



HIGH COURT OF AUSTRALIA

29 May 2020

HOCKING v DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA
[2020] HCA 19

Today the High Court by majority allowed an appeal from a judgment of the Full Court of the Federal Court of Australia. The appeal concerned the question of whether correspondence between the former Governor-General of Australia, Sir John Kerr, and Her Majesty Queen Elizabeth II in the custody of the National Archives of Australia ("the Archives") was constituted by "Commonwealth records" for the purposes of the *Archives Act 1983* (Cth) because the correspondence was "the property of the Commonwealth or of a Commonwealth institution".

Pursuant to the *Archives Act*, the Archives has responsibility for the "care and management" of "the archival resources of the Commonwealth". Section 3(2) of the *Archives Act* defines the archival resources of the Commonwealth as consisting 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". A "Commonwealth record" is defined in s 3(1) as including "a record that is the property of the Commonwealth or of a Commonwealth institution". "Commonwealth institution" is defined as including "the official establishment of the Governor-General". Subject to exceptions, 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", which for a Commonwealth record created before 1980 is 31 years after the date of creation. There is no requirement for public access to archival resources of the Commonwealth that are not Commonwealth records.

The correspondence was exchanged throughout the period of Sir John Kerr's term of office as Governor-General and was described as personal and confidential. In 1978, on the instructions of Sir John Kerr, the correspondence was deposited with the Archives (then known as the Australian Archives) by Mr David Smith, the Official Secretary to the Governor-General, in fulfilment of an arrangement he had made with the Director-General of the Archives ("the Director-General"). In 2016, Professor Jennifer Hocking requested access to Record AA1984/609, which contained the deposited correspondence. That request was rejected by the Director-General on the basis that Record AA1984/609 did not contain Commonwealth records. An argument that the deposited correspondence was not the property of the Commonwealth but was private or personal to Sir John Kerr was accepted by the Federal Court at first instance and by a majority of the Full Court on appeal.

In the High Court, the majority held that the correspondence was constituted by Commonwealth records because it was the property of the Commonwealth or of a Commonwealth institution, namely the official establishment of the Governor-General. Five Justices in the majority held that in the statutory context of the *Archives Act* the term "property" connoted the existence of a relationship in which the Commonwealth or a Commonwealth institution had a legally endorsed concentration of power to control the custody of a record. Their Honours held that the arrangement by which the correspondence was kept by Mr Smith and then deposited with the Archives demonstrated that lawful power to control the custody of the correspondence lay with the Official Secretary, an office within the official establishment of the Governor-General, such

that the correspondence was the property of the official establishment. The other Justice in the majority held that the correspondence was, by common law concepts of property employed in the *Archives Act*, the "property of the Commonwealth" because it had been created or received officially and kept by the official establishment of the Governor-General.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*