

Before the High Court

Hocking v Director-General of the National Archives of Australia: Can Kerr's Correspondence with the Queen Be Kept Secret Forever?

Anne Twomey*

Abstract

For decades, there has been much speculation over the contents of the correspondence between the Governor-General, Sir John Kerr, and the Queen concerning the dismissal of the Whitlam Government in 1975. This appeal to the High Court of Australia concerns whether these documents are 'Commonwealth records' that must be released to the public in accordance with the *Archives Act 1983* (Cth), or are the private property of the former Governor-General, with access controlled by the Queen. The answer turns on whether the documents are the 'property' of the Commonwealth or a Commonwealth institution. The Full Federal Court of Australia held that these documents were Kerr's personal property and that he therefore controlled the conditions of access to them. The appellant argues that the documents were made in the course of exercising official Commonwealth functions and are the property of the Commonwealth. This column contends that 'property' must be interpreted consistently with the purposes of the Act and accordingly includes documents created by the highest officers of the nation in the exercise of their official functions.

I Introduction

Nearly all documents concerning the dismissal of the Whitlam Government in 1975 have been released by the National Archives of Australia ('NAA'), including the personal records and notes of the Governor-General of Australia, Sir John Kerr. The last remaining records of note are the 'Kerr–Palace correspondence' between Sir John and the Queen leading up to, and in the aftermath of, the dismissal.

The Kerr–Palace correspondence, which occurred between 15 April 1974 and 5 December 1977, is held by the NAA. Section 31 of the *Archives Act 1983* (Cth) ('*Archives Act*') requires the NAA to give public access to any Commonwealth record that is in the open access period, is in the care of the NAA and is not an exempt record. The open access period for the Kerr–Palace correspondence commenced on 1 January, 31 years after the year they were created — that is, on 1 January 2005, 2006, 2007 or 2008, depending on the date of the document.

* Professor of Constitutional Law, Sydney Law School, University of Sydney, New South Wales, Australia. Email: anne.twomey@sydney.edu.au; ORCID iD: 0000-0002-8921-1730.

Even though these documents are in the care of the NAA and in the open access period (and no claim of exemption has yet been raised), the NAA has refused to release them for public access. This is because they were treated by the NAA as personal and private documents, rather than Commonwealth records.

*Hocking v Director General of the National Archives of Australia*¹ involves a legal challenge to this decision. Both the Federal Court of Australia at first instance² and the Full Federal Court of Australia on appeal³ held that the documents were ‘personal’ communications, not ‘Commonwealth records’, and that the NAA was therefore entitled not to release them. The appellant was granted special leave to appeal these decisions to the High Court of Australia.⁴

II The Nature of the Correspondence

Neither of the courts below viewed the Kerr–Palace correspondence, so it was discussed in the judgments in the abstract.⁵ Nonetheless, some observations can be made about the likely nature of it, given knowledge of comparable correspondence between the Queen and her vice-regal representatives, including in relation to exercises of the reserve powers.⁶

All correspondence between a vice-regal officer and the Sovereign goes through the Sovereign’s Private Secretary. This is because the correspondence is ‘official’ in nature, not personal. The Kerr–Palace correspondence will therefore not contain any letters from the Queen setting out her views. The agreed facts note that the correspondence from the Queen’s side is ‘by means of Her Private Secretary’.⁷

From the Palace side, the letters are most likely to contain short notes from the Private Secretary, thanking the Governor-General for updating the Queen, encouraging him to continue to do so, expressing solicitude for the difficult circumstances in which he finds himself, and perhaps querying some points he has made or seeking further information.

In the United Kingdom (‘UK’), any correspondence from the Queen’s Private Secretary that found its way onto government files (including correspondence with the Foreign Office and the UK Prime Minister addressing constitutional crises in Commonwealth countries) was routinely publicly released under the 30-year rule.⁸

¹ High Court of Australia, Case No S262/2019.

² *Hocking v Director-General of the National Archives of Australia* (2018) 255 FCR 1, 29 [107] (Griffiths J) (*Hocking (FCA)*).

³ *Hocking v Director-General of the National Archives of Australia* (2019) 264 FCR 1, 18 [86], 20 [99], 21 [107] (Allsop CJ and Robertson J) (*Hocking (FCAFC)*).

