence.

121 For completeness, it should be added that the fact that the correspondence was deposited under an arrangement between the Official Secretary and the Director-General of the Australian Archives and was fulfilled by the Official

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104 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 20 [95].

Secretary in his official capacity also means that the arrangement was not one by which the custody of records was accepted by the Australian Archives "from a person other than a Commonwealth institution". The consequence is that s 70(3) of the *Archives Act* has no application to the arrangement. Even if it did, the character of each item of the deposited correspondence as a Commonwealth record would make Div 3 of Pt V applicable to it through the operation of s 6(3) notwithstanding s 6(2).

122 To the extent that the conclusion that each item of the deposited correspondence is a Commonwealth record might run counter to the current understanding of the Private Secretary and to the present expectations of Her Majesty about the timing of public access to it, two points are to be made. The first is that the conclusion is the product of the application of the *Archives Act*, properly interpreted, to the historical circumstances. The second is that acceptance that the holder of the office of Official Secretary acting in his official capacity had power to enter into and fulfil the arrangement under which the correspondence was deposited was implicit in acceptance that a subsequent holder of the office of Official Secretary acting in the same official capacity had power, by conveying the decision of Her Majesty, to alter the conditions on which the deposit was made.

123 To the extent that conclusion might be thought to run counter to the expectations of Mr Smith as Official Secretary and of Professor Neale as Director-General of the Australian Archives in entering into the arrangement under which the correspondence was deposited, of Mr Fraser as Prime Minister in suggesting it, and of Sir John Kerr as retiring Governor-General in acquiescing in it, the point to be emphasised is that the conclusion is the product of legislative choices made in the final stages of the parliamentary processes which resulted in the enactment of the *Archives Act*. The determinative legislative choices were made after the arrangement was entered into and fulfilled.

124 The appeal must be allowed. The orders of the Full Court must be set aside, the appeal to that Court must be allowed, and the orders made at first instance must be set aside. In their place, it should be declared that the deposited correspondence is constituted by Commonwealth records within the meaning of the *Archives Act* and it should be ordered that a writ of mandamus issue to compel the Director-General to reconsider Professor Hocking's request for access to the deposited correspondence. The Director-General must pay Professor Hocking's costs.

125 NETTLE J. Most of the facts of this matter and the terms of the relevant legislation sufficiently appear from the reasons for judgment of the plurality, and I gratefully adopt their Honours' recitation of them. I respectfully disagree, however, with their Honours' conclusion.

Definition of "Commonwealth record"

126 As the plurality's reasons indicate[105], the Governor-General is not "the Commonwealth" within the meaning of the *Archives Act 1983* (Cth). As is apparent from the way that the Act distinguishes between "the Commonwealth" and "a Commonwealth institution", "the Commonwealth" refers to the body politic established under the *Constitution*[106] or, as it is sometimes described, the Crown in right of the Commonwealth[107].

127 As the plurality's reasons also indicate[108], the Governor-General is not "a Commonwealth institution", because the Governor-General is not part of "the official establishment of the Governor-General". Within the *Archives Act*, "the official establishment of the Governor-General" refers to the Official Secretary and other staff who assist the Governor-General in the performance of duties of the viceregal office[109].

128 That conclusion is fortified by the way the Act recognises the distinction between persons holding office and organs of government to which their offices relate, in each of the other paragraphs of the definition of "Commonwealth institution". Most notably, just as para (a) distinguishes "the official establishment

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105 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [77].

106 *Constitution*, covering cll 3, 4; "A Proclamation", in *Commonwealth of Australia Gazette*, No 1, 1 January 1901 at 1; *Acts Interpretation Act 1901* (Cth), s 2B (definition of "Commonwealth"). See *The Commonwealth v Rhind* (1966) 119 CLR 584 at 599 per Barwick CJ (McTiernan J agreeing at 600), 603 per Taylor J, 611 per Owen J; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 431 [109] per Gummow J; *Williams v The Commonwealth* (2012) 248 CLR 156 at 185 [22] per French CJ, 237 [154] per Gummow and Bell JJ, 254 [205] per Hayne J.

107 See *The Commonwealth v Baume* (1905) 2 CLR 405 at 418 per O'Connor J; *The Commonwealth v Bogle* (1953) 89 CLR 229 at 259 per Fullagar J (Dixon CJ, Webb and Kitto JJ agreeing at 249, 255, 274).

108 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [80].

109 See, eg, *R v Accrington Youth Court; Ex parte Flood* [1998] 1 WLR 156 at 162 per Sedley J; [1998] 2 All ER 313 at 318.

of the Governor-General" from the Governor-General, whom the Official Secretary and other staff assist in the performance of viceregal duties, para (b) distinguishes "the Executive Council" from the Governor-General, whom the Executive Councillors "advise ... in the government of the Commonwealth"[110]; and para (e) distinguishes "a Department" from the Minister of State who administers the Department. In marked contrast, para (c) refers to "the Senate", which includes the Senators; para (d) refers to "the House of Representatives", which includes the Members of the House of Representatives; para (f) refers to "a Federal court", which includes the Chief Justice or Chief Judge and Judges of each federal court; and para (h) refers to "the Administration of an external Territory", which includes the Territory's Administrator. Finally, para (g) refers to "an authority of the Commonwealth", which includes both "an authority, body, tribunal or organization ... established for a public purpose" by prescribed means and "the holder of a prescribed office under the Commonwealth".

129 As the plurality's reasons indicate[111], too, the reference to "the property" of the Commonwealth or a Commonwealth institution in the definition of "Commonwealth record" cannot mean a thing owned by the Commonwealth or one of the Commonwealth institutions[112]. Ownership is neither necessary nor sufficient for compliance with the "record-keeping obligations"[113] which the Act attaches to Commonwealth records. As the principal obligation is to cause Commonwealth records to be transferred to the care of the Archives[114], the word "property" must refer to the "legally endorsed concentration of power"[115] that Pollock and Wright termed "possession in law": "the fact of control" over a record

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110 *Constitution*, s 62.

111 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [94].

112 cf *Shorter Oxford English Dictionary*, 6th ed (2007) at 2370, quoted in *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10] per French CJ, Crennan and Bell JJ.

113 *Archives Act 1983* (Cth), s 2A.

114 *Archives Act 1983* (Cth), s 27.

115 Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299, quoted in *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ and *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

"coupled with a legal claim and right to exercise it in one's own name against the world at large"[116].

130 For Commonwealth institutions that have no separate legal personality or collective power over chattels (such as the power to compel production of documents on pain of contempt[117]), possession in law – like any other legally endorsed concentration of power over things – must be exercised by one or more natural persons comprising the Commonwealth institution[118]. To avoid the absurd consequence that every record in the lawful possession of any such natural person is a "Commonwealth record", the references to such Commonwealth institutions must be taken to require that the person lawfully possess the record in his or her capacity as one of the persons comprising the Commonwealth institution.

131 Evidently, then, the definition of "Commonwealth record" is intended to confine the record-keeping obligations in the Act to records in the lawful possession of the Commonwealth or a person or persons comprising a Commonwealth institution in their capacity as such, and thereby to prevent those obligations attaching to records in the lawful possession of office holders and others related to a Commonwealth institution in their personal capacity.

132 The intention so to distinguish records officially possessed by organs of government from records in the personal possession of office holders is also apparent from the legislative history of the Act. As first introduced in 1978, the *Archives Bill* expressly excluded all records of the present, and any former, Governor-General from the open-access requirements under the proposed Act[119]. Thereafter, the Bill was referred to two committees: the Senate Standing Committee on Constitutional and Legal Affairs ("the Constitutional Committee"); and the Senate Standing Committee on Education and the Arts ("the Education Committee"). Although not accepting the policy of total exemption for a Governor-General's records, the Constitutional Committee acknowledged "the need for special treatment to be given to a few categories of records, such as ...

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116 Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 16.

117 See *James v Cowan; In re Botten* (1929) 42 CLR 305; *Egan v Willis* (1998) 195 CLR 424.

118 See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171 at 192-193 [52]-[53] per Gageler J.

119 cl 18(1)(a).

correspondence with the Monarch"[120]. By contrast, the Education Committee concluded that the total exemption of, inter alia, a Governor-General's documents was "acceptable on the grounds of preserving the traditional independence of [those] arms of government from the executive"[121]. As re-introduced in 1981, the *Archives Bill* retained the total exemption for a Governor-General's records[122] but lapsed.

133 In 1983, the *Archives Bill* was re-introduced in the form of the present Act, providing that records of the official establishment of the Governor-General are subject to the open-access requirements, but without any indication of an intention to include personal records of the Governor-General, including the special category of correspondence between the Governor-General and the Queen. To the contrary, as Senator Evans observed in his Second Reading Speech[123], the 1983 Bill was "chiefly designed to replace existing ad hoc decisions and conventions which have been relied upon for the last thirty years" and thus the provisions of the legislation would "apply to the records of the official establishment of the Governor-General, but not to his private or personal records".

Personal communications and official records

134 At common law, the fact of control of a chattel, as of land, is prima facie evidence of the right to exercise such control[124]. Hence, just as a person who takes the profits or product of land is presumed to have lawful possession of the land[125], a person who holds or writes on a document is presumed to have lawful possession

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120 Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) at 339 [33.22]-[33.23].

121 Australia, Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) at 19 [5.16].

122 cl 18(1)(a).

123 Australia, Senate, *Parliamentary Debates* (Hansard), 2 June 1983 at 1183, 1184.

124 *Wilbraham v Snow* (1670) 2 Wms Saund 47 at 47 n (1) [85 ER 624 at 628]; *Robertson v French* (1803) 4 East 130 at 136-137 per Lord Ellenborough CJ [102 ER 779 at 782]; *Jeffries v Great Western Railway Co* (1856) 5 El & Bl 802 at 806 per Lord Campbell CJ, 806 per Wightman J [119 ER 680 at 681]; *Russell v Wilson* (1923) 33 CLR 538 at 546 per Isaacs and Rich JJ; *Gatward v Alley* (1940) 40 SR (NSW) 174 at 178-180 per Jordan CJ.

125 See Finlaison, *Wills on the Law of Evidence in Civil and Criminal Cases*, 3rd ed (1938) at 62-63.

of the document[126]. Where, however, a person exercises control merely as agent, the fact and right of control which comprise lawful possession are attributed to the principal, and the agent enjoys only bare "custody"[127].

135 Accordingly, the fact that a document is dealt with by a person in his or her capacity as part of a Commonwealth institution will support an inference that the document is in the lawful possession of the Commonwealth institution, and so is a Commonwealth record. By contrast, the fact that a document is dealt with by, or as agent for, a person other than the Commonwealth or a Commonwealth institution will support an inference that the document was not in the lawful possession of the Commonwealth or a Commonwealth institution, and thus not a Commonwealth record.

136 Ordinarily, the determination of the capacity in which a person exercises control over a document depends on the objectively discerned intentions of the persons directing and engaged in its production, sending, receipt and storage. And such intentions may often be inferred from the character of the document itself. Other things being equal, a document communicating personal information on a confidential basis is more likely to have been produced, sent, received and stored in a personal capacity or as agent for the confider or confidant. By contrast, a document communicating official information for the purposes of the Commonwealth institution is more likely to have been produced, sent, received and stored in an official capacity as part of the Commonwealth institution.

137 So, for example, if one Senator or Member of the House of Representatives sends a note conveying personal opinions on proposed legislation to another Senator or Member of the House of Representatives expressly on the basis that those opinions should be and remain confidential, the note will ordinarily be a personal communication between the Senators or the Members, notwithstanding that the opinion concerns the business of the Senate or the House. By contrast, if one Senator or Member of the House of Representatives sends a report of the public proceedings of a committee to another Senator or Member of the House of Representatives for the latter to table it, the report will ordinarily be an official record of the Senate or the House.

138 Likewise, if a Judge of a federal court sends a personal note to the Chief Justice or Chief Judge of the court conveying personal opinions about a matter before the court with the evident intention that the opinions be and remain

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126 See Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 37.

127 *Ancona v Rogers* (1876) 1 Ex D 285 at 291 per Mellish LJ for the Court; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770 at 791 per Lord Blackburn. See also Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 17-18.

confidential, the note will ordinarily be a personal communication between the Judge and the Chief Justice or Chief Judge. By contrast, if a Judge of a federal court sends a memorandum to the Chief Justice or Chief Judge notifying his or her intended absence from the country with the evident intention of providing formal notice, the memorandum will ordinarily be an official record of the court.

139 Similarly, if a Minister of State sends a personal note to another Minister concerning upcoming Cabinet business, but with the intention, as objectively discerned, that the note be and remain confidential, the note will be a personal communication between the Ministers, notwithstanding that it concerns Cabinet business. By contrast, if a Minister sends a memorandum to another Minister detailing the progress of a change in departmental functions with the intention, as objectively discerned, that it be kept as an official record of the recipient Minister's Department, the memorandum will be such a record.

140 Conceivably, personal communications sent and received on an express or tacit understanding that they be and remain confidential could become official records of an organ of government if the sender or recipient were to deal with them in a manner that objectively bespeaks an intention so to convert their character. But whether the actions of the sender or recipient would have that effect would need to be assessed in light of all the circumstances of the case, in particular the likelihood that each person's initial reasons for desiring confidentiality, and interest in not disappointing the confidence reposed by the other, will continue.

141 More particularly, where an understanding of confidentiality exists, the act of the sender or the recipient in storing his or her copy in official facilities might well indicate no more than the choice of an available and convenient means of keeping the communication secure and confidential. And delivery of the copy to another person engaged in official work for the purpose of such storage might well indicate no more than a personal reliance on the diligence and fidelity of the latter as agent. Furthermore, an observation to that agent or another that the copy should one day be released in the public interest might well indicate no more than an intention to part with lawful possession at some later time and on terms consistent with the understanding between sender and recipient.

