AUSTRALIA'S ACCESS TO THE QUEEN'S CORRESPONDENCE: IS THIS LONG SAGA RESOLVED?

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A recent High Court decision has established that the secrecy of Royal correspondence is subject to an Act which regulates public access to Commonwealth records. Communications between Her Majesty The Queen of Australia and her Governor-General between 1974 and 1977 are now accessible. Other relevant Royal correspondence may continue to be secret where not prohibited by an Act. Based on what has become accessible, The Queen had no direct part in the Governor-General's dismissal of the Australian Government on 11 November 1975. However, the Royal Household played an important part leading to the Governor-General actions on 11 November 1975. These actions were inconsistent with the constitutional requirements codified at the latest in 1926. Australia's future republican status inevitably is posed.

I Introduction

The Right Honourable Sir John Kerr AK, GCMG, GCVO, QC held the constitutional office of Governor-General of the Commonwealth of Australia from 11 July 1974 until 8 December 1977.[1] On 29 May 2020, the High Court of Australia held by a six-to-one majority that Sir John's 'personal and confidential' correspondence with Her Majesty The Queen of Australia while he was Governor-General was a 'Commonwealth record'. The High Court held that, as a Commonwealth record, this documentation was governed by, and subject to, the public access provisions of the *Archives Act 1983* (Cth) ('*Archives Act*').[2] Kiefel CJ, Bell, Gageler and Keane JJ handed down a joint judgment. Gordon and Edelman JJ each handed down separate concurring judgments. Nettle J dissented.

In 1974, the Foreign and Commonwealth Office in the United Kingdom ('UK') had issued instructions that correspondence of this kind should not take the form

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1 *Hocking v Director-General of the National Archives of Australia* (2020) 379 ALR 395, 397 [1] (Kiefel CJ, Bell, Gageler and Keane JJ) ('*Hocking 2020*').

2 Ibid.

of official dispatches. Instead, they should take the form of 'personal letters' between The Queen and her Australian vice-regal representatives. These personal letters were to be marked: 'Personal and Confidential' to prevent their being accessed by the then Prime Minister of Australia, Mr Gough Whitlam.[3] Before 1974, previous Governors-General had reported to The Queen on a quarterly basis. There were 212 letters sent between The Queen and Sir John in his term as Governor-General between 1974 and 1977. The great bulk was written in the months before and after Sir John dismissed Mr Whitlam as Prime Minister.[4]

Sir John had dismissed the Australian Labor Party ('ALP') government headed by Mr Whitlam, on 11 November 1975. Sir John had installed a government from the Liberal–National Country Party opposition benches headed by the Opposition Leader, Mr Malcolm Fraser, as caretaker Prime Minister. Sir John had required that there be a third election of the House of Representatives, where Mr Whitlam's ALP had a majority, in less than three years. Sir John had dissolved the House of Representatives, together with the Senate, after the House of Representatives had passed a motion of no confidence in Mr Fraser which called upon Sir John to reinstate Mr Whitlam as Prime Minister.[5] Sir John's behaviour on 11 November 1975 has been described as 'the most dramatic event in Australia's political history'.[6]

Professor Jennifer Hocking, an academic historian, had approached the Director-General of the National Archives of Australia ('NAA'), with a request for access to this correspondence. The correspondence was contained in a sealed package deposited in the NAA by the Governor-General's Official Secretary on Sir John's instructions after he left office. The deposit was made with a request that its contents remain 'closed' until 2037. The embargo was later shortened by ten years, to 2027:

> Thereafter the documents are subject to a further caveat that their release after 60 years [subsequently shortened to 50 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.[7]

The Director-General refused to provide Professor Hocking with access to this correspondence. The Director-General's refusal was based on the correspondence being private and not a 'Commonwealth record'. A 'Commonwealth record' is defined

3 Foreign and Commonwealth Office (UK) 24/1931, *Changes in Constitution of Australia 1974* cited by Jenny Hocking, *The Palace Letters: The Queen, the Governor-General and the Plot to Dismiss Gough Whitlam* (Scribe Publications, 2020) 77–8 ('*The Palace Letters*').

4 Ibid 78.

5 Jenny Hocking, *The Palace Connection: The Dismissal Dossier: Everything You Were Never Meant to Know about November 1975* (Melbourne University Press, rev ed, 2017) 76–86 ('*The Palace Connection*').

6 Michael Sexton, *The Great Crash: The Short Life and Sudden Death of the Whitlam Government* (Scribe Publications, 2005).

7 *Hocking 2020* (n 1) 399 [12] (Kiefel CJ, Bell, Gageler and Keane JJ).

as 'a record that is the property of the Commonwealth or of a Commonwealth