⁴ Transcript of Proceedings, *Hocking v Director-General of the National Archives of Australia* [2019] HCATrans 160.

⁵ Note the discussion by Flick J of the unsatisfactory consequences, as some documents, if examined, might be characterised as ‘personal property’ while others, such as newspaper clippings and reports to the Queen might not: *Hocking (FCAFC)* (n 3) 24 [118] (Flick J, dissenting).

⁶ For examples of what is included in such correspondence, see Anne Twomey, ‘Constitutional Law: The Queen’s Letters’ (2019) 93(4) *Australian Law Journal* 267.

⁷ *Hocking (FCAFC)* (n 3) 11 [46].

⁸ This was the case until the law was altered by the *Constitutional Reform and Governance Act 2010* (UK). See the discussion of the history of the secrecy of royal correspondence in: Anne Twomey,

Hence, all such correspondence was carefully written with an eye to publication in the long run.⁹

From Kerr's side, the letters will contain reports upon the political situation in Australia, including newspaper clippings and other relevant documents. It was part of vice-regal duty to report regularly (usually quarterly) to the Sovereign about political, economic, agricultural, industrial and social matters within the jurisdiction, with special reports being made in relation to events of importance, such as elections, national disasters and constitutional crises.¹⁰ The purpose was to ensure that the Sovereign was well informed in fulfilling her constitutional and symbolic functions with respect to the Realm concerned. Hence, all parties were acting in the fulfilment of their constitutional offices by participating in the correspondence.

Kerr's correspondence will also contain an explanation and justification of his actions in dismissing the Whitlam Government. This is because the Governor-General, as the representative of the Queen, under s 2 of the *Australian Constitution*, is obliged to report to her regarding any exceptional exercise of the powers of the office.

This duty of vice-regal officers was previously set out in *Royal Instructions*, which provided that if a vice-regal officer acted in opposition to the opinion of his ministerial advisers, he had to report 'the matter to Us without delay, with the reasons for his so acting'.¹¹ Even without such formal instructions, this obligation continues to apply to vice-regal officers. For example, when the Governor-General of Pakistan dismissed his Government in 1953 and failed to send a report to the Queen justifying his action, he was swiftly reminded of his obligation to do so. The Governor-General's subsequent report and the Queen's Private Secretary's comment on it are all publicly available on the relevant file in the UK National Archives, released under the 30-year rule.¹²

Accordingly, Kerr was obliged, as part of his official duties, to report to the Queen on any exercises of his powers that were taken contrary to the advice of his responsible ministers. The Kerr–Palace correspondence would contain that report.

'Peering into the Black Box of Executive Power: Cabinet Manuals, Secrecy and the Identification of Convention' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart, 2019) 399, 402–8.

⁹ Note that the Royal Family's website says: 'Papers that originate in the Royal Household but are held by bodies subject to the *Public Records Act 1958*, for example The National Archives, are public records.' 'Information held by bodies subject to the *Public Records Act*', Freedom of Information (Web Page) <<https://www.royal.uk/freedom-information>>.

¹⁰ See, eg, in the UK National Archives: 'Governor-General, West Indies: Periodic Reports 1960–1961' (CO 1031/4159); 'Governor-General's Report, Federation of Nigeria 1960' (CO 554/2479); 'Western Australia: Governor's Quarterly Reports 1948–1952' (DO 35/3196); 'Victoria: Governor's Quarterly Reports 1951–1952' (DO 35/3195), which also included a report on the Governor's exercise of a reserve power in 1952.

¹¹ See, eg, *Royal Instructions to the Governor of New South Wales*, 29 October 1900, cl VI.

¹² UK National Archives, 'Dismissal of Kwaja Nazimuddin's Government by Governor-General of Pakistan' (DO 35/5106).

III Private Collections and Commonwealth Records

The legal question in the *Hocking* case is relatively simple to identify, but difficult to answer. It is whether the Kerr–Palace correspondence, held by the NAA, is comprised of ‘Commonwealth records’ within the meaning of s 3(1) of the *Archives Act*. A ‘Commonwealth record’ is defined as ‘a record that is the property of the Commonwealth or a Commonwealth institution’. A ‘Commonwealth institution’ is defined as including ‘the official establishment of the Governor-General’, but not the Governor-General himself or herself.