142 So, in the case of the personal communication between Senators or Members of the House of Representatives postulated above, the fact that the recipient placed the note in a safe in his or her parliamentary office could hardly be regarded as enough to infer an intention to make the note an official record of the Senate or the House of Representatives. Likewise, in the case of the personal communication between a Judge of a federal court and the Chief Justice or Chief Judge, one plainly could not infer an intention to make the communication an official record of the court merely from the fact that the Chief Justice or Chief Judge requested his or her associate to file a photocopy in a filing facility provided by the court. If those were the only facts in either case, the logical inference would

be that all involved were merely endeavouring to abide by the understanding of confidentiality using the resources available to them.

143 Of course, if the Senator or Member of the House of Representatives were to table the personal note in Parliament, or if the Chief Justice or Chief Judge were to instruct a Registrar of the court to place the personal note in the official file of a matter, then, notwithstanding the understanding, the logical inference would be one of intention to make the communication a record of the Senate or the House of Representatives, or of the court; and, other things being equal, the communication would thereby become such a record.

Correspondence between the Governor-General and the Monarch

144 As the plurality in *Kline v Official Secretary to the Governor-General* observed[128], "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". This case is demonstrative of those dichotomies. As the primary judge found[129], and the majority of the Full Court affirmed[130], the letters under consideration arose from a "representative" function of the Governor-General which was undertaken in "private". As the primary judge also found[131], and the majority of the Full Court affirmed[132], at all relevant times, correspondence of the kind in issue has been dealt with as the personal property of the Governor-General or the Monarch, not to be disclosed without the Monarch's assent. So much is apparent from documents immediately before, during and immediately after Sir John Kerr's tenure.

145 For example, in a memorandum from the United Kingdom Secretary of State to the Governor of the State of Victoria, the practice which appears to have applied equally to State Governors and Governors-General was detailed as follows:

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128 (2013) 249 CLR 645 at 661 [38] per French CJ, Crennan, Kiefel and Bell JJ.

129 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 25 [79], 32 [120].

130 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 20 [95]-[96].

131 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 29-32 [107]-[118].

132 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 20 [99], 21 [103].

> "The Secretary of State will be glad to receive from the Governor periodically, for the information of Her Majesty The Queen, reports relating to affairs in the State. If these reports take the form of official despatches, they should be marked 'Confidential', and should not be included in the ordinary numbered series of despatches, since the intention is that they should afford to the Governor an opportunity of expressing his own personal views and not those of his Ministers. It may, however, be found convenient that they should not take the form of despatches, but of personal letters marked 'Personal and Confidential'. Observations by the Governor of a general nature, from his own personal enquiries or experiences, and impressions gained during travel in the State, are most helpful to Her Majesty. The Governor might wish from time to time to comment on the state of the political situation, on public feeling in the State, as indicated in the Press or in other ways, and on economic affairs, (eg unemployment and commerce)."

146 Consistently with that practice, a document dated 16 December 1974 outlining the contents and public availability of the papers of Sir John's predecessor, Sir Paul Hasluck, provides as follows:

> "This collection of papers contains copies of documents which have not been placed on official files. Consequently they are additional to material that may be found on the files of Government House, the Prime Minister's Office and Commonwealth Government Departments.
>
> This collection is arranged in five groups.
>
> Group 1.
>
> Copies of despatches written by the Governor-General for the information of Her Majesty the Queen and the acknowledgements made of them by the Private Secretary to the Queen. The originals are now the property of the Queen and the permission of Her Majesty or Her successor has to be obtained before the documents can become public."

147 Likewise, on 22 September 1976, Sir John wrote, on a personal and confidential basis, to the Queen's Private Secretary, Sir Martin Charteris:

> "I recently had occasion to remake my will. This resulted in my realising that something should be done about my papers. These include, amongst other things, documents relevant to my Governor-Generalship, especially the crisis. They include a lot of diary notes, records of conversations and draft chapters of possible future books. Also included, of course, is my copy of the correspondence between us.
>
> ...

> One thing that worries me is, that if I were to die in the relatively near future – indeed whenever I die – someone has to have the custody and control of our letters. Do you have any suggestions about this? I would not wish to leave this correspondence in Government House. Each Governor-General takes with him such material. Having regard to the probable historical importance of what we have written, it has to be, I think, preserved at this end as well as in the Palace. ...
>
> The alternatives appear to be to allow it to go into the custody of my literary editors, unopened and fully embargoed with instructions for it to be deposited in a bank or some other safe place, or to let it go to, say, the National Library completely embargoed for whatever period of time you suggest."

148 Sir Martin replied on 8 October 1976:

> "I have no doubt in my own mind that the best solution, from The Queen's point of view, would be for [your papers] to be deposited in the National Library. ...
>
> If you agree to this solution it remains to be decided for what period of time your papers are placed under complete embargo. The figure we usually specify nowadays is 60 years from the end of the appointment concerned."

149 On 18 October 1977, the Prime Minister, Malcolm Fraser, wrote to Sir John advising that Ministers had under consideration the introduction of an Archives Bill but that the provisions for compulsory transfer, custody and access would not apply "to the records of a Governor-General or his Office" because "a proper distinction should be made between Government House records and the records of executive government", which was "reflected in the Bill as drafted". The Prime Minister proceeded to observe, however, that "Government House records nevertheless are part of the history of Australia", that it was thus "proper that they should receive all the care and protection possible" and that, to that end, the Bill provided that Archives "may enter into arrangements with a Governor-General to take custody of records under access rules which a Governor-General may lay down". He continued:

> "Royal Household records, including The Queen's correspondence with Governors-General, are protected in Britain under special archives rules. I am sure you will agree that there should be no lesser protection in Australia.
>
> ... I hope that it will be possible, when the legislation is passed, for your Office to move promptly to enter into arrangements with the Australian Archives for the protection of records arising from your own period in office."

150 Seemingly as a result of arrangements made in response to that request, on 18 November 1977 the Director-General of the Australian Archives wrote to the Official Secretary to the Governor-General, David Smith, in the following terms:

> "On the question of the transfer of Sir John's papers, as I remember it, it was agreed that both the originals and the copies of the papers would be transferred to the custody of the Australian Archives and that I would arrange for the copies to be forwarded by Foreign Affairs safe hand to a London address to be determined when Sir John has finalised his London arrangements. I am to wait upon your initiative in these things, you will let me know when you wish me to take custody ... I can guarantee the security and the privacy of the papers placed in the custody of the Archives.
>
> ...
>
> The question of access. Given the nature of the sensitive papers, these would normally be administered by the official policy governing such papers whether in the custody of the Australian Archives or of the Royal Archives at Windsor. I assume that any variation from these rules will be determined by discussions in London.
>
> I would, however, like to stress one matter and that is, I suggest the desirability of Sir John making adequate and suitable provision for the disposition of the sensitive papers in case of death or incapacity. ... It might be possible, for example, if Sir John uses a bank vault for security deposit of these copies, that in case of death or incapacity, the papers should be either placed in the custody of or retained by the bank in order that they might be transferred securely into the custody of either the Australian Archives or the Royal Archives at Windsor."

151 On 8 December 1977, Sir John ceased to hold the office of Governor-General, and Mr Smith became the Official Secretary to Sir John's successor, Sir Zelman Cowen. But, on 23 December 1977, Mr Smith wrote a handwritten, apparently personal note to Sir John, who was then in London, to the effect that he had, in his own time, partially completed the process of photocopying the papers for transmission of the copies to Sir John in London. Mr Smith continued:

> "In the meantime the papers are in my strong-room under absolute security until the task is completed and the original file is in Archives."

152 On 3 June 1978, Mr Smith wrote, again in hand and apparently in his personal capacity, to the effect that the process of copying was finally completed and that the originals:

> "will now be sealed and lodged with the Director-General of Archives, with instructions that they are to remain closed until after 8 December 2037, ie 60 years after you left office".

153 Then, as foreshadowed, on 26 August 1978 Mr Smith wrote to the Director-General of the Australian Archives:

> "This package contains the personal and confidential correspondence between the Right Honourable Sir John Kerr, AK, GCMG, GCVO, K St J, QC, 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, ie 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."

154 As can be seen, therefore, at all relevant times Sir John regarded the letters from the Monarch, and the copies of his own letters to the Monarch, as subject to an established understanding of confidentiality. Consistently with that understanding, Sir John resolved that the correspondence should be deposited with Archives subject to the embargo. And, to that end, Sir John gave instructions for the correspondence to be so deposited. On those facts, the overwhelming inference is that Sir John continued to exercise control over the correspondence at the time of deposit.

155 A lot is made in the appellant's argument, and the plurality's reasons[133], of the fact that the records were at some points of time kept by Mr Smith in his official strong room. But, for the reasons already expressed[134], the mere fact that a personal communication may be kept pro tem in an available place of storage of the official establishment is not sufficient to infer an intention that the communication should thenceforth stand as an official record of that establishment. Much less could it be sufficient to infer an intention that Mr Smith or anyone else in the official establishment could thenceforth exercise control over the correspondence, personally or in an official capacity.

156 A lot is made, too, in the plurality's reasons[135], of the fact that the letter of deposit with Archives was on official letterhead and identified Mr Smith as the "Official Secretary to the Governor-General". But that unexceptional use of

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133 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [22], [115], [117].

134 See [140]-[141] above.

135 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [11]-[13], [116].

official stationery and an official title can hardly be regarded as involving an assertion by Mr Smith of the right to control the correspondence, either personally or in his capacity as Official Secretary, by then to Sir Zelman. Any implication to that effect is immediately contradicted by Mr Smith's express statements that the correspondence was "personal and confidential" to Sir John and the Monarch and that the papers were to remain closed for 60 years in accordance with "Sir John Kerr's instructions".

157 Relying on later correspondence between Sir John and Mr Smith, the appellant also contended that Sir John ran his office at Government House by distinguishing between his "personal papers", which were kept in his Administrative Secretary's office and were later sent to him in London after his tenure as Governor-General, and "official papers", which were "passed out" to the Official Secretary's office, as "must have" occurred with the correspondence in issue.

158 That contention is not persuasive. The evidence relied upon is a letter of 15 January 1981 from Mr Smith to Sir John, outlining how "letters and telegrams" sent to Sir John "supporting or criticising [his] actions of 11 November 1975" were dealt with. It explains that the letters and telegrams to which Sir John replied personally were kept in the Administrative Secretary's office and later sent to London with other personal papers, while the remaining letters and telegrams were passed out to the Official Secretary's office, acknowledged where possible, and placed in boxes in a store-room in out-buildings at Government House to go to the Archives as soon as possible. Contrary to the appellant's contention, it does not indicate that every document ever placed in Mr Smith's office – even correspondence repeatedly described as "personal" or "private" and "confidential" – was, ipso facto, an official record of the official establishment of the Governor-General. Rather, it only confirms that Sir John exercised personal control over correspondence to which he attended personally, like that with the Monarch, notwithstanding that such correspondence might be relevant to his performance of the viceregal office.

159 This conclusion is supported by a letter of 15 December 1983 from the Acting Director-General of the Australian Archives to Sir John as to arrangements to be made to bring back archival material with Sir John from England to Australia. The clearly understood distinction between personal records of the Governor-General and records of the official establishment of the Governor-General is apparent in the following paragraph of that letter:

> "In my view, it is important that such arrangements be made for its storage, preservation and accessibility as are appropriate to both *the official and personal components*. Of course, it will be necessary for any such arrangements to take account of the provisions of Archives legislation which was passed in October. Briefly, the position will be that *all private and personal material including direct and personal correspondence with*

> *the Queen, is exempt from the provisions of the legislation*. Any official material is subject to provisions covering disposal, access and storage." (emphasis added)

160 Finally, the appellant relied as well upon the fact, apparent from evidence at trial, that some of Sir John's correspondence with the Monarch was "drafted with the Official Secretary's input". That evidence consisted of the following paragraph from a personal and confidential letter of 24 March 1981 from Sir John to Mr Smith:

> "I appreciate very much all that you have done for me, including, of course, your attention to the 'Palace correspondence'. As to the latter, I have always been very glad that I introduced the system during my period of the Official Secretary participating in the preparation of that correspondence. Your checking of it before despatch and suggestions which you made from time to time as to its contents were very valuable to me, as were your comments on the replies from the Palace."

According to the appellant, the fact that the Official Secretary was involved in the composition of some of the Palace correspondence was a strong indicator that the correspondence was correspondence of the official establishment of the Governor-General.

161 That contention should also be rejected. The fact that Sir John involved his Official Secretary in correspondence with the Monarch does not suggest that the correspondence so created was anything other than a personal communication by Sir John, sent, copied and kept in accordance with the established understanding that it would remain confidential, and thus subject to the personal control of the Governor-General. It shows no more than that Sir John sufficiently valued the ability of the Official Secretary as to seek his assistance in composing the personal correspondence with the Palace.

Conclusion

162 For the foregoing reasons, nothing in the evidence gives reason to doubt that Sir John exercised control over his personal communications with the Monarch from the moment that they were written or received to the moment of their deposit with the Archives. At times, that control was exercised through Mr Smith, who, as Sir John's agent, had custody of the correspondence until that custody was transferred to the Archives. In the absence of contrary evidence, it follows that the correspondence was in Sir John's lawful possession at all relevant times. And, as the plurality's reasons indicate[136], Sir John's powers over the correspondence are not to be attributed to the Commonwealth or a Commonwealth

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136 See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [106].

institution merely because Sir John held a public office. Hence, even if the Commonwealth or a Commonwealth institution had a superior right to possession as owner of some or all of the correspondence, Sir John's control could not be attributed to any organ of government.

163 In the result, no part of the correspondence was the "property" of the Commonwealth or of a Commonwealth institution, and, accordingly, the appeal should be dismissed.

164 GORDON J. The Official Secretary to the Governor-General of the Commonwealth of Australia deposited a package with the Australian Archives, as it then was, on 26 August 1978. That package contained letters and telegrams, and attachments such as newspaper clippings, between the Right Honourable Sir John Kerr, who held the office of Governor-General of the Commonwealth of Australia from 11 July 1974 to 8 December 1977, and Her Majesty The Queen.

165 The question in this case is whether each item of correspondence in that package is a "Commonwealth record" within the meaning of the *Archives Act 1983* (Cth) and subject to the access regime in Div 3 of Pt V of that Act or merely "other material"[137]. I agree with the plurality that the answer to that question is that each item of correspondence in that package is a "Commonwealth record". I write separately primarily to address the construction of key provisions of the *Archives Act*.

