

# Royal correspondence comprises Commonwealth records

Ahmed Rizk reports on *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19

The High Court has determined that correspondence between the former Governor-General of Australia, Sir John Kerr, and Queen Elizabeth II, known as the 'Palace Letters', comprises 'Commonwealth records' for the purposes of the *Archives Act 1983* (Cth) (Act) and therefore was not exempt from an application for public access under the Act. In doing so, the High Court has clarified the scope of the definition of 'Commonwealth records' under the Act.

## Background

Sir John Kerr held the office of Governor-General of the Commonwealth of Australia from 11 July 1974 until 8 December 1977. Throughout this period, Sir John engaged in what was marked as 'personal and confidential' correspondence with the Queen. This included the period in which Sir John dismissed Gough Whitlam as the Prime Minister of Australia on 11 November 1975.

Following Sir John's retirement, a sealed package containing copies of the correspondence exchanged by Sir John and the Queen was collated and held by the Official Secretary to the Governor-General. This package of correspondence constituted what became known as the 'Palace Letters'. Most, but not all, of the Palace Letters addressed 'topics relating to the official duties and responsibilities of the Governor-General'.

With the knowledge (and encouragement) of Sir John, the Palace Letters were then deposited with the Australian Archives. The Palace Letters were lodged by the Official Secretary to the Governor-General, under cover of a letter expressing Her Majesty's 'wishes' and Sir John's 'instructions' that the contents should remain 'closed' for 60 years from Sir John's date of retirement, so as not to be available for public access until after 8 December 2037. There was a further caveat that the Palace Letters should only be released following consultation between the reigning sovereign's private secretary and the incumbent Governor-General's Official Secretary. 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.

## The Act

Subsequent to the Palace Letters being deposited with the Australian Archives, the legislative scheme governing the release of Commonwealth records was altered upon the commencement of the Act, on 6 June 1984.

With the enactment of the Act, 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 (Archives), the powers of which are exercisable by the Director-General of the Archives (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, among other things, the history or government of Australia.

In accordance with the Act, subject to exceptions that were not in issue in these proceedings, 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 relevant open access period for the Palace Letters was 31 years after the year of their creation. There is no requirement for public access to be granted by the Director-General for archival resources of the Commonwealth that are not 'Commonwealth records'.

## History of Claim

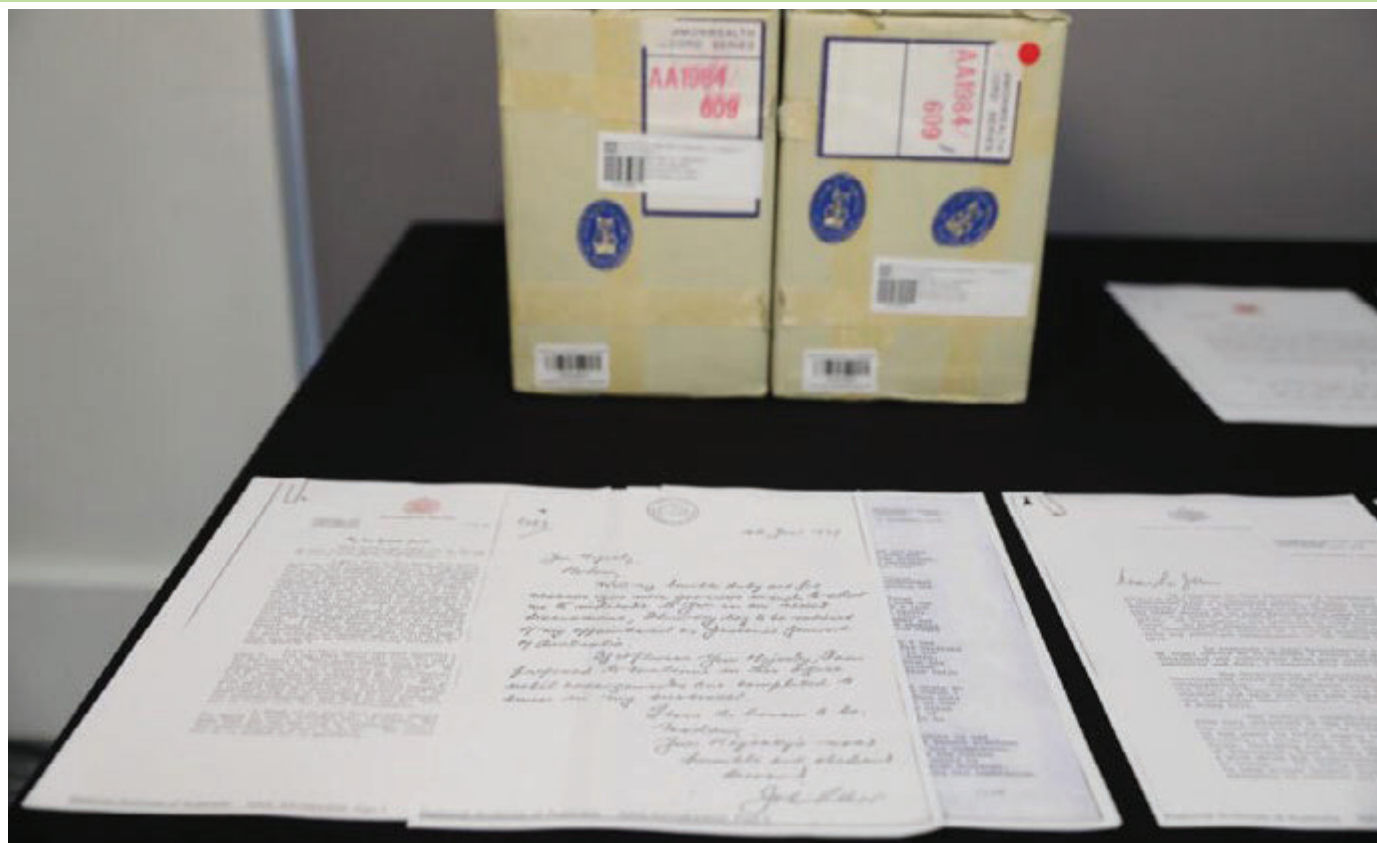
On 31 March 2016, Professor Jennifer Hocking, an academic historian and writer, requested access to the file within the custody of the Archives which contained the Palace Letters. On 10 May 2016, the Director-General rejected her request for access on the basis that the contents of the file were not Commonwealth records under the Act. That characterisation of the deposited correspondence was upheld by the Federal Court, at first instance (Griffiths J) and on appeal by a majority of the Full Court (Allsop CJ and Robertson J, Flick J dissenting). Professor Hocking then appealed to the High Court.