There was much discussion in the lower courts of the practice of past Governors-General taking such correspondence with them on leaving office. Griffiths J in the Federal Court observed that this was ‘redolent of ownership’.¹³ But the practice of senior office holders, such as Prime Ministers, Ministers, and Governors-General, taking with them copies of documents that relate to their time in office, is relatively common. It does not necessarily involve a transfer of property from the Commonwealth to the officer concerned.

These documents are often later deposited in a governmental institution, such as the National Library,¹⁴ a state library,¹⁵ the NAA, or a university.¹⁶ They usually contain a mix of private and official papers. Access to the papers is generally governed both by conditions imposed by the donor of the documents and conditions imposed by legislation in relation to the release of official documents.

In the case of the NAA, this is dealt with by ss 6(2) and (3) of the *Archives Act* as follows:

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

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

These provisions recognise that private collections of records that are deposited with the NAA may indeed include Commonwealth records. This was also

¹³ *Hocking (FCA)* (n 2) 31 [117] (Griffiths J).

¹⁴ See, eg, the Papers of Edmund Barton, James Scullin, Lord Hopetoun, Lord Tennyson, Lord Dudley, Lord Denman, Sir Ronald Munro Ferguson, Lord Stonehaven, Sir Isaac Isaacs, Lord Gowrie, Sir Paul Hasluck, Sir Zelman Cowen, Sir Ninian Stephen and Bill Hayden.

¹⁵ See, eg, the correspondence between Sir Philip Game and King George V regarding the Lang dismissal, in the State Library of New South Wales.

¹⁶ See, eg, the Whitlam Institute at Western Sydney University, the Bob Hawke Prime Ministerial Library at the University of South Australia, the John Curtin Prime Ministerial Library at Curtin University, the Malcolm Fraser Collection at the University of Melbourne and the Howard Library at the Museum of Australian Democracy.

noted in the Explanatory Memorandum to the *Archives Act*, which stated that the purpose of s 6(3) 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’.¹⁷

Mere possession of those records by individuals does not cause them to cease being the property of the Commonwealth. Nor does any practice or custom of an officeholder taking such records with him or her on leaving office have that effect. Equally, private lodgement of those documents with the NAA does not cause all the documents lodged to be regarded as non-Commonwealth records that are exclusively controlled by the wishes of the depositor.

Where a record is a Commonwealth record, the access requirements in Part V of the *Archives Act* override any conditions imposed by the donor. A Commonwealth record cannot be released prior to coming into the open access period, and *must* be released (subject to any exemption) after coming into the open access. This is not something that the conditions imposed by the donor can affect.

For example, if one gains the permission of a former Minister to access his or her private papers, lodged with the NAA, one is informed that most, if not all, of the documents will be Commonwealth records and cannot be accessed until the requisite confidentiality period for Commonwealth records has expired and the documents have been scrutinised for any additional exempt material.

It is therefore not sufficient, in responding to a request for access to privately lodged documents, for the NAA to state that the conditions of lodgement do not permit access. The NAA must also assess whether any of those documents is a Commonwealth record and apply the law accordingly. That is why the determination of whether such correspondence amounts to the property of the Commonwealth is critical to the *Hocking* case.

IV Property in Commonwealth Records

The issue of whether the Commonwealth holds property in the Kerr-Palace correspondence that is currently in the care and custody of the NAA, is a difficult one. When it comes to letters written in the course of official duties, a number of questions arise. Should one look to:

- ownership of the piece of paper on which the letter is written;
- copyright in the original work;
- the rights of senders and recipients of letters;
- the capacity in which the letter was written;
- the understanding of the author and recipient as to ownership;
- the relationship between the author and recipient; or
- who currently possesses the letter?

¹⁷ Explanatory Memorandum, Archives Bill 1983 (Cth) 12.

The submissions of the respondent helpfully explain the complicated law with respect to the ownership of letters generally.¹⁸ But in this case, the key issue is what the *Archives Act* meant in its reference to ‘property’ of the Commonwealth and how that should be interpreted consistent with the purposes of the Act.

There are various ways in which archival legislation can identify the documents to which it applies, including by reference to provenance (was it created by or received by the Commonwealth?) or custody (is it currently under the custody and control of the Commonwealth?). But the Commonwealth chose instead to rely on the concept of ‘property’ due to the greater clarity of its legal meaning.¹⁹ As this case shows, that was wishful thinking.