Archives Act

166 The package was deposited with the Australian Archives prior to the commencement of the *Archives Act*. Upon commencement of that Act[138], the contents of the package became "records" which formed part of the "archival resources of the Commonwealth", and which the Australian Archives had the function of conserving and preserving[139]. 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", among other things, "the history or government of Australia"[140].

Record

167 A "record" is broadly defined to include a document, or an object, in any form that is, or has been, kept by reason of "any information or matter that it contains or that can be obtained from it" or "its connection with any event, person,

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137 See *Archives Act*, s 3(2).

138 The complete text of the relevant provisions of the *Archives Act* is set out in the reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [35]-[53]. It is unnecessary to repeat it except to the extent necessary to explain these reasons.

139 *Archives Act*, ss 3(2), 5(2)(a). The Australian Archives was created by s 5(1) of the *Archives Act*. It was later renamed the National Archives of Australia: *Census Information Legislation Amendment Act 2000* (Cth), Sch 2.

140 *Archives Act*, s 3(2)(a).

circumstance or thing"[141]. The fact that a document or object exists is not sufficient for it to be a "record". For a document or object to be a "record", it must be kept, or have been kept, for one or both of the stated reasons.

Commonwealth record

168 A "Commonwealth record" is, among other things, "a record that is the property of the Commonwealth or of a Commonwealth institution"[142]. There are two limbs to the definition: "property of the Commonwealth" and "property ... of a Commonwealth institution"[143]. The definition cannot be read as treating "of the Commonwealth or of a Commonwealth institution" as a compound expression. And describing the expression as "comprehensive" cannot obscure the fact that many of the institutions in the list of Commonwealth institutions are not legal persons.

169 A "Commonwealth institution" is defined to mean one of a list of eight institutions, the first of which is the "official establishment of the Governor-General"[144]. Many of the institutions in the list are not legal persons and are therefore not recognised by law as capable of having legal rights and duties[145]. The inclusion of institutions that are not legal persons in the definition of a "Commonwealth institution" has interlinked consequences.

170 The first consequence is that, like artificial legal persons, the interests of the named institutions can be pursued and protected only by natural persons appointed to act for an institution either generally or specifically[146]. For the official

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141 *Archives Act*, s 3(1) definition of "record".

142 *Archives Act*, s 3(1) para (a) of the definition of "Commonwealth record".

143 Each reference to the limbs of the definition of "Commonwealth record" in this judgment is a reference to the limbs in para (a) of that definition.

144 *Archives Act*, s 3(1) definition of "Commonwealth institution". See reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [41].

145 Paton, *A Textbook of Jurisprudence*, 4th ed (1972) at 391-395; *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed (2012), vol 2 at 1528-1529.

146 Paton, *A Textbook of Jurisprudence*, 4th ed (1972) at 394-395.

establishment of the Governor-General, the Official Secretary is such a natural person[147].

Property

171 A second consequence concerns the meaning to be given to "property". "[P]roperty" is not defined in the *Archives Act*. As Gleeson CJ, Gaudron, Kirby and Hayne JJ said in *Yanner v Eaton*[148], the concept of "property" may be elusive. The word "property" can refer to something that "belongs to another" but it can also be no more than a description of a legal relationship with a thing; it can refer to "a degree of power that is recognised in law as power permissibly exercised over the thing"[149]. Thus, it "can be, and is, applied to many different kinds of relationship with a subject matter"[150]. It can and often does refer to "a legally endorsed concentration of power over things and resources", or "control over access"[151], which may not derive from legal title.

172 In deciding what is "property ... of a Commonwealth institution" (here, the official establishment of the Governor-General), the question is whether "property" is limited to something that belongs to another[152], or whether it extends to records in the custody of the official establishment of the Governor-General – or, to put it another way, records over which the Official Secretary has a legally endorsed concentration of power.

173 "Property" is a core element of both limbs of the definition of "Commonwealth record". It is a common element. In the first limb of the definition of "Commonwealth record" – "a record that is the property of the

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147 See *Governor-General Act 1974* (Cth), s 6.

148 (1999) 201 CLR 351 at 365-367 [17]-[20]. See also *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

149 *Yanner* (1999) 201 CLR 351 at 365-366 [17].

150 *Yanner* (1999) 201 CLR 351 at 366 [19].

151 Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299, cited in *Yanner* (1999) 201 CLR 351 at 366 [18].

152 See *Pope v Curl* (1741) 2 Atk 342 at 342 [26 ER 608 at 608]; *In re Wheatcroft* (1877) 6 Ch D 97 at 98; *Earl of Lytton v Devey* (1884) 54 LJ Ch 293. cf *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 496-497; *Yanner* (1999) 201 CLR 351 at 365 [17]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 69 [175]. See also Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 21-22.

Commonwealth" – "property" may be thought to be limited to, or referring to, something that belongs to another, though it is not necessary to decide that point. The content of the second limb of the definition, however, compels a different conclusion. Where, as here, the relevant Commonwealth institution has no legal personality, the reference to "*property* ... of a Commonwealth institution" (emphasis added) must be read as extending to those records of an institution in the custody of that institution.

174 "Custody" is not limited to physical custody. It may be physical custody but "property" in a record also can, and often does, extend to records over which an institution has a legally endorsed concentration of power absent physical custody – for example, when a document is provided to a third party to hold it as bailee for, or agent of, that institution. And where the document is held by a third party as bailee for, or agent of, that institution, the institution still has custody of – "property" in – the document because it retains a legally endorsed concentration of power over the document. The institution may, subject to the terms on which the document was provided to the third party, call for the return of it. At the same time, the third party may be described as having custody of – "property" in – the document because the third party holds it with a legally endorsed concentration of power, albeit that the source of the power to hold and control the document is different from the institution's because it derives from the institution.

175 Moreover, the construction of what is "property", and thus "property ... of a Commonwealth institution", that has been described is not inconsistent with, but is reinforced by, s 24(2)(d) of the *Archives Act*. Section 24(2)(d) provides that the prohibition in s 24(1) on a person engaging in conduct that results in destruction or other disposal of a Commonwealth record, or transfer of the custody or ownership of a Commonwealth record, or damage to or alteration of a Commonwealth record, does not apply to anything done "for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records". The provision recognises that Commonwealth records may not be in the physical custody of the Commonwealth or of a Commonwealth institution, and that steps may need to be taken to place those Commonwealth records in the physical custody of the Commonwealth or of a Commonwealth institution that is "entitled to custody of the records". What that entitlement is will not be uniform.

Official establishment of the Governor-General

176 It is unnecessary to attempt any general definition of the phrase "official establishment of the Governor-General" in the *Archives Act*[153]. Although the version of the *Governor-General Act 1974* (Cth) in force at the time the *Archives Act* was enacted did not refer to the Official Secretary[154], the phrase "the official establishment of the Governor-General" certainly includes the Official Secretary to the Governor-General[155] acting in his or her official capacity and, in that capacity, having custody of the records of that institution.

Parties' positions

177 Two aspects of the parties' positions should be noted. First, Professor Jennifer Hocking did not accept that the records which had been deposited with the Australian Archives were the property of the official establishment of the Governor-General. And the Director-General of the National Archives of Australia and the Attorney-General of the Commonwealth, intervening, did not accept that the inference could be drawn that the records were kept in the official establishment of the Governor-General.

178 Second, the parties embraced the conclusion reached by the primary judge[156] and the Full Court of the Federal Court of Australia[157] that the phrase "the property of the Commonwealth or of a Commonwealth institution" was to be given content by the common law. The Director-General of the National Archives of Australia and the Attorney-General of the Commonwealth then submitted that it was critical to examine the common law concerning ownership of correspondence. There can be no dispute that 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

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153 *Archives Act*, s 3(1) para (a) of the definition of "Commonwealth institution".

154 Provisions referring to the Official Secretary were introduced into the *Governor-General Act* by the *Public Service Reform Act 1984* (Cth), ss 139, 141.

155 See *Governor-General Act*, s 6.

156 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 29 [102]-[103], 36 [136].

157 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 13-14 [62], 18 [84]-[86].

confidence[158]. Moreover, as a chattel, the "property in the paper" of a letter is owned by the recipient[159] and if the sender of a letter keeps a copy, that copy belongs to the sender, not the recipient[160]. Indeed, the *Archives Act* itself recognises that the National Archives of Australia may enter into arrangements to accept the care of records from a person other than a Commonwealth institution and that those arrangements may provide for the extent (if any) to which the Archives or other persons are to have access to those records[161].

179 But those respective positions were adopted because each party misunderstood and misconstrued the concept of "property" in the phrase "property ... of a Commonwealth institution" in the *Archives Act*. As has been explained[162], the reference to "property" is not limited to something that belongs to another but, relevantly, extends to records in the custody of an institution. To treat "property" as limited to something that belongs to another would fail to recognise that many of the Commonwealth institutions are not legal persons. It is this which leads to the construction that has been given to "property" and, thus, the second limb of the definition of "Commonwealth record".

Issue

180 In the present appeal, it was an agreed fact that the package which was deposited with the Australian Archives under the letter of deposit of 26 August 1978 contained the letters and telegrams Sir John received from The Queen and a contemporaneous copy of each letter and telegram Sir John sent to Her Majesty. The question which emerges is whether that package was "property" of the official establishment of the Governor-General and was deposited by the Official Secretary on behalf of the official establishment of the Governor-General.

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158 *OBG Ltd v Allan* [2008] AC 1 at 76 [274], citing *Philip v Pennell* [1907] 2 Ch 577. See also *Oliver v Oliver* (1861) 11 CB (NS) 139 [142 ER 748]; *Macmillan & Co v Dent* [1907] 1 Ch 107 at 120-121, 129; *British Oxygen Co v Liquid Air Ltd* [1925] Ch 383 at 389-390. cf *Moorhouse v Angus and Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700, especially at 711; *Musical Fidelity Ltd v Vickers* [2003] FSR 50 at 907 [28], 908 [33].

159 *Pope v Curl* (1741) 2 Atk 342 at 342 [26 ER 608 at 608]. See also *Oliver v Oliver* (1861) 11 CB (NS) 139 [142 ER 748]; *Earl of Lytton v Devey* (1884) 54 LJ Ch 293.

160 *In re Wheatcroft* (1877) 6 Ch D 97 at 98.

161 *Archives Act*, s 6(2). See also s 6(3).

162 See [171]-[175] above.

181 For the reasons that follow, the answer is yes: the Official Secretary to the Governor-General, in his capacity as Official Secretary on behalf of the official establishment of the Governor-General, had custody of the original file, and then deposited the package containing the contents of that original file with the Australian Archives.

"Property ... of a Commonwealth institution"

182 The Official Secretary had physical custody of the papers later deposited with the Australian Archives. He referred to these papers as the "original file". The Official Secretary recorded that "the papers [were] in [his] strong-room under absolute security until the task [of copying the papers for Sir John] [was] completed and the original file [was] in Archives". It is thus apparent that the original file was not taken by Sir John when his appointment as Governor-General ceased but was instead held by the Official Secretary. Further, when Sir John subsequently sought access to what was in the original file, he did not ask for the original file to be sent to him in London. Sir John asked for a copy[163].

183 That the original file was part of the administrative apparatus surrounding the Governor-General is reinforced by the Official Secretary's correspondence with Sir John, written on "Government House" letterhead, about the copying of the contents of the original file and the deposit of the contents of the original file with the Australian Archives[164]. That Sir John had ceased to be Governor-General by the time the Official Secretary first corresponded with him on those subjects does not detract from that conclusion. Mr Smith remained employed as Official Secretary, albeit a new Governor-General had been appointed. Practically speaking, there was, and had to be, some continuity in the apparatus surrounding the office of Governor-General.

184 It was also an agreed fact that "[o]n 26 August 1978 Mr Smith, in his capacity as Official Secretary to the Governor General lodged with the [Australian] Archives the documents contained in Archives record AA1984/609". Mr Smith, in his capacity as Official Secretary to the Governor-General, wrote that deposit letter[165] on the letterhead of the Governor-General of the Commonwealth of Australia, Government House, Canberra, and signed it "David I Smith", above the typewritten words "Official Secretary to the Governor-General". The inevitable inference is that physical transfer of the package to the Australian Archives was controlled by the Official Secretary to the Governor-General, in his capacity as

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163 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [21]-[22].

164 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [22].

165 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [12].

Official Secretary on behalf of the official establishment of the Governor-General, rather than on behalf of, or as agent for, Sir John. On any view, the physical transfer of the package was not made by Sir John or his personal representative.

185 The form and content of the documents in the original file[166] further reinforce the conclusion that Mr Smith deposited the package in his capacity as Official Secretary on behalf of the official establishment of the Governor-General. Most, but not all, of the letters and telegrams were exchanged by Sir John, as Governor-General, through the Official Secretary. All of the letters and telegrams were exchanged by The Queen through her Private Secretary. The majority of the documents were letters addressing topics relating to the official duties and responsibilities of the Governor-General. Some of the letters were in the form of reports to The Queen about the events of the day in Australia. Certain of the reports included attached photocopies of newspaper articles and other correspondence "expanding upon and corroborating the information communicated by the Governor-General in relation to contemporary political happenings in Australia". As the plurality explain[167], given the nature and significance of that correspondence, it was only to be expected that it would be kept within the official establishment of the Governor-General with responsibility for keeping records created or received by a Governor-General in that capacity.

186 Thus, it does not matter if Sir John had some property interest in the correspondence or its contents – any such property interest was not inconsistent with the official establishment of the Governor-General having "property" in the letters as that term is used in the *Archives Act*. But if Sir John did have some property interest in the correspondence or its contents then under the control of the Official Secretary in his official capacity (and it is unnecessary to resolve that question), Sir John encouraged and agreed in the Official Secretary retaining custody of the package containing that correspondence, and then subsequently depositing it with the Australian Archives[168]. By those actions, Sir John must be taken to have given up any property interest he may have held. For Sir John, it was enough that he had a copy of the correspondence.