## Issue for determination

The key issue in the appeal was whether the Palace Letters, as held by the National Archives, comprised 'property of the Commonwealth or of a Commonwealth institution' and therefore were within the scope of the definition of Commonwealth records for the purposes of the Act.

The Director-General submitted that in the course of their correspondence, neither the Governor-General nor the Queen wrote as an emanation of the Commonwealth body politic. In those circumstances, the Director-General submitted that the 'personal and confidential' labelling of the 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. Accordingly, 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.

Conversely, Professor Hocking submitted 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.



## Decision

By a 6:1 majority, the High Court found that the Palace Letters constitute 'Commonwealth records', and ordered a writ of mandamus to compel the Director-General to reconsider Professor Hocking's request for access to these documents.

In their joint judgment, Kiefel CJ and Bell, Gageler and Keane JJ, held, contrary to the arguments of the parties, that the outcome of the appeal did not turn on who might have been the true owner of the correspondence at common law or on expectations held at the time of the deposit of the correspondence with the Australian Archives by reference to constitutional convention or otherwise.

Instead, the appeal turned on the construction and application of the elaborate statutory definition of Commonwealth record in the Act.<sup>1</sup> This was so even if the conclusion from that analysis ran counter to the current understanding of the Private Secretary to the Queen, the Director-General and the Official Secretary to the Governor-General, and to the present expectations of the Queen, about the timing of public access to the Palace Letters. That was simply a product of legislative choices to introduce the Act in its current form and the application of the Act, properly interpreted, to the historical circumstances.<sup>2</sup>

In their Honours' view,<sup>3</sup> where the Commonwealth (as a body politic) or a 'Commonwealth institution' (which is defined in the Act to include the official establishment of the Governor-General), has physical custody and lawful power of control of a record, that would suffice to make that

record property of the Commonwealth (or of a Commonwealth institution) for the purposes of the Archives Act.

Their Honours further held<sup>4</sup> that the arrangement by which the correspondence was kept by the Official Secretary to the Governor-General and then deposited with the Archives demonstrated that lawful power to control the custody of the correspondence lay with the Official Secretary, an office squarely within the official establishment of the Governor-General. A relevant factor in this determination was that notwithstanding the 'personal' labelling applied to the correspondence, their Honours did not accept that the correspondence could appropriately be described, however loosely, as private or personal records of the Governor-General. It was held in the joint judgment that 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.<sup>5</sup>

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 was sufficient to lead to the ultimate conclusion that each item of the deposited correspondence constituted a Commonwealth record under the Act.

Kiefel CJ and Bell, Gageler and Keane JJ held also that even if Sir John were the true owner of the Palace Letters, the mere existence of any such ownership rights would not have altered the conclusion that the documents were Commonwealth records, in light of the circumstances in which the documents had been deposited with the Archives.<sup>6</sup>

Justice Gordon, while agreeing with the joint judgment, separately addressed the construction of the Act. Justice Gordon held that even if Sir John did have some property interest in the Palace Letters, he gave up that interest by encouraging the then Official Secretary to retain custody of the documents and then deposit them with the Archives.<sup>7</sup> While also agreeing with the conclusion of the majority, Justice Edelman held that the letters were created or received officially and were kept as institutional documents to the exclusion of others. On that basis, the correspondence comprised property of the Commonwealth.<sup>8</sup> Justice Nettle dissented on the basis that the communications were personal correspondence of Sir John and could not be characterised as property of the Commonwealth or of a Commonwealth institution.<sup>9</sup> **BN**

## ENDNOTES

- 1 [2020] HCA 19 at [7].
- 2 [2020] HCA 19 at [122]-[123].
- 3 [2020] HCA 19 at [92]-[102].
- 4 [2020] HCA 19 at [116].
- 5 [2020] HCA 19 at [117].
- 6 [2020] HCA 19 at [118], [120].
- 7 [2020] HCA 19 at [180]-[181], [186]-[187].
- 8 [2020] HCA 19 at [199].
- 9 [2020] HCA 19 at [162].