A majority of the Full Federal Court rejected the argument that the correspondence was a Commonwealth record because it was created in the exercise of the official duties of the Governor-General and the Queen of Australia. The Court did so because this would introduce ‘an administrative provenance definition’, which had previously been rejected in the drafting of the Act.²⁰ But it is difficult to see how provenance and custody (or ‘possession’) are not relevant to determining ownership of correspondence. Who created a document, the capacity in which they acted when they created it, and the person who currently possesses it, would all appear to be relevant factors in determining who holds property in it.

The majority of the Full Federal Court went on to say that

[n]o doubt some of the records written by the Governor-General would be the property of the Commonwealth and one general example may be records of the exercise by the Governor-General of the executive power of the Commonwealth within the meaning of s 61 of the *Constitution*.²¹

Yet this brings provenance back into play in determining ‘property’. If a document recording the Governor-General’s exercise of the executive power to dismiss the Prime Minister is regarded as a Commonwealth record, then how is the record of the reasons for so acting, sent by the Governor-General to the person he represents and whose executive power he exercises, not also a Commonwealth record? At the very least, the making of the document is incidental to the exercise of executive power. It is not a mere ‘personal’ reflection that ‘relates’ to the exercise of a power, such as an entry in a personal diary.²² Such correspondence fulfils a formal duty of the Governor-General to report to the Monarch and ensure that the Monarch is sufficiently informed to be able to fulfil his or her role with respect to Australia.

Two justifications were given by the Full Federal Court, neither of which were convincing. The first was that correspondence with the Queen is different because the Queen is not able to act in relation to what she is told or to direct the

¹⁸ Director-General of the National Archives of Australia and Attorney-General (Cth), ‘Joint Submissions of the Respondent and Attorney-General for the Commonwealth’, Submission in *Hocking v Director-General of the National Archives of Australia*, Case No S262/2019, 1 November 2019, [13]–[17].

¹⁹ *Hocking (FCAFC)* (n 3) 7 [26], 13 [62] (Allsop CJ and Robertson J).

²⁰ *Ibid* 18 [86] (Allsop CJ and Robertson J).

²¹ *Ibid* 19 [91] (Allsop CJ and Robertson J).

²² Compare *ibid* 18 [89] (Allsop CJ and Robertson J).

Governor-General.²³ It is true that the Queen, at least according to convention, could only dismiss the Governor-General if she was advised by the Australian Prime Minister to do so.²⁴ Her Majesty also could not reverse the exercise by the Governor-General of a power that is expressly conferred upon the Governor-General by the *Australian Constitution*, such as the power in s 64 to appoint and remove the Prime Minister. But what was not clear from the Full Federal Court judgment was why this inability to discipline or override affected property in the correspondence.

It would seem implausible that a letter written by the Prime Minister to a State Premier would not be a Commonwealth record simply because neither could discipline nor override the actions of the other. The power relationship between the sender and recipient of the letter would seem to have little relevance to the ownership of a letter if the letter was written in the course of exercising the functions or powers of a particular office.

The second justification given by the Full Federal Court was based on a policy reason. The respondent argued that if the correspondence between the Governor-General and the Queen comprised Commonwealth records, then a Prime Minister could choose to release them immediately and that this was a possibility ‘that should not lightly be embraced’.²⁵ A majority of the Court accepted that view.²⁶

However, if the respondent and the majority of the Full Federal Court were correct, and such correspondence is personally owned by a former Governor-General or whoever inherits his or her property, then this person could immediately go to Sotheby’s and sell the correspondence for a large amount of money, making it immediately public or locking away Australian history in a private collection forever.

As the appellant noted in her submissions to the High Court, this would mean that the Governor-General could profit financially from the performance of his or her office, and that the profit would be greater the more controversial his or her actions were, creating a private financial incentive for the exercise of the reserve powers.²⁷

This would seem to fly in the face of the principles of responsible and representative government, which require Members of Parliament, Ministers and other officers of the Crown always to act in the public interest and never place themselves in a position where their private financial interest may be seen to conflict with their public duty. If, in 1977, Kerr had sold copies of his correspondence with

²³ *Hocking (FCAFC)* (n 3) 20 [97].