187 Put in different terms, when Sir John put in train, as he did, that the correspondence on the original file was to be copied and then the contents of that original file deposited with the Australian Archives, Sir John gave up any claim that he might have had in respect of the original file. The better view is that even before Sir John took those steps, the original file was the "property" of the official

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166 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [10].

167 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [117].

168 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [16]-[18], [21]-[22].

establishment of the Governor-General. The steps described above which Sir John took put the matter beyond doubt.

188 Finally, although not determinative, subsequent correspondence between Sir John and the Official Secretary in the early 1980s reinforces that conclusion. The correspondence records that Sir John knew that what he described as the "Palace correspondence", namely the package the subject of this appeal, was "lodged in the National Archives" and that other papers that Sir John had left behind, after he had decided which papers he would take with him, "remained as part of the official records of the Governor-General's Office". In a letter dated 20 May 1980, the Official Secretary told Sir John that those papers that Sir John had left behind:

> "are still held here at Government House in our own file storage ... Irrespective of where the papers are physically kept, they are now part of the official records of this office, and the Official Secretary of the day is responsible for their safe custody. The advice which I have received ... is that I have no authority to release these or any other papers from the official records."

In responding to that letter in July 1980, Sir John did not dispute or take issue with these matters but, instead, said he wished to talk with Professor Neale, the then Director-General of the Australian Archives, about other material he may have been able to put together with a view to depositing it in the Australian Archives in addition to the items already there. Later correspondence between Sir John and the Official Secretary in 1981 records that that discussion was held.

Part of contents of package personal and confidential and terms of deposit

189 Much was made in argument in writing and orally of the fact that the correspondence between Sir John and The Queen was personal and confidential and, further, that the letter of deposit stated that it was their joint wish that the papers were to remain closed until 60 years after the end of Sir John's appointment[169].

190 Those matters are not determinative of the disposition of this appeal. They are outweighed by the considerations addressed above[170], which show that the transfer of the package to the Australian Archives was controlled by the Official Secretary in that capacity on behalf of the official establishment of the

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169 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [12]. This was later said to be reduced to 50 years: reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [28].

170 See [182]-[185] above.

Governor-General. The designation of the correspondence as personal and confidential and the terms of the deposit may be relevant when the Director-General of the National Archives of Australia reconsiders Professor Hocking's request for access. Those considerations may – I do not say must – be relevant[171]. And, of course, depending on the precise contents of "any information or matter that [each record] contains or that can be obtained from it"[172], reconsideration of the request for access to each Commonwealth record may give rise to different answers.

Form of orders

191 For these reasons, I agree that orders should be made in the form proposed in the reasons for decision of Kiefel CJ, Bell, Gageler and Keane JJ[173].

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171 *Archives Act*, s 35.

172 *Archives Act*, s 3(1) para (a) of the definition of "record".

173 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [124].

EDELMAN J.

Introduction

192 On 26 August 1978, Mr David Smith, acting in his capacity as Official Secretary to the Governor-General, and on instructions of the former Governor-General, Sir John Kerr, lodged with the Australian Archives (now the National Archives of Australia, or "Archives"[174]) a package of documents being "originals" of correspondence between Sir John and the Queen (always by her Private Secretary), namely the originals of letters received, the originals of telegrams sent, and the contemporaneous copies of letters sent (described in some correspondence as "carbon copies") with photocopies of attachments such as newspaper articles. Those original documents are now held in record AA1984/609. The appellant, Professor Hocking, is an academic historian who was refused access to those original documents by the Archives. She applied for judicial review of that decision but her application was dismissed by the Federal Court of Australia. An appeal was dismissed by a majority of the Full Court of the Federal Court of Australia.

193 The period of the correspondence covered by the original documents was one described by the primary judge as relating to "one of the most controversial and tumultuous events in the modern history of the nation"[175], namely the dismissal of Prime Minister Whitlam by the Governor-General, Sir John Kerr. The primary judge found that Sir John had assumed that he owned the "material"[176]. Two years prior to the lodgement of the original documents with the Archives, Sir John had remarked to the Private Secretary to the Queen that, upon departure from office, "[e]ach Governor-General takes with him such material". However, Sir John also recognised that the historical significance of the correspondence meant that it had to be preserved. Perhaps for this reason, after his retirement from office, Sir John took the material with him by having Mr Smith, his former Official Secretary, make and send photocopies of the originals to him in London, whilst preserving the originals in a file at Government House to be deposited with the Archives. The photocopied material sent to Sir John in London is now also contained in the Archives, as Series M4513 Part 1. That material is a near complete copy of the original documents. But this litigation concerns the "originals", not the photocopies.

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174 *Archives Act 1983* (Cth), s 3(1).

175 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 4-5 [1].

176 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 29-30 [108].

194 The question on this appeal is whether the Commonwealth had a property right to those originals. The legal issue concerns the meaning of the expression "the property of the Commonwealth or of a Commonwealth institution" in the definition of "Commonwealth record" in s 3(1) of the *Archives Act 1983* (Cth).

195 If the original documents held in the Archives record AA1984/609 were "the property of the Commonwealth or of a Commonwealth institution" when they were deposited then they are Commonwealth records within s 3(1) of the *Archives Act* and are within the "open access period" as defined in s 3(7) because 31 years has expired since their creation. Access will then be governed by Div 3 of Pt V of the *Archives Act*. Any restrictions upon the ability of the appellant to access them will depend upon the application of exemptions to access.

196 On the other hand, if (i) the original documents in record AA1984/609 were not the property of the Commonwealth or of a Commonwealth institution when they were deposited, and (ii) the Archives accepted the care of those records "from a person other than a Commonwealth institution", then access to those documents will be governed by arrangements made with that person, rather than by Div 3 of Pt V of the *Archives Act*[177]. In this case, the terms of the letter of deposit of the original documents provided for restrictions that "[i]n 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, ie until after 8 December 2037" and that thereafter their release should only be "after consultation with the Sovereign's Private Secretary of the day and with the Governor-General's Official Secretary of the day".

197 Throughout this litigation, a consistent approach was taken to the meaning of "property" in the definition of "Commonwealth record" in s 3(1) of the *Archives Act*. That approach was taken in this Court by the appellant, and in the joint submissions of the Director-General of the Archives and the Commonwealth (intervening), together described in these reasons as "the respondent". The same approach was taken by the parties in the Federal Court and the Full Court, and by all judges in those courts. That approach, correctly, was to treat the *Archives Act* as using the term "property" in its ordinary, common law sense in relation to chattels rather than to create a new, and potentially unique, meaning. As explained below, that long-established sense involves a right to exclude others from the chattel (here, the record) or, by its correlative, it recognises a duty upon others not to interfere physically with the chattel.

198 As to the meaning of the expression "of the Commonwealth or of a Commonwealth institution", this expression is sparsely used in the *Archives Act.*

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177 See *Archives Act*, ss 6(2), 6(3), 70(3).

The focus throughout the *Archives Act* is upon Commonwealth institutions. It is not upon "the Commonwealth". The phrase "of the Commonwealth or of a Commonwealth institution" is used in the *Archives Act* only to describe the holding of property rights. It follows the familiar form of a "comprehensive expression"[178]. It is comprehensive in the sense that it is exhaustive of the ways of holding property rights to documents that are, or were, kept by the wide list of enumerated Commonwealth institutions. The comprehensive expression does not obscure the issue concerning how title could be held by a Commonwealth institution without legal personhood. Nor does it obscure issues that would otherwise arise by legislative provisions that deem the property rights of some of those institutions to be held by the Commonwealth as a body politic. Rather, the inclusion in the comprehensive expression of the Commonwealth as a body politic is a direct response to, and a clear resolution of, those issues. The relevant property right will always be held by either the Commonwealth institution or the Commonwealth as a body politic.

199 The primary judge and the majority of the Full Court held, again correctly, that institutionally kept documents that record matters such as the exercise of the executive power of the Commonwealth by the Governor-General are property of the Commonwealth[179]. But the majority of the Full Court, affirming the decision of the primary judge, concluded that the correspondence between the Governor-General and the Queen was "personal" rather than "official"[180]. In dissent in the Full Court, Flick J held that personal and official were not binary categories. A conclusion that the correspondence was personal did not prevent the conclusion, which his Honour reached, that the correspondence was also official[181]. That conclusion, with respect, was correct. For the reasons below, the original documents in the Archives record AA1984/609 were created or received officially, and were kept as institutional documents. They were kept by the "official establishment of the Governor-General" to the exclusion of others. They are the "property of the Commonwealth". No convention existed that requires them to be treated otherwise. The appeal must be allowed.

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178 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 600. See *Constitution*, ss 55, 90.

179 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 32 [120]; *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 19 [91].

180 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 20 [97].

181 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 23 [116], 24 [119].

The definition of a "Commonwealth record" in s 3(1) of the *Archives Act*

200 A "Commonwealth record" is defined, with exceptions that can be put to one side, in s 3(1) of the *Archives Act* as, relevantly, a "record that is the property of the Commonwealth or of a Commonwealth institution". A "record" is defined as "a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of: (a) any information or matter that it contains or that can be obtained from it; or (b) its connection with any event, person, circumstance or thing". Two aspects of the definition are presently relevant. First, and of considerable importance, a document will only be a record if it is, or has been, "kept" for the relevant reason. Secondly, although records can be electronic, the core concept of a record is concerned with tangibles, namely chattels. This case concerns only chattels.

The meaning of "property" in the *Archives Act*

The common law meaning of property in relation to chattels

201 The word "property" is not defined in the *Archives Act.* As all the parties and both courts below rightly assumed, in the absence of any indication in the *Archives Act* to the contrary it must bear its usual legal meaning. At common law, the word has been used in different senses, applying to both tangibles and intangibles, and common law and equitable rights to things[182]. Its meaning in relation to intangibles is different from its meaning in relation to tangibles. Its meaning in relation to equitable rights is different from its meaning in relation to common law rights. But when dealing with a relationship with tangible things, or chattels, the common law conception of property has been the subject of development and analysis for hundreds of years. It would be very surprising if Parliament had intended to use the concept of "property" in the *Archives Act* to describe a legal relationship with a chattel according to some unique, undefined meaning, unknowable until it is revealed by creative judicial exegesis. If Parliament had created such a unique meaning it would potentially compete with the common law conception of property rights, violating a numerus clausus principle of a closed number of property rights[183] and creating a potential clash between the statutory regime and co-existing remedies for common law actions for

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182 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 577 [135]; *Kennon v Spry* (2008) 238 CLR 366 at 397 [89]. See also McFarlane and Stevens, "The nature of equitable property" (2010) 4 *Journal of Equity* 1.

183 See also Swadling, "Opening the Numerus Clausus" (2000) 116 *Law Quarterly Review* 354 at 357.

detinue and replevin and equitable remedies for delivery up of chattels. Unsurprisingly, it did not do so.

202 Despite its long history of exposition and development at common law, the concept of "property" in relation to a chattel has sometimes been the subject of confusion by loose thinking and expressions of "common speech"[184]. For instance, "property" is sometimes used, by "false thinking"[185], to describe a thing that is the subject of rights: "That book is my property". In more precise thought, it has been long recognised that when the concept of property is used in law in the context of a tangible thing it describes the legal relationship between a person and a thing rather than the thing itself. The focus is therefore upon the nature of the legal relationship between a person and a thing.

203 Because the relationship between a person and a thing is metaphysical – that is, abstracted from the physical thing – there is a tendency in the case law, adopted at times in submissions on this appeal, to describe that legal relationship between person and thing by metaphors and slogans such as a "bundle of rights"[186] or "a legally endorsed concentration of power over things"[187]. Although these expressions can occasionally be helpful in directing thinking, they should not control analysis. They have serious "limits as an analytical tool or accurate

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184 Bentham, "An Introduction to the Principles of Morals and Legislation", in Bowring (ed), *The Works of Jeremy Bentham* (1843), vol 1 at 108. See also *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10].

185 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18].

186 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 207; *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17]; *Western Australia v Ward* (2002) 213 CLR 1 at 95 [95], 262 [615], 263 [618], 273 [638]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [44]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 421-422 [296], see also at 360 [89]; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 32 [37], 107 [299]-[300].

187 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44]; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 421-422 [296], see also at 360 [89]; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 83 [218].

description"[188]. They can be "awkward and incongruous"[189]. In the United States, where the "bundle of rights" metaphor may have originated[190], it has been said that its conflation of use interests with legal interests, commonly "sticks" in the bundle or sources of "power", is a reason that the application of the approach "winds up being wrong in practice"[191].

204 A "right to use" a chattel is generally treated as one of the different "sticks" in the "bundle of rights" or as an aspect of the power derived from a "concentration of patiently garnered rights"[192]. But a "right to use" a chattel usually means only a liberty to use it[193] and a mere liberty to use a chattel is neither necessary[194] nor sufficient[195] for a property right. The misleading language of a "right to use" can also lead to the error of thinking that property rights arise only by lawful conduct. But even a thief can obtain a property right to exclude all others except those with a better right if the thief has physical control of the chattel and the intent to exercise that control on their own behalf to exclude others[196]. A clear understanding of a

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188 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17].

189 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 107 [300].

190 See Lewis, *A Treatise on the Law of Eminent Domain in the United States* (1888) at 43.

191 Smith, "Property Is Not Just a Bundle of Rights" (2011) 8 *Econ Journal Watch* 279 at 284.

192 Honoré, "Ownership", in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107 at 113, 116.

193 *Allen v Flood* [1898] AC 1 at 29. See Douglas and McFarlane, "Defining Property Rights", in Penner and Smith (eds), *Philosophical Foundations of Property Law* (2013) 219 at 220-221, 226-227.

194 Douglas and McFarlane, "Defining Property Rights", in Penner and Smith (eds), *Philosophical Foundations of Property Law* (2013) 219 at 233-234, discussing *Yearworth v North Bristol NHS Trust* [2010] QB 1.

195 *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 809, quoted in *R G and T J Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363 at 368-369. See also *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 at 794; [1984] 2 All ER 321 at 325.

