

HOCKING v DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA (S262/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 12

Date of judgment: 8 February 2019

Special leave granted: 16 August 2019

At issue in this appeal is whether certain documents (“the Records”) held by the National Archives of Australia (“the Archives”) are “*property of the Commonwealth*” and are therefore “*Commonwealth records*” for the purposes of the *Archives Act 1983* (Cth) (“the Archives Act”).

The Records include the originals (and copies) of correspondence between the then Governor-General Sir John Kerr (or his Official Secretary) and Queen Elizabeth (or her Private Secretary) from 15 August 1974 to 5 December 1977. The then Official Secretary to the Governor-General lodged the Records with the Archives on 26 August 1978 with the instruction that they were to remain closed until 2037. (That date was later changed to 2027.) Thereafter they could only be released following consultation between the reigning Sovereign’s Private Secretary and the incumbent Governor-General’s Official Secretary.

The Appellant’s request for access to the Records was refused by the Archives on 10 May 2016. The refusal letter stated that the Records were not *Commonwealth records* and were not therefore subject to the access provisions of the Archives Act.

Relevantly s 3(1)(a) of the Archives Act defines “*Commonwealth record*” as meaning a record that is the property of the Commonwealth or of a Commonwealth institution. It does not however include exempt material and the term “property” is not defined. A “Commonwealth institution” does however include “the official establishment of the Governor-General” and “an authority of the Commonwealth”.

On 16 March 2018 Justice Griffiths dismissed the Appellant’s application seeking a declaration that the Records were *Commonwealth records*. On 8 February 2019 the Full Federal Court (Allsop CJ & Robertson J; Flick J dissenting) also dismissed the Appellant’s subsequent appeal, with the majority finding that the relationship between the Queen and the Governor-General was essentially a personal one. The majority then held that the Records were the personal property of Sir John Kerr and not that of the Commonwealth.

Justice Flick however disagreed strongly with the majority and concluded that the Records, as whole, were in fact *Commonwealth records*. His Honour reached that conclusion by reference to the following factors:

- a) The positions occupied by the Queen and the Governor-General;
- b) The functions being discharged by the Governor-General;
- c) The nature of the correspondence;

- d) The subject matters being addressed; and
- e) The importance of that subject matter to the Constitutional system of government of this country.

Justice Flick held that to regard those documents as Sir John Kerr's personal property was a conclusion which could not be supported.

The grounds of appeal are:

- The majority erred at FC [97] in reasoning that the Records are constituted by documents, none of which are the property of the Commonwealth because they were each created or received by Sir John Kerr acting personally and not officially.
- The majority erred by reasoning at FC [95] and [102] that the Archives Act does not include within the defined term "Commonwealth record" records which, while they are the property of the Commonwealth, are the personal or private records of the Governor-General.

On 29 August 2019 a Notice of Constitutional matter was filed. On 14 October 2019 the Attorney-General of the Commonwealth filed a Notice of Intervention in this matter.