²⁴ Note that Her Majesty could still issue a ‘rebuke’ to the Governor-General (as she did to the Queensland Governor in 1975) or express support for the Governor-General’s conduct (as she did publicly in relation to the Governor-General of Fiji in 1987), or encourage particular conduct (as she did, through her Private Secretary, to the Governor of Queensland in 1987): see Anne Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (CUP, 2018) 787, 805, 275 (respectively).

²⁵ *Hocking (FCAFC)* (n 3) 13 [61] (Allsop CJ and Robertson J).

²⁶ *Ibid* 18 [88] (Allsop CJ and Robertson J).

²⁷ Jennifer Hocking, ‘Appellant’s Submissions’, Submission in *Hocking v Director-General of the National Archives of Australia*, Case No S262/2019, 4 October 2019, [38] (‘Appellant’s Submissions’).

the Queen for \$1 million, one cannot but imagine that the Commonwealth would have gone to court to argue that the documents were indeed Commonwealth records and not within the power of the Governor-General to sell.

The risk that a beneficiary under the will of a former Governor-General might sell such documents would seem to be far greater than the risk of the Commonwealth Government immediately exposing correspondence with the Sovereign, especially given that a Prime Minister must maintain a working relationship with both the Sovereign and the current Governor-General.

Commonwealth records are protected by both the *Archives Act* and the *Freedom of Information Act 1982* (Cth), with long periods of secrecy and exacting scrutiny to determine what exemptions may apply in relation to matters such as national security and international relations, before the records can be publicly released. Property owned by a former Governor-General is not subject to any particular legal protection from publication, no matter how damaging its release might be to the public interest. From a public policy point of view, it is far more dangerous to leave official correspondence between the Governor-General and the Queen in the hands of any impecunious relative of the former Governor-General who may have inherited it, than it is for it to be protected by law in Commonwealth archives.

In addition, there is a further policy argument that the purpose of the *Archives Act* is to preserve and make publicly available important Australian historical documents for the benefit of the nation.²⁸ The term ‘Commonwealth record’ should be applied in accordance with its natural and ordinary meaning, ‘read in the context and consistent with the purpose of the *Archives Act*’.²⁹ To the extent that there is any uncertainty as to who holds ‘property’ in official correspondence between the holders of the highest ranking offices of the Commonwealth of Australia, the Governor-General and the Queen of Australia, then an interpretation should be made in favour of preserving and making publicly available such correspondence for the benefit of the nation.

V The Conditions on Release of the Kerr–Palace Correspondence

The Kerr–Palace correspondence was lodged with the NAA by the Official Secretary to the Governor-General, David Smith, acting in his official capacity.³⁰ The NAA has stated that it ‘remains under the effective and immediate control of the Office of the Governor-General through the Official Secretary of the Governor-General’ and that the NAA has no ‘power or authority to give access to the record

²⁸ *Archives Act* s 2A.

²⁹ *Hocking (FCAFC)* (n 3) 23 [113] (Flick J, dissenting).

³⁰ *Ibid* 10 [42]. Note the argument that as he acted in his official capacity, the correspondence was lodged by a ‘Commonwealth institution’, being the official establishment of the Governor-General. This meant that s 6(2) of the *Archives Act* was not applicable, the conditions of lodgement were not binding, and the documents were in fact lodged as ‘Commonwealth records’. Note also that the *Archives Act* did not come into effect until after Kerr’s letters were deposited, so transitional provisions are relevant.

other than in accordance with the instrument of deposit and arrangements specified by the offices of the Queen and the Governor-General'.³¹

At the time the correspondence was lodged with the NAA, it was on the condition that the papers were to 'remain closed until 60 years after the end of [Kerr's] appointment as Governor-General' and 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'.³² This is a strong indication of the official (not personal) nature of the correspondence, because it is officials (not Kerr's personal representatives) who must be consulted before the documents are released.

In July 1991, the Queen, by way of a letter from the Official Secretary to the Governor-General, instructed that the secrecy period for the correspondence between herself and Sir John Kerr, Sir Ninian Stephen and Sir Zelman Cowen, be reduced to 50 years, but instead of them then being subject to release after 'consultation' with the Queen's Private Secretary and the Official Secretary to the Governor-General, the 'approval' of both was required.³³

This gave the Sovereign an absolute veto over the release of the correspondence. Kerr died in March 1991. The change in the conditions under which his correspondence was held appears to have been unilaterally made by the Queen, despite the fact that she neither deposited the documents nor held property in them.