196 *Buckley v Gross* (1863) 3 B & S 566 at 574 [122 ER 213 at 216]; *Field v Sullivan* [1923] VLR 70 at 84; *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437 at 1446 [22]; [2001] 3 All ER 150 at 159; *McMillan Properties Pty*

property right to tangible goods should eschew metaphors and avoid conflation of different juristic concepts by being expressed simply as the right to exclude others or, by a correlative, as a duty upon those others not to interfere physically with the chattel. For chattels, this is the "necessary and sufficient condition of identifying the existence of property"[197].

205 Even despite the (powerfully criticised[198]) bundle of rights and concentration of power metaphors, the Supreme Court of the United States has still characterised the right to exclude others as "one of the most essential sticks in the bundle of rights"[199]. Indeed, even the most vociferous supporter of the "bundle of rights" has described the right to possession – that is, the right to control physical access – as "the foundation on which the whole superstructure of ownership rests"[200]. Similarly, in the passage by Professor Gray from which members of this Court borrowed the slogan of a "legally endorsed concentration of power"[201], the power in relation to a thing was described as the "control over access" of the thing and the ability to exclude others from it[202], with Gray later adding that "[b]eyond the irreducible constraints imposed by the idea of excludability, 'property'

Ltd v W C Penfold Ltd (2001) 40 ACSR 319 at 325-326 [44]; *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 at 32 [15]; *Bride v Shire of Katanning* [2013] WASCA 154 at [72].

197 Merrill, "Property and the Right to Exclude" (1998) 77 *Nebraska Law Review* 730 at 731.

198 For instance, Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 *UCLA Law Review* 711; Merrill, "Property and the Right to Exclude" (1998) 77 *Nebraska Law Review* 730; Smith, "Property Is Not Just a Bundle of Rights" (2011) 8 *Econ Journal Watch* 279; Douglas and McFarlane, "Defining Property Rights", in Penner and Smith (eds), *Philosophical Foundations of Property Law* (2013) 219.

199 *Kaiser Aetna v United States* (1979) 444 US 164 at 176.

200 Honoré, "Ownership", in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107 at 113.

201 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44].

202 Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 299.

terminology is merely talk without substance – a filling of empty space with empty words"[203].

206 The essence of a property right to, or "property" in, a chattel as the right to exclude others also flows from the requirements for a property right in the chattel, namely that a person have (i) a sufficient degree of physical control (sometimes described as "factual possession"[204]) to the exclusion of others and (ii) a manifested intention to exercise that control personally (ie not on behalf of another) in a manner that "exclude[s] unauthorized interference"[205]. These two requirements have been recognised as essential for a property right to a physical thing for thousands of years[206]. They are the reason the common law has long refused to recognise as a property right the mere "custody" of a chattel where the custodian holds the chattel for another[207]. Hence, the common law has long held that "mere custody" of a chattel by a servant or agent on behalf of an employer or principal is not sufficient for a property right[208]. Similarly, for a property right to arise by bailment the bailee "must have both the intention and the practical means to exercise independent control over the item that would exclude the bailor's own possession and control"[209].

The established meaning of property applied in the Archives Act

207 The *Archives Act* generally uses "property" in this long-established common law sense with its essence being the right to exclude others. As the

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203 Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 252 at 306.

204 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 435-436 [40].

205 Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 41.

206 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 435-436 [40].

207 Pollock and Wright, *An Essay on Possession in the Common Law* (1888) at 60.

208 *Alexander v Southey* (1821) 5 B & Ald 247 at 248-249 [106 ER 1183 at 1183-1184]; *Wilton v Commonwealth Trading Bank of Australia Ltd* [1973] 2 NSWLR 644 at 651; *Rowell v Alexander Mackie College of Advanced Education* (1988) Aust Torts Reports ¶80-183 at 67,733; *Burnett v Randwick City Council* [2006] NSWCA 196 at [64], referring to Fleming, *The Law of Torts*, 9th ed (1998) at 73. See now Sappideen and Vines (eds), *Fleming's The Law of Torts*, 10th ed (2011) at 77 [4.180] and Palmer, *Palmer on Bailment*, 3rd ed (2009) at 458 [7-001].

209 American Law Institute, *Restatement of the Law Fourth: Property, Tentative Draft No 1* (2020), Bailments, §2 at 78, Comment e.

Australian Law Reform Commission explained in its review of the *Archives Act*, the drafts of what became the *Archives Bill 1978* (Cth) evolved from a "provenance definition" to a "custodial definition" before the present property definition was adopted, albeit with recognition of the difficulties for the Commonwealth to prove "ownership" where the Commonwealth sought to recover what it believed to be official records from private custodians[210].

208 The *Archives Act* provides for mechanisms to compel Commonwealth institutions to transfer to the Archives records that are the property of the Commonwealth[211] but it does not subject individuals to those mechanisms[212]. Apart from Commonwealth institutions, the procedures for recovery of chattels that are Commonwealth property are left to the general law, including actions for detinue or delivery up of chattels. The assumption is that the same notion of a property right is involved under the *Archives Act* as at common law. As the Director-General of the Australian Archives observed when asked during a committee consideration of a draft *Archives Bill* about the test for identifying a Commonwealth document[213]:

> "As the test is a property test it is not determinable under this Bill. Under existing law, it is determinable in the courts and if it ever came to an attempt to acquire a paper the onus would be on the Commonwealth to prove that right."

209 Consistently with the common law conception of property as a right to exclude others, the *Archives Act* also draws the same distinctions as the common law between (i) property and custody and (ii) property and physical possession without an intention to possess personally.

210 The contrast between "property" and "custody" can be seen throughout the *Archives Act*. For instance, s 5(2)(f) describes a function of the Archives as being "to seek to obtain ... material (including Commonwealth records) not in the custody of a Commonwealth institution". Hence, s 5(2)(f) assumes that a record that is the property of a Commonwealth institution, within the definition of "Commonwealth record" in s 3(1), might not be in the custody of a Commonwealth institution.

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210 Australian Law Reform Commission, *Australia's Federal Record: A review of Archives Act 1983*, Report No 85 (1998) at [8.13]-[8.14].

211 *Archives Act*, s 27.

212 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 45.

213 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 47.

Another example is s 6(1)(c), which is concerned with the power of the Archives to make arrangements relating to the custody of material that forms part of the archival resources of the Commonwealth, a category that, by s 3(2), is not limited to records that are the property of the Commonwealth or of a Commonwealth institution. A further example is s 24(2)(d), which provides that the prohibitions in s 24(1) do not apply to anything done "for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records". That is, this section contemplates that a record can be the "property" of the Commonwealth or of a Commonwealth institution (and therefore a Commonwealth record) without the record being in the custody of the Commonwealth or of a Commonwealth institution.

211 The *Archives Act* contrasts property and possession in s 3(6) by providing for the power to make regulations, in certain cases, to deem records to be Commonwealth records, and therefore the property of the Commonwealth or of a Commonwealth institution, where the Commonwealth is in possession of the records. In other words, s 3(6) recognises that there will be cases where records will not be the property of the Commonwealth despite the Commonwealth being in physical possession of the records. Another example is s 22(2), which entitles the Commonwealth to "the possession of records kept by a Royal Commission, or by a Commission of inquiry, that are no longer required for the purposes of the Commission". However, since the mere entitlement to possession is insufficient for the records to become the "property" of the Commonwealth, the sub-section also provides that "all such records shall be deemed to be Commonwealth records [and therefore property of the Commonwealth] for the purposes of this Act".

"The Commonwealth or ... a Commonwealth institution" in the *Archives Act*

What is "the Commonwealth"?

212 Rousseau described the "public person ... formed by the union of individuals", with individual "members" collectively described as "The People", as a "Body Politic"[214]. Rousseau carefully distinguished "The People", the collective term for membership of the body politic, from the subsets of "Citizens" and "Subjects"[215]. In its primary sense, the body politic of the Commonwealth is such a legal body with membership constituted by the political community of the

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214 Rousseau, "The Social Contract", in Barker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (1947) 237 at 257-258.

215 Rousseau, "The Social Contract", in Barker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (1947) 237 at 257-258.

people, and with established territory[216]. In this primary sense of "the Commonwealth", which the preamble to the *Constitution* describes as an "indissoluble Federal Commonwealth", the membership is of all the people and not merely the subsets such as statutory citizens, subjects or electors[217]. The *Constitution* contains inherent limits upon the extent to which legislatures can fracture the membership of the political community of the body politic such as by exclusion of those people who were, and remain, necessary members of the body politic[218] or by imposition of unjustified restraints upon the participation by the people in the operation of the body politic[219].

213 In its primary sense, the body politic described as "the Commonwealth" is a legal entity or right-holder. It has a legal body or corpus like a body corporate and it represents the people who are its members. Maitland described it as a "corporation aggregate"[220]. As Griffith CJ said in *The Commonwealth v Baume*[221], "the body politic ... [although] not a corporation or body corporate in the sense in which those words are used in [s 102 of the *Common Law Procedure Act 1899* (NSW)] ... stands for the Crown as representing the whole community". The body politic of the Commonwealth has legislative, executive and judicial functions[222]. The expression "Crown in right of the Commonwealth" is commonly used to

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216 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 366-368; Lumb, "'The Commonwealth of Australia' – Constitutional Implications" (1979) 10 *Federal Law Review* 287 at 289.

217 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 93 [279]; Arcioni, "The Core of the Australian Constitutional People – 'The People' as 'The Electors'" (2016) 39 *University of New South Wales Law Journal* 421 at 443-444. See also *DJL v Central Authority* (2000) 201 CLR 226 at 277-278 [134]; *Love v The Commonwealth* (2020) 94 ALJR 198 at 247 [249], 258 [295], 259 [304]-[305], 277 [406]-[407], 283-284 [434]; 375 ALR 597 at 656, 670, 672, 695-696, 704.

218 See *Love v The Commonwealth* (2020) 94 ALJR 198; 375 ALR 597.

219 *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

220 Maitland, "The Crown as Corporation" (1901) 17 *Law Quarterly Review* 131 at 140.

221 (1905) 2 CLR 405 at 413.

222 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 120 [194].

describe the exercise of executive power by the Commonwealth as a body politic[223], albeit that this expression is not without difficulties[224].

214 The primary sense of "the Commonwealth" as a body politic is not its only connotation. There are others[225]. For instance, the Commonwealth has also been extended beyond its character as a body politic to include all legal entities within the description of Commonwealth agencies and instrumentalities. This includes the creation of a new body corporate from that which would otherwise have fallen within the conception of the Commonwealth as a body politic. For instance, "the Commonwealth" as a party to a suit, within s 64 of the *Judiciary Act 1903* (Cth), is not limited to the body politic of "the Commonwealth stricto sensu" but extends also to cases of "a statutory corporation representing the Crown in right of the Commonwealth"[226].

215 Another meaning of the Commonwealth is a secondary, or instrumental, conception, also used in the *Constitution*, to describe the "central organs of

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223 *The Commonwealth v Rhind* (1966) 119 CLR 584 at 599. As Dawson J observed in *The Commonwealth v Mewett* (1997) 191 CLR 471 at 498, this expression may have been first so described in *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 231. See also *R v Sutton* (1908) 5 CLR 789 at 805; *Bank of New South Wales v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 362; *Jacobsen v Rogers* (1995) 182 CLR 572 at 585; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 409-411 [31]-[36], 429-431 [105]-[109]; *Sue v Hill* (1999) 199 CLR 462 at 501 [90].

224 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 291, 293; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 431 [108]-[109]; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 13 [2], 41 [82], 45 [89], 51 [115], 55 [131]. See also Hartford Davis, "The Legal Personality of the Commonwealth of Australia" (2019) 47 *Federal Law Review* 3 at 9.

225 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 56; *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (2004) 217 CLR 264 at 271 [23]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 72 [185]. See also Hartford Davis, "The Legal Personality of the Commonwealth of Australia" (2019) 47 *Federal Law Review* 3 at 7-8.

226 *Maguire v Simpson* (1977) 139 CLR 362 at 398. See further *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [15]; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 581-582 [42]-[43].

government", and particularly the executive[227]. In this secondary sense, the Commonwealth connotes the "organizations or institutions of government in accordance with the conceptions of ordinary life" including "government owned and controlled instrumentalities"[228]. Such organisations can be, but need not be, entities with a legal corpus or body.

The instrumental use of "Commonwealth institutions" in the Archives Act

216 The central focus of the *Archives Act* is upon Commonwealth institutions of government in accordance with the conceptions of ordinary life. An object of the *Archives Act* is "overseeing Commonwealth record-keeping, by determining standards and providing advice to Commonwealth institutions"[229]. The functions of the Archives include, in broad terms, promoting the "creation, keeping and management of current Commonwealth records" "by providing advice and other assistance to Commonwealth institutions"[230]. The archival resources of the Commonwealth are defined in terms relating to "the legal basis, origin, development, organization or activities of the Commonwealth or of a Commonwealth institution"[231] and "a person who is, or has at any time been, associated with a Commonwealth institution"[232]. The Archives has power to "chronicle and record matters relating to the structure and functioning of Commonwealth institutions"[233] and, on request, to "assist Commonwealth institutions in the training of persons responsible for the keeping of current Commonwealth records"[234]. For the purposes of the *Archives Act*, the Archives is entitled to full and free access, at all reasonable times, to all Commonwealth

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227 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 368; Lumb, '"The Commonwealth of Australia' – Constitutional Implications" (1979) 10 *Federal Law Review* 287 at 289.

228 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 230-231. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 362-363.

229 *Archives Act*, s 2A(a)(iii).

230 *Archives Act*, s 5(2)(c).

231 *Archives Act*, s 3(2)(b).

232 *Archives Act*, s 3(2)(c).

233 *Archives Act*, s 6(1)(d).

234 *Archives Act*, s 6(1)(j).

records in the custody of a Commonwealth institution other than the Archives[235]. Although the Archives has power to enter arrangements to accept care of records from a person other than a Commonwealth institution[236], the *Archives Act* contemplates the usual circumstance being transfer of a Commonwealth record to the Archives from a Commonwealth institution[237]. Commonwealth institutions are, in general terms, entitled to reasonable access to Commonwealth records that they have transferred[238].

217 The "Commonwealth institutions" about which the *Archives Act* is concerned are defined. They are the organisations or institutions of government which accord with the conceptions of ordinary life. Some are incorporated. Some are not. The definition of "Commonwealth institution" in s 3(1) provides that they are: "(a) the official establishment of the Governor-General; (b) the Executive Council; (c) the Senate; (d) the House of Representatives; (e) a Department; (f) a Federal court or a court of a Territory other than the Northern Territory or Norfolk Island; (g) an authority of the Commonwealth; or (h) the Administration of an external Territory other than Norfolk Island". An "authority of the Commonwealth" is itself defined in s 3(1), again using the Commonwealth in its conception based upon ordinary life, as generally including, subject to exceptions: "an authority, body, tribunal or organization, whether incorporated or unincorporated, established for a public purpose" in various ways; "the holder of a prescribed office under the Commonwealth"; and Commonwealth-controlled companies and associations.

218 The enumerated Commonwealth institutions are separate from the holders of offices within those institutions unless the office under the Commonwealth – that is, appointed by the Commonwealth or employed by the Commonwealth[239] – is prescribed[240]. Thus, the institutions of the House of Representatives and the Senate will not automatically include the offices of its members, Senators, or

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235 *Archives Act*, s 28.

236 *Archives Act*, s 6(2).

237 *Archives Act*, s 27. See also s 6A(2). And compare the exception in s 6(3) for other transfers.

238 *Archives Act*, s 30.

239 *Sykes v Cleary* (1992) 176 CLR 77 at 95-96; *Re Lambie* (2018) 263 CLR 601 at 628 [58].

240 *Archives Act*, s 3(1), definition (b) of "authority of the Commonwealth".

Ministers[241]. The institution of the High Court of Australia and other federal courts of Australia will not automatically include the offices of the Justices or judges. And the institution of the official establishment of the Governor-General will not automatically include the office of the Governor-General. However, as will be seen below, things that are created or received for the institution and which are, or were, kept by the holders of those individual offices will be the property of the institution or, if the institution has no legal existence, the property of the Commonwealth as a body politic.

The Governor-General and the institution of "the official establishment of the Governor-General"

219 The office of Governor-General is not the institution of the official establishment of the Governor-General nor is it the Commonwealth as a body politic[242]. But it is closely related to both. The constitutional office of Governor-General has some independence[243] and involves public loyalty. As Mr Kingston said at the Convention Debates in 1897, if the Governor-General "does his duty conscientiously he need not fear anything, neither should he be driven from the strict course of duty by the hope of reward"[244]. Nevertheless, despite swearing an oath or making an affirmation to perform functions without fear or favour, many of the official acts performed by the Governor-General, particularly the exercises of executive power under s 61 of the *Constitution*, involve decisions taken upon advice of a Minister or the Executive Council[245]. Those exercises of power are official acts, creating documents that, if kept by the Governor-General, will be retained institutionally and owned by the Commonwealth as a body politic.

220 The enumerated institution, "the official establishment of the Governor-General", was not included in the early incarnations of the *Archives Bill.* Clause 18(1)(a) of the 1978 draft of the *Archives Bill* expressly provided that Divs 2 and 3 of Pt V do not apply to the "records of the Governor-General or of a former Governor-General". However, a Senate Standing Committee on Constitutional and Legal Affairs suggested that whilst there may be a need "for special treatment to be given to a few categories of records, such as judges'

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241 See also the Notes to *Archives Act*, ss 27 and 28.

242 See *Constitution*, s 2.

243 *Constitution*, s 3.

244 *Official Report of the National Australasian Convention Debates* (Adelaide), 14 April 1897 at 633.

245 *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 661 [38].

notebooks and correspondence [by the Governor-General] with the Monarch", the guarantee of preservation and reconstruction of national history "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"[246]. The Senate Standing Committee referred to evidence from the Director-General of the Australian Archives where the following exchange occurred[247]:

> "Senator HAMER – If we eliminate [the exclusion of records of a Governor-General and the Executive Council and Cabinet documents] and treat them like the other documents, would any damage be done that you can see?
>
> Prof. Neale – Well, there would be to the relations between Australia and Great Britain. The Governor-General, representing the Queen, is in direct correspondence with Her Majesty. The letters from the Governor-General would be in the Royal Archives and copies of the Monarch's letters to the Governor-General would be in the Australian Archives."

Senator Hamer then asked what damage to the relations between Australia and Great Britain could result if the letters were treated like other documents with an exemption under cl 31 where they contain information the disclosure of which would prejudice the international relations of the Commonwealth. After the Director-General responded by referring to the different access periods in Great Britain and Australia, Senator Hamer observed that Australia could make its own rules because "[w]e are dealing here with ... the Queen of Australia". He observed[248]:

> "What would happen if you brought all these under the same provision and just used the exemption under clause 31 [categories of exempt record] for

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246 Australia, Senate, Standing Committee on Constitutional and Legal Affairs, *Freedom of Information: Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and the Archives Bill 1978* (1979) at 339 [33.22]-[33.23].

247 Australia, Senate, Standing Committee on Constitutional and Legal Affairs (Reference: Freedom of Information), *Transcript of Evidence*, 13 December 1978 at 714.

248 Australia, Senate, Standing Committee on Constitutional and Legal Affairs (Reference: Freedom of Information), *Transcript of Evidence*, 13 December 1978 at 715.

necessary protection? I am afraid that I still cannot understand why this cannot be done."

221 Although the recommendations of the Senate Standing Committee were not initially adopted in the 1981 draft of the *Archives Bill*, which retained the exclusion of the Governor-General's records, they were adopted when the *Archives Bill* was reintroduced in 1983. The 1983 version of the *Archives Bill* removed the exclusion of the Governor-General's records and inserted the "official establishment of the Governor-General" into the definition of "Commonwealth institution". In the Second Reading Speech the Minister for Home Affairs and Environment said that "[t]he 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"[249].

222 In this context, the expression therefore connotes the institutional apparatus that supports and assists the official acts of the Governor-General, equivalent to the institutional apparatus of a Department that supports and assists a Minister[250]. As the appellant pointed out in oral submissions, the only other similar statutory phrase is a reference to the "Governor-General's Establishment"[251] in legislation which appropriated £10,000 from the Consolidated Revenue Fund to defray the expenses of "the Governor-General's establishment in connexion with the visit to Australia of Their Royal Highnesses the Duke and Duchess of Cornwall and York".

The holding of property by the Commonwealth or Commonwealth institutions

223 Although the focus of the *Archives Act* is upon Commonwealth institutions of government in accordance with the conceptions of ordinary life, on several occasions the *Archives Act* uses the comprehensive expression "the property of the Commonwealth or of a Commonwealth institution". One example is s 62(2), which is concerned with the transfer of samples of objects from Commonwealth institutions, where those samples being transferred from the Commonwealth institution are the property of the Commonwealth or of a Commonwealth institution. Another, and the matter of present significance, is the definition in s 3(1) of "Commonwealth record" as including property of the Commonwealth or of a Commonwealth institution.

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249 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1983 at 1851.

250 Compare *Appropriation Act (No 1) 1982-83* (Cth), Sch 2, Divs 505 and 506.

251 *Governor-General's Establishment Act 1902* (Cth).

224 Despite the general focus throughout the *Archives Act* on Commonwealth institutions rather than on the Commonwealth as a body politic, the expression "of the Commonwealth or of a Commonwealth institution" was intended as a comprehensive expression to cover all of the ways in which property rights to documents that are or were kept by the enumerated institutions of government could be held[252]. The expression is comprehensive in the sense that it is exhaustive of all the ways in which property rights to institutionally kept documents can be held. The use of the conjunction "or", and the repetition of "of", reinforces the comprehensive nature of the expression as comprised of two different parts that exhaust the two different categories of person who might hold the property rights to institutionally kept documents. The comprehensive expression follows the same form as the expression in ss 55 and 90 of the *Constitution*, "duties of customs or of excise", which is also a "comprehensive expression"[253] which "must be construed as exhausting the categories of taxes on goods"[254].

225 The comprehensive nature of the expression avoids the difficulty that arises where the enumerated institution is not a legal person, because the relevant property rights that would have been held by that institution if it were a legal person will be held by the Commonwealth. For instance, documents administered and kept within a Department of State are generally "property of the Commonwealth" as a body politic. Equally, documents that are administered and kept by an unincorporated body, tribunal or organisation falling within the meaning of an "authority of the Commonwealth" will also generally be "property of the Commonwealth" as a body politic.

226 The comprehensive expression also avoids any debate about whether the relevant property right to a document is held by an institution with independent legal personality or by the Commonwealth as a body politic itself. As the Australian Law Reform Commission observed, "while most Commonwealth property is owned by the Commonwealth as a whole, there are some Commonwealth institutions which own property in their own right"[255]. A simple example is a Commonwealth-controlled company within the definition in s 3(1) of an "authority of the Commonwealth".

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252 See also *Archives Act*, s 36(4)(d).

253 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 600.

254 *Ha v New South Wales* (1997) 189 CLR 465 at 488, quoting *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 589-590.

255 Australian Law Reform Commission, *Australia's Federal Record: A review of Archives Act 1983*, Report No 85 (1998) at [8.39].

227 The comprehensive expression thus avoids any debate or dispute about whether the Commonwealth as a body politic holds a property right to documents that are in the custody of Commonwealth institutions or whether the property right is instead held by those institutions. For instance, any real or personal property, other than money, held by the High Court of Australia is deemed to be the property of the Commonwealth[256]. A record held by or on behalf of the Parliament or a House of Parliament is taken to be the property of the Commonwealth[257]. And a record kept by a Royal Commission or Commission of Inquiry which is no longer required for the purposes of the Commission is a record to which the Commonwealth is entitled to possession and is deemed to be a Commonwealth record, and therefore the property of the Commonwealth[258].

228 The official establishment of the Governor-General is not an independent legal person. As I have explained above, the expression distinguishes the Governor-General from the institution that supports them. It therefore distinguishes the Governor-General's private or personal records from official records kept by the official establishment. An assumption underlying the *Archives Act* is that a property right to institutional records is held by the Commonwealth. In other words, one assumption inherent in the expression "property of the Commonwealth or of a Commonwealth institution" is that a property right to those official records kept by the official establishment of the Governor-General, which is not a legal entity, will be a property right of the Commonwealth as a body politic.

Property rights to the correspondence lodged with the Archives

229 When Mr Smith lodged the documents now forming Archives record AA1984/609, he was acting in his capacity as Official Secretary to the Governor-General, then Sir Zelman Cowen, and doing so on the instructions of the former Governor-General, Sir John Kerr[259]. That record contains correspondence between 15 August 1974 and 5 December 1977, being correspondence between the Queen, by her Private Secretary, and the former Governor-General, Sir John, or his Official Secretary, Mr Smith. The subject matter was described by Sir John, in an extract of his autobiography tendered in evidence at trial, to be part of "the duty ...

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256 *High Court of Australia Act 1979* (Cth), s 17(3).

257 *Archives Act*, s 3(5).

258 *Archives Act*, s 3(1), definition of "Commonwealth record", read with s 22(2).

259 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 30-31 [114].

to send despatches which keep Her Majesty informed"[260]. The following was agreed by the parties as to the content of the correspondence:

> "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."

230 As will be seen, the title to the original documents, being the contents of Archives record AA1984/609, was held by the Commonwealth. It is therefore unnecessary to engage with the issue of whether Sir John Kerr manifested sufficient intention gratuitously to transfer title to those originals to the Commonwealth. The Commonwealth, as a body politic, had "property" in the original documents held in Archive record AA1984/609.

General law property principles and the Archives Act

231 It is curious that although huge intellectual effort has been devoted to the development of principles of administrative law regulating the authority by which public power is exercised, there has been far less focus upon the norms governing the manner of the exercise of authorised power and its consequences[261]. The parties to this case focused upon private law analogies, essentially relying on the Diceyan principle that government should be held to the same principles that apply between private persons[262].

232 The private law principle is that if the letters had been written by a person as an independent "professional" then the title to those letters would usually be held by that person[263] and when they are sent the title would usually be held by the

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260 Kerr, *Matters for Judgment: An Autobiography* (1978) at 329.

261 See Smith, "Loyalty and politics: From case law to statute law" (2015) 9 *Journal of Equity* 130 at 144.

262 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 178-179, 200-201.

263 *Breen v Williams* (1996) 186 CLR 71 at 89, 101.

intended recipient[264]. By contrast, if the letters had been written by a person as an employee or agent then the title to the letters would usually be held by the employer or the principal[265], unless they were drafts, working papers, or "memoranda, notes, etc, made by him for his own information"[266]. The appellant's submissions effectively equated the legal position of the Governor-General with that of an agent. The respondent's submissions effectively equated the legal position of the Governor-General with that of the independent professional. All parties rightly recognised that the analogies were not entirely apt. But the underlying principle is important.

233 The underlying principle is one which generally allocates to a person a property right to a new thing that the person created for themself but allocates the right to another where the new thing was created for another. The issue of when a new thing is created for another is not affected by the purely subjective views of the creator. It depends upon objective assumptions of responsibility, established by express or implied undertaking, including by reference to the history and status of an office. Thus, if a solicitor, not acting as agent or employee, procures a contract or deed for a paying client then, unless their agreement provides otherwise, that document will be owned by the client[267].

234 This principle can only be stated in general terms. A qualification must be made. Although both of the examples – the "agent" and the "professional" – assume that the property right becomes that of the creator of the new thing or the person on whose behalf the creator acts, that general proposition is not always true. Where a new thing is created using the materials of another, sometimes the property right will be held by the owner of the materials. Perhaps in anticipation that this might be an issue, the respondent submitted that the appropriate rule in relation to correspondence sent by Sir John Kerr was the approach adopted in *Justinian's Institutes* by which the creator of a new thing (here, the "carbon copies" and telegrams created by Sir John being assumed to be a new thing) became the owner unless the materials were all owned by another and the new thing could be

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264 *Earl of Lytton v Devey* (1884) 54 LJ Ch 293 at 295, citing *Pope v Curl* (1741) 2 Atk 342 at 342 [26 ER 608 at 608].