The NAA also applied 'new arrangements decided by the Queen' to the records of other Governors-General, including those of Lord Casey, who was Governor-General from 1965 to 1969. Lord Casey's documents were lodged with the NAA by his daughter on 2 June 1992. The instrument of deposit stated that she understood that the provisions of the *Archives Act* would apply to any Commonwealth records contained in the deposit. It also stated that documents that would otherwise be exempt if they were Commonwealth records, such as those that would endanger national security or the safety of a person, would be exempt from public access until they had lost this sensitivity, and that other records would be made available for public access when 30 years old. The depositor imposed this 30-year period *after* the Queen had instructed the NAA on the 'new arrangements'.

Nonetheless, the 30-year period appears to have been unilaterally changed to comply with the Queen's instructions so that it was extended to 1 May 2019, 50 years after Casey's term as Governor-General ended.³⁴ This lengthened the confidentiality period by 20 years. In addition, a condition was added that public access could only occur with the 'approval' of the Sovereign's Private Secretary and the Official Secretary of the Governor-General. No such condition had been originally applied by the depositor.

³¹ *Hocking (FCAFC)* (n 3) 2 [4] quoting the letter from the NAA refusing access to the relevant files

³² *Ibid* 10 [43]. It appears that Smith imposed these conditions after consultation with the Palace and that Kerr was not certain of the detail of them: *Hocking (FCA)* (n 2) 12 [19]–[20], 30 [112] (Griffiths J).

³³ *Hocking (FCAFC)* (n 3) 10 [42].

³⁴ I am unaware of the depositor agreeing to alter the terms of the deposit, although it is possible this occurred. If so, the Queen was exercising soft power to achieve the same result as an exercise of hard power.

As the access period for Lord Casey's records opened in May 2019, approval was sought by the NAA to open the correspondence to public access. Approval was very recently refused by the Queen's Private Secretary.³⁵ He stated that approval would not be given for the release of the correspondence during the Queen's lifetime and for five years after the end of the Queen's reign. Even then, it would not be released without the approval of the Private Secretary of the new Sovereign. If the need for the approval of the Sovereign's Private Secretary for the release of such documents is legally binding, Australia's constitutional history concerning its relationship with the Queen is lost to Australian control, despite sitting in the custody of an Australian institution.

If these documents were the personal property of the former Governor-General, then only the depositor could have controlled access — not the Queen or the current Governor-General. As the appellant noted in her submissions, '[t]he Queen having such an entitlement was inconsistent with Sir John Kerr's personal ownership of the Records.'³⁶

The irony here is that a majority of the Full Federal Court accepted the view of the primary judge that the correspondence did not form Commonwealth records, because although the Governor-General is the representative of the Monarch, the Monarch cannot exercise executive power in Australia and has no capacity to direct the Governor-General.³⁷ Yet it is that very Monarch who has, through her Private Secretary, directed both the Governor-General and the NAA to change the conditions of access to documents in Australia under Australian law, so that the documents cannot be released in future without the agreement of her Private Secretary (who acts on her behalf), and who has now, again through her Private Secretary, refused access to the correspondence with Lord Casey.³⁸

In 2015, the then Prime Minister of Australia, Malcolm Turnbull, stated that he intended to advise the Queen to approve the release of the Kerr–Palace correspondence.³⁹ If he did so, the Queen refused to act upon his advice.

Turnbull's communications with the Queen, which would reveal whether he advised her to approve the release of the documents and whether she declined to act upon his advice, have been the subject of a freedom of information application. The Department of the Prime Minister and Cabinet refused to release this correspondence on the grounds that it would damage the international relations of the Commonwealth and the deliberative processes of the Government. The Australian Information Commissioner rejected the application of these exemptions

³⁵ Letter from Paul Singer MVO, Official Secretary to the Governor-General, to David Fricker, Director-General NAA, 20 December 2019, setting out the position of the Queen's Private Secretary, Mr Edward Young.

³⁶ *Appellanti's Submissions* (n 27) [53].

³⁷ *Hocking (FCAFC)* (n 3) 16 [75], 20 [96] (Allsop CJ and Robertson J). Note, to the contrary, that the Monarch can exercise executive power in Australia: *Royal Powers Act 1953* (Cth); *Australia Act 1986* (Cth) s 7(4). The Monarch can also issue Royal Instructions upon ministerial advice.

³⁸ It is not apparent that in either case action was taken with ministerial advice.

³⁹ Paul Kelly and Troy Bramston, 'Malcolm Turnbull's Bid to Unlock John Kerr's Letters', *The Australian* (Sydney, 9 November 2015); Paul Kelly, 'Malcolm Turnbull to Try Recovering John Kerr's Letters to Queen', *The Australian* (Sydney, 11 November 2015).

and found that it was in the public interest to release the correspondence.⁴⁰ The Administrative Appeals Tribunal overturned that finding, treating the correspondence as exempt on the two grounds claimed by the Commonwealth.⁴¹

Hence, whether the Queen refused to accept the advice of her Prime Minister to release the Kerr–Palace correspondence remains unknown. Knowledge of how the Queen exercises her powers in relation to Australia and whether, as is believed, she acts only upon the advice of her responsible ministers, is fundamental to an understanding of Australia’s constitutional system. No such understanding can exist if all evidence is locked behind secrecy laws for long or indefinite periods.

Although the conditions placed on the release of royal correspondence held by the NAA do not bear directly on whether such correspondence is comprised of Commonwealth records, they are still relevant for the following reasons. First, the degree of control exercised by the Queen suggests that, in practice, the letters have not been treated as the personal property of the Governor-General. Second, it shows the weakness in the argument that the Queen has no capacity to direct the Governor-General or exercise power in Australia. Third, the refusal by the Queen’s Private Secretary to approve the release of vice-regal correspondence, even after 50 years, shows that one consequence of a finding that such documents are not Commonwealth records will be the loss to the nation of control over records of national historical importance, contrary to the purposes of the *Archives Act*.

VI Conclusion

Secrecy of government records, for a reasonable period of time, is necessary to ensure the effective running of government and so that frank advice can be given when needed. But the value of that secrecy diminishes over time. At a point, it becomes oppressive and potentially toxic, creating distrust in the institutions of government and fuelling conspiracy theories. This is why secrecy periods have been progressively reduced over the last century, from 50, to 30 and now 20 years. Even the most sensitive of Commonwealth documents, the Cabinet Notebooks which record what was said in Cabinet Meetings, have had their secrecy period reduced from 50 to 30 years.

The same consideration has not been given to royal correspondence, fuelling corrosive speculation about what it may contain. While the appearance was given of reducing the period from 60 to 50 years in 1991, in fact the effect of this change was to introduce a complete veto by the Sovereign’s Private Secretary to any release. This has been recently evidenced by the refusal to release Lord Casey’s correspondence, despite the 50 years having passed. It also means that the Kerr–Palace correspondence is unlikely to be released in 2027, when 50 years have passed from the end of Sir John Kerr’s term as Governor-General.

⁴⁰ *William Summers and Department of the Prime Minister and Cabinet (Cth) (Freedom of Information)* [2018] AICmr 9, [52]–[53].

⁴¹ *Secretary, Department of Prime Minister and Cabinet (Cth) and Summers (Freedom of Information)* [2019] AATA 5537, [145]–[146].

Any rational person, if asked whether a letter from the Governor-General of Australia to the Queen of Australia, reporting upon and justifying the Governor-General's exercise of a reserve power, was a Commonwealth record or a personal letter, would answer that it was a Commonwealth record. To contend that it is a private and personal document defies common sense. As Flick J noted in his dissenting judgment in the Full Federal Court, it is 'difficult to conceive of documents which are more clearly "Commonwealth records" and documents which are not "personal" property'.⁴²

It would be a very poor policy choice for the Commonwealth to attribute personal ownership of critical constitutional correspondence of this kind to the Governor-General, so that it could be sold to the highest bidder at any time. Such documents deserve the protection of Commonwealth archives laws for a reasonable period, be it 20 or 30 years, or perhaps even longer. But they should also remain under the control of officials in Australia. To interpret the *Archives Act* in a manner that cedes all local control of these documents is contrary to the entire purpose of the Act and would be a perverse and unreasonable interpretation of it.

⁴² *Hocking (FCAFC)* (n 3) 22 [110] (Flick J).