265 *Breen v Williams* (1996) 186 CLR 71 at 88, 101, quoting *Leicestershire County Council v Michael Faraday and Partners Ltd* [1941] 2 KB 205 at 216.

266 *Breen v Williams* (1996) 186 CLR 71 at 89, citing *Chantrey Martin v Martin* [1953] 2 QB 286 at 293 and *Wentworth v De Montfort* (1988) 15 NSWLR 348.

267 *Breen v Williams* (1996) 186 CLR 71 at 89.

reduced back to its original material (blank paper that might be owned by the Commonwealth)[268].

235 With a dearth of modern authority, some judges have, like the submissions of the respondent, relied upon the rule adopted by *Justinian's Institutes*[269]. However, this rule: (i) was a forced compromise between two schools of thought[270]; (ii) was arguably intended to apply only where there was common ground between the schools[271]; (iii) has been powerfully criticised as taking "no account of the relative importance of the materials and of the maker's skill" and therefore leading to potentially bizarre consequences[272]; (iv) has not generally been adopted in English or Australian law[273]; and (v) is the subject of considerable variation in practice among Civilian jurisdictions[274] with dispute even in Scotland, where the dominant rule is closest to, but still not identical with, the Roman rule[275].

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268 Citing Inst II.1.25. See *Justinian's Institutes*, tr Birks and McLeod (1987) at 57: "if the thing can be turned back into its materials, its owner is the one who owned the materials; if not, the maker".

269 *International Banking Corporation v Ferguson, Shaw, & Sons* 1910 SC 182; *McDonald v Provan (of Scotland Street) Ltd* 1960 SLT 231 at 232. See also *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 at 35, 44, 46; *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* (1996) 20 ACSR 205 at 209-210.

270 See D 41.1.7.7 (Gaius, *Common Matters or Golden Things*, bk 2): *The Digest of Justinian*, tr ed Watson, rev ed (1998), vol 4 at 3.

271 Thomas, *Textbook of Roman Law* (1976) at 175, fn 4.

272 Nicholas, *An Introduction to Roman Law* (1962) at 137.

273 *Glencore International AG v Metro Trading International Inc* [2001] 1 All ER (Comm) 103 at 165 [178]. Compare Blackstone, *Commentaries on the Laws of England* (1766), bk II at 404; *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* (1996) 20 ACSR 205 at 209-210.

274 Compare, for instance, *Code Civil*, Arts 570, 571 (France); *Bürgerliches Gesetzbuch*, s 950 (Germany).

275 *McDonald v Provan (of Scotland Street) Ltd* 1960 SLT 231. See Scottish Law Commission, *Corporeal Moveables: Mixing Union and Creation*, Memorandum No 28 (1976) at [19]-[20].

236 For these reasons, although I proceed on the basis that Sir John Kerr was the creator of the correspondence sent to the Queen and that the Commonwealth had no right to exclude him from the original documents if they were created for him personally, I do not do so on the basis of the application of Justinian's rule as the respondent had submitted. I do so because the creation of the originals of the telegrams sent were the subject of substantial work and skill by Sir John and both the nature and the value of those originals depend essentially upon that work rather than upon the materials used. The same principle applies to the "originals" of the letters sent which were described as "carbon copies". I accept the submission of the Solicitor-General of the Commonwealth, which was not contested, that the Court should draw an inference that these carbon copies were "created simultaneously upon Sir John writing the letters ... rather than by some subsequent process by which an agent went away and copied them using a photocopier". However, the same conclusion might not apply in a case where the maker does no more than take a photocopy of another's thing so that the existence and nature of the new thing (if it be such) depends upon nothing more than the press of a button[276]. As the Director-General of the Australian Archives presciently observed during a committee consideration of the draft *Archives Bill*, "given modern copying technology, there may often be real doubt as to where ownership of a particular record resides"[277].

The correspondence was created and received by Sir John Kerr for the institution of the official establishment of the Governor-General

237 The primary submission by the appellant was that the Commonwealth obtained a property right to all the original documents created or received by the Governor-General in the course of performance of his duties. This submission cannot be accepted.

238 Since the Governor-General is neither the body politic of the Commonwealth nor the institution of the official establishment of the Governor-General, things created or received by the Governor-General can only become the property of the Commonwealth if the circumstances indicate that they were created or received officially, and retained institutionally. The creation or receipt of documents in that way involves physical control over the documents being asserted with a manifested, or objective, intention that the Commonwealth or the Commonwealth institution have a right to exclude others from them.

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276 Compare *Glencore International AG v Metro Trading International Inc* [2001] 1 All ER (Comm) 103 at 165 [178].

277 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 19.

239 The fact that something is created or received by a public officer in the course of performance of public duties is a powerful indicator that it was created or received for the institution so that the legal entity of the Commonwealth or the Commonwealth institution has a property right in that thing. But documents are commonly created or received in the course of performance of public duties where the creation or receipt is entirely personal and not institutional. Examples are preliminary working papers, personal notes or drafts of a final product created by judges, Ministers, Senators or the Governor-General. As the majority rightly said in the Full Court, if the Commonwealth obtained a property right in the correspondence, thus rendering the correspondence a "Commonwealth record" under s 3(1) of the *Archives Act*, simply because the officer was performing duties, this would "introduce an administrative provenance definition, when that alternative had been rejected some years earlier"[278].

240 The respondent submitted that the Commonwealth obtains a property right to documents created by the Governor-General when the Governor-General is acting as "an emanation" of the Commonwealth. But the expression "emanation of the Commonwealth" either is too opaque to be meaningful or collapses into an approach based upon agency which the respondent rightly disclaimed as too narrow. The "much criticised"[279] expression, "emanation of the Crown", has similarly been said to convey "no meaning capable of precise significance"[280] and, where it is used, commonly denotes a relationship of agency such that the so-called emanation is acting with actual or apparent authority of the Crown[281]. The issue of whether a document was created or received for an institution that is not a legal entity is not one of agency, although there are similarities.

241 The general principles of property adopted in the *Archives Act* require consideration of whether the creation of the new thing (the carbon copies of letters, and originals of telegrams, sent) or the receipt of a new thing (the correspondence received), as objectively characterised, (i) was solely for Sir John Kerr personally so that he alone obtained the property right or (ii) was official, being created or received officially and retained for the institution of the official establishment of the Governor-General with a property right held by the body politic of the

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278 *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1 at 18 [86].

279 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 149 [163].

280 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 284.

281 *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 342-343. See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 42 [50].

Commonwealth so that the correspondence was a "Commonwealth record" within s 3(1) of the *Archives Act*. There are five reasons why the correct characterisation is the latter in the circumstances of this case.

242 First, the exchange of correspondence was treated by Sir John Kerr as an official issue. Sir John was assisted by Mr Smith in the preparation of correspondence sent to the Queen and in discussing the correspondence received from the Queen. As Sir John observed in a letter to Mr Smith, he adopted a system "of the Official Secretary participating in the preparation" of what he described as "Palace correspondence" and providing comments on the replies from the Palace. At that time, the office of Official Secretary to the Governor-General was not a statutory office[282]. The position of Official Secretary was filled by Mr Smith as a public servant holding an office in a Department (within the definition of "Commonwealth institution" in s 3(1) of the *Archives Act*), namely the Department of the Prime Minister and Cabinet[283]. Thus, the correspondence written by the Governor-General was authored with the assistance of an officer of the public service who formed part of the official establishment of the Governor-General.

243 Secondly, as the primary judge correctly characterised the correspondence between the Governor-General and the Queen, it was correspondence "arising from the performance of the duties and functions of the office of Governor-General"[284]. Holders of high public offices such as that of the Governor-General have been described as "trustees of the public"[285]. Public powers to act in the performance of duties are said to be conferred "as it were upon trust"[286].

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282 Australia, House of Representatives, *Public Service Reform Bill 1984*, Explanatory Memorandum at 47.

283 Australia, House of Representatives, *Public Service Reform Bill 1984*, Explanatory Memorandum at 47. See *Public Service Act 1922* (Cth), s 48A (as at 19 December 1973).

284 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 35 [132].

285 Finn, "The Forgotten 'Trust': The People and the State", in Cope (ed), *Equity: Issues and Trends* (1995) 131 at 143. See also *R v Bembridge* (1783) 22 St Tr 1 at 155 ("an office of trust and confidence, concerning the public"); *R v Whitaker* [1914] 3 KB 1283 at 1296-1297.

286 *Porter v Magill* [2002] 2 AC 357 at 463 [19], quoting *R v Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd* [1988] AC 858 at 872, in turn quoting Wade, *Administrative Law*, 5th ed (1982) at 355. See also *Three Rivers*

These loose references to trusteeship are expressions of the duty of loyalty owed by holders of public offices created "for the benefit of the State"[287]. Like all implied duties of loyalty, the content of the duty falls to be determined against a background of general expectations, based upon custom, convention and practice, which impose upon the public officer "an inescapable obligation to serve the public with the highest fidelity"[288]. Thus, a member of Parliament has a duty to "act with fidelity and with a single-mindedness for the welfare of the community"[289].

244 Compliance with this obligation of loyalty was manifested by the expressed reason why Sir John Kerr kept the originals of the telegrams sent, the carbon copies of the letters sent, and the correspondence received, as part of the performance of his official duties. As Sir John expressed this reason in a letter to the Private Secretary to the Queen, it was that "[h]aving regard to the probable historical importance of what we have written, it has to be ... preserved". Sir John's expression of the desire to preserve the documents given their historical import, understood in light of his duties of public loyalty, militates powerfully against the originals having been created or received by him personally.

245 Thirdly, events subsequent to the creation or receipt of the original correspondence, which reveal how the original correspondence was treated, can shed light on how the correspondence was created or received. In particular, the subsequent treatment of the "original" correspondence as institutional, that is, part of the official establishment of the Governor-General, is supported by a letter written by Prime Minister Malcolm Fraser to Sir John Kerr towards the end of Sir John's period as Governor-General and from which there is no suggestion of demur by Sir John. The Prime Minister referred in that letter to the draft *Archives Bill* and said that "Government House records ... are part of the history of Australia and it is proper that they should receive all the care and protection possible". The Prime Minister continued:

District Council v Governor and Company of the Bank of England [No 3] [2003] 2 AC 1 at 235 (power "held in trust for the general public").

287 Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (1820) at 83.

288 *Driscoll v Burlington-Bristol Bridge Co* (1952) 86 A 2d 201 at 221.

289 *R v Boston* (1923) 33 CLR 386 at 400. See also *Re Day [No 2]* (2017) 263 CLR 201 at 221 [49], 251 [179], 272 [269].

> "For that purpose clause 21 provides that Australian Archives may enter into arrangements with a Governor-General to take custody of records under access rules which a Governor-General may lay down."

In the draft of the *Archives Bill* that was current at the time that the Prime Minister wrote, cl 21 permitted those arrangements to be made for records of the Governor-General that were exempt from the operation of Divs 2 and 3 of Pt V of the *Archives Bill*, concerning dealings with Commonwealth records and access to Commonwealth records[290]. Although that draft of the *Archives Bill* contained no reference to the "official establishment of the Governor-General" as a category of Commonwealth institution, it was still contemplated that the records were Commonwealth records. The Prime Minister was referring to an *exemption* from the regime of *dealings* with Commonwealth records and *access* to Commonwealth records which assumed that those records were Commonwealth records that required exemption. Naturally, once there was express provision for the institution of the Governor-General and removal of the exemption from the *Archives Bill* when it was reintroduced in 1983 the inference that originals of the correspondence were created or received institutionally, and were therefore Commonwealth records, became even stronger.

246 Fourthly, the same institutional approach to the correspondence was taken after Sir John Kerr's retirement as Governor-General by the different treatment of the original correspondence (the original telegrams sent, the carbon copies of the letters sent, and the original letters received) and the copies made of those originals. Very shortly before Sir John's retirement as Governor-General took effect, on 18 November 1977 the Director-General of the Australian Archives wrote to Mr Smith, as Sir John's Official Secretary, confirming their agreement that both the originals and the "copies" would be transferred to the Australian Archives with the copies then to be sent to a London address for Sir John. After Sir John's retirement took effect, Mr Smith (who was then the Official Secretary to the new Governor-General, Sir Zelman Cowen) wrote to Sir John on 23 December 1977 and described photocopying that he had been undertaking on the instructions of Sir John of correspondence in the "original file" at Government House. He said that he could "copy only at night" and had been encountering problems with the copying process. He explained that "[i]n the meantime the papers are in my strong-room under absolute security until the task is completed and the original file is in Archives".

247 These letters provide strong support for the treatment of Sir John Kerr's correspondence with the Queen as being subject to property rights of the Commonwealth as a body politic or, more loosely, as part of the institution of "the official establishment of the Governor-General". Relevantly, the matters supporting this conclusion are: (i) the presence of the "originals" of the

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290 See cl 18(1)(a) of the *Archives Bill 1978* (Cth).

correspondence at Government House even after Sir John had left office; (ii) the separate arrangements made by Sir John for copies to be made for his own personal purposes; (iii) the description of the originals as part of a "file"; and (iv) the high security within Government House which was given to the file containing the originals.

248 Fifthly, it was an agreed fact that Mr Smith lodged the originals of the correspondence with the Australian Archives on 26 August 1978 (at which time the Governor-General was Sir Zelman Cowen) as the Official Secretary to the Governor-General. Although Mr Smith referred in the letter of deposit to various caveats by Sir John Kerr including that the "papers are to remain closed until 60 years after the end of his appointment as Governor-General", he did not sign the letter of deposit as an agent for Sir John. He signed it as the "Official Secretary to the Governor-General".

249 Each of these five matters points to the character of the correspondence between the Governor-General and the Queen as being created or received officially and kept institutionally. As I explain below, some of the content of that correspondence might have been confidential, and some might have contained observations of a personal nature, akin to those in correspondence between State Governors and the Queen concerning "reports relating to affairs in the State", which were described as "most helpful to Her Majesty" when containing information "of a general nature, from ... personal enquiries or experiences, and impressions gained during travel". Nevertheless, the agreed fact in this case was that the correspondence "relat[ed] to the official duties and responsibilities of the Governor-General".

There was no convention that the correspondence was not official or institutional

250 The respondent supported the contrary conclusion by relying upon the references by the primary judge to correspondence that suggested that several people subjectively held the view that title to the documents was held by Sir John Kerr. The people said to have held that subjective view were Sir John himself, one former Director-General of the Australian Archives, the executor of Lady Kerr's estate, and some previous Governors-General, namely Lord Stonehaven, Lord Casey, and Sir Paul Hasluck[291]. The respondent also relied upon the subjective view of the Private Secretary to the Queen, who, in replying to a letter from Sir John, referred to the letters as "your papers".

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291 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 11 [15], 29 [108], 30-31 [113]-[117(a)-(e)].

251 These submissions were factually overstated. Sir John Kerr probably did not hold the view that he had title to the originals, as opposed to the copies, to the exclusion of the Commonwealth. For the reasons explained above[292], Prime Minister Fraser did not hold that view and Sir John had not demurred from the view of the Prime Minister in correspondence with him. In a letter to the Private Secretary to the Queen, Sir John also said that "I can make the appropriate decisions about papers which are exclusively mine, but our correspondence falls into a different category". It was in response to that letter that the Private Secretary had referred to "your papers dealing with the Governor-Generalship".

252 Sir Paul Hasluck also did not regard his correspondence with the Queen as part of his personal property. In the outline to his collation of "The Governor-General's papers", which were an exhibit at trial, the papers were divided into five groups. The first group concerned the despatches written to the Queen and the responses by her Private Secretary. The documents in that group were described as requiring the permission of Her Majesty before they could be made public. In contrast, in the second group, notes made in the Governor-General's personal minute book were described as "the private property of Sir Paul Hasluck".

253 As for the opinion of the Archives itself, the clearest expression of the opinion that such correspondence was not a Commonwealth record was made decades after the correspondence in issue. Earlier expressions of opinion are more equivocal. For instance, the appellant pointed to a statement by the Director-General of the Australian Archives in a letter dated 18 November 1977 that conditions of access to the originals of the correspondence in this case "would normally be administered by the official policy governing such papers" and that "variation from these rules will be determined by discussions in London". The role of London in amending rules of access is, at least, in tension with an understanding that the originals of the correspondence are the personal property of Sir John Kerr.

254 More fundamentally than any factual overstatement, the legal flaw in the respondent's submission is that a person does not obtain a property right by thinking they have a property right or merely by them or others expressing that belief. The respondent's submission thus transmogrified to an argument that the expression of these subjective views established a convention that the correspondence was "private and confidential" and "does not form part of any official government record". If this convention existed at the time of the correspondence, and if it were not inconsistent with the policy of the *Archives Act*, then the respondent would be correct that the correspondence was not created or

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292 At [245].

received officially nor retained institutionally so that the originals of the correspondence would not be the property of the Commonwealth.

255 It is only in the application of whether the correspondence was created or received institutionally that the convention suggested in this case could be recognised and enforced by the Court[293]. The convention could not contradict the effect of the *Archives Act*; it could only operate to establish a rule based upon the uniform consensus of the relevant persons that correspondence passing between the Governor-General and the Queen is never created or received by the Governor-General officially nor retained institutionally. In other words, the convention to be given effect is that the correspondence would never be created or received for the institution of the official establishment of the Governor-General.

256 A common starting point for ascertaining the existence of a convention is the three questions posed by Sir Ivor Jennings[294]: "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?" This approach is not a fixed legal test. Recorded historical precedents are only one indicator of past practice. Further, although the expressions of belief by actors can be important, the work and approach of senior bureaucrats, scholars and other writers can be relevant where the convention is one that binds the general public[295]. More fundamentally for present purposes, the conventions with which Jennings was concerned were those of a "duty-imposing" kind rather than a rule of characterisation such as characterising the nature of correspondence[296]. Nevertheless, it suffices in this case to address the convention in the terms upon which it was asserted by the respondent, purportedly supported by the three criteria proposed by Jennings.

257 As Professor Twomey has explained, a convention that excludes from government records the correspondence between the Governor-General and the

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293 Compare, generally, Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed (1939) at 417 and Barber, "Laws and Constitutional Conventions" (2009) 125 *Law Quarterly Review* 294.

294 Jennings, *The Law and the Constitution*, 5th ed (1959) at 136, adopted in *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753 at 888.

295 See also Heard, "Constitutional Conventions: the Heart of the Living Constitution" (2012) 6 *Journal of Parliamentary and Political Law* 319 at 332.

296 See also Jaconelli, "Do Constitutional Conventions Bind?" (2005) 64 *Cambridge Law Journal* 149 at 152, citing Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1984) at 210.

Queen is "difficult to substantiate" upon Jennings' approach for three reasons[297]. First, prior to 1983, Commonwealth record-keeping was "haphazard and little regulated". If they were not lost, vice-regal records were sometimes kept by Governors-General or their families, sometimes kept by national institutions and sometimes archived on government files.

258 Secondly, the precedents in relation to the manner in which vice-regal records are handled are, at best, "thin"[298]. The respondent's overstatement of the position of some of the relevant actors has already been mentioned. More fundamentally, some of the thin precedents relied upon by the respondent would support a wider convention than that relied upon by the respondent, extending to all correspondence between the Governor-General and the Queen, whether or not it was confidential. For instance, only "some" of the correspondence between Lord Casey and the Queen or her Private Secretary, which he took with him at the end of his term as Governor-General, was confidential[299].

259 In addition to the weakness of the precedents, there is also the lack of evidentiary support for the submission that the behaviour of the relevant actors is attributable only to a belief in an underlying norm that the original correspondence was personal and was not official. For instance, even if Sir Paul Hasluck believed that he held property rights to the exclusion of the Commonwealth in the personal and confidential correspondence between him and the Queen during his tenure as Governor-General, there is no evidence to suggest that he saw those property rights as arising due to an understanding that correspondence with the Queen must be treated as non-institutional. A similar point was made by the Director-General of the Australian Archives in evidence to a committee consideration of the draft *Archives Bill* about the practice of public servants and Ministers in treating official papers as if they were personal records. Even if this were not done knowingly, the

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297 Twomey, "Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention", in Varuhas and Stark (eds), *The Frontiers of Public Law* (2019) 399 at 410-411.

298 Twomey, "Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention", in Varuhas and Stark (eds), *The Frontiers of Public Law* (2019) 399 at 410.

299 *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1 at 14 [23].

Ministers could not be said to have reached a conclusion by critical reflection. The Director-General said this[300]:

> "The papers of Lord Bruce, for example, are called personal papers. They are copies of every cable sent by Bruce and received by Bruce while he was in office in London, every record of conversation he had with every ambassador and with every British official, and of records, of which he should never have made, of debates which took place in the British War Cabinet. There is nothing whatsoever private or personal about them. They are copies of official records and in the [*Archives Bill*] sense they are copies of Commonwealth records ... Many other Ministers have followed this practice and they have kept in their offices complete sets of copies of correspondence crossing their desk".

In the report of the Committee the view of the Australian Archives was recorded that "in many of the collections of personal papers of former ministers and officials there were records which might be the property of the Commonwealth"[301].

260 Thirdly, there is "no adequate reason" for the convention proposed by the respondent[302]. No coherent principle could justify a convention that title to the originals of final correspondence, created and received as part of official duties, should vest in a holder of high public office to the exclusion of the Commonwealth. The principle of loyalty which underlies public office, and which precludes public officers from benefiting personally from their office[303], points to the opposite conclusion. Indeed, as the appellant observed, the effect of the convention suggested by the respondent is that the more controversial the correspondence the more wealth that would be created for the Governor-General.

261 The respondent relied upon a letter, dated 1 February 2017 and written in an attempt to clarify the position prior to the trial in this matter, from the Official

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300 Australia, Senate, Standing Committee on Education and the Arts (Reference: Archives Bill) 1978-79, *Official Hansard Transcript of Evidence* (1979) at 42-43.

301 Australia, Senate Standing Committee on Education and the Arts, *Report on the Archives Bill 1978* (1979) at 9 [3.9].

302 Twomey, "Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention", in Varuhas and Stark (eds), *The Frontiers of Public Law* (2019) 399 at 411.

303 For instance, see *The Earl of Devonshire's Case* (1607) 11 Co Rep 89a [77 ER 1266]; *Hornsey Urban Council v Hennell* [1902] 2 KB 73 at 80; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330. See also *Re Day [No 2]* (2017) 263 CLR 201 at 250-251 [174]-[179], 272-273 [270]-[271].

Secretary to the Governor-General to the Private Secretary to the Queen. In that letter, the Official Secretary said that his understanding was that "it is a matter of long-standing convention that non-official correspondence between the Monarch and Her Governors-General across the 15 Realms outside the United Kingdom are private and confidential communications, not forming part of any official government records". It was asserted that the reason for the convention was to enable the communication between the Queen and the Governor-General to be in confidence and thereby to permit and facilitate such communication. The reply from the Private Secretary to the Queen was no doubt written with considerable care and with the expressed permission for the letter to form part of the "official submissions to the Court". It did not acknowledge that the communications were "non-official" or that they did not form part of any official government records. The convention to which the Private Secretary referred was "a convention of confidentiality ... necessary to protect the privacy and dignity of the Sovereign and her Governors-General, and to preserve the constitutional position of the Monarch and the Monarchy".

262 The confidentiality of the correspondence to which the Private Secretary referred is entirely consistent with the marking of the correspondence between the Queen and the Governor-General as "personal and confidential". That labelling convention was explained in documentary exhibits from trial concerning correspondence from State Governors to the Queen through the relevant Secretary of State on general affairs in the State. The labelling convention was explained as requiring the use of "confidential" to describe correspondence which, although part of official despatches on general affairs in the State, contained the views of the Governor and not of their Ministers and the use of "personal and confidential" to describe correspondence that was confidential and also contained personal observations of a general nature.

263 Confidentiality is not a reason that could justify a convention that correspondence passing between the Governor-General and the Queen is never created or received by the Governor-General officially nor retained as part of the institution of the official establishment of the Governor-General. Whether or not the correspondence is created or received officially, and whether or not it is retained institutionally, the confidentiality of such correspondence is protected by the general law of confidence[304]. It is also protected by the categories of exemption to which Senator Hamer referred during the hearings concerning the *Archives Bill* before the Senate Standing Committee, including as "information or matter the disclosure of which under [the *Archives Act*] could reasonably be expected to cause

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304 *Earl of Lytton v Devey* (1884) 54 LJ Ch 293 at 295, citing *Pope v Curl* (1741) 2 Atk 342 at 342 [26 ER 608 at 608].

damage to the ... international relations of the Commonwealth"[305] or as "information or matter the disclosure of which under [the *Archives Act*] would constitute a breach of confidence"[306]. That protection, however, is neither absolute nor perpetual.

264 The labelling convention of "personal and confidential" is also not inconsistent with a characterisation of the correspondence as official or with its retention institutionally. Indeed, the trial exhibits in this matter include correspondence, disclosed under the open access provisions of the *Archives Act*, between Sir Paul Hasluck, the Governor-General prior to Sir John Kerr, and the Private Secretary to the Queen concerning quintessentially institutional matters such as the employment relationships in the official establishment of the Governor-General. That correspondence was marked "Personal and Confidential". And even if it was once confidential it is no longer so: "a person who sends a communication to a public officer, relative to the public business, cannot make his communication private and confidential simply by labeling it as such. The law determines its character, not the will of the sender."[307]

Extreme consequences

265 The respondent submitted that a legal rule to govern the application of the meaning of "property" was needed because the consequence of permitting title to the original correspondence to be held by the Commonwealth would be that the correspondence "could be inspected within government and/or publicly released at any time of the Government's choosing". The implicit suggestion that information about which the Queen has rights to confidence might be publicly released by the executive in breach of duties of confidence upon which the Queen imparted the information, or that the executive would assert the property right of the Commonwealth as a body politic to discover the content of the correspondence at any time of the executive's choosing, is the type of extreme consequence that is of little assistance in the interpretation of legislative provisions[308].

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305 *Archives Act*, s 33(1)(a). See Australia, Senate, Standing Committee on Constitutional and Legal Affairs (Reference: Freedom of Information), *Transcript of Evidence*, 13 December 1978 at 714-715.

306 *Archives Act*, s 33(1)(d).

307 *Egan v Board of Water Supply of New York* (1912) 98 NE 467 at 470.

308 See *Love v The Commonwealth* (2020) 94 ALJR 198 at 289 [455] and the authorities cited there; 375 ALR 597 at 711-712.

266 In any event, it could hardly be supposed that confidences would be more likely to be protected if title to the correspondence were held privately, to the exclusion of the Commonwealth, so that the Governor-General personally could sell, publish or distribute the correspondence at any time. The respondent correctly observed that "no responsible Governor-General would ever do such a thing". But the reason this would not occur in Australia is the duty of loyalty that exists for original records kept of correspondence sent or received. This duty contrasts with the position in the United States, where Presidents do not regard themselves as "trustees for the American people" so that, absent voluntary arrangements for a Presidential Library, the institutional correspondence of a President can be sold "for a fancy sum" or can be the subject of arrangements, such as in the case of President Monroe, for publication with the profits to be divided among his daughters and son-in-law[309].

Conclusion

267 Orders should be made as follows:

1. Appeal allowed.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 8 February 2019 and, in their place, order that:

    (a) the appeal to the Full Court be allowed;

    (b) the orders of Griffiths J made on 16 March 2018 be set aside and, in their place, it be:

        (i) declared that the contents of Record AA1984/609 ("the deposited correspondence") constitute Commonwealth records within the meaning of the *Archives Act 1983* (Cth);

        (ii) ordered that a writ of mandamus issue to compel the Director-General of the National Archives of Australia to reconsider Professor Hocking's request for access to the deposited correspondence; and

        (iii) ordered that the Director-General of the National Archives of Australia pay Professor Hocking's costs at first instance; and

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309 *Nixon v United States* (1992) 978 F 2d 1269 at 1278.

(c) the Director-General of the National Archives of Australia pay Professor Hocking's costs of the appeal to the Full Court.

3. The Director-General of the National Archives pay Professor Hocking's costs of this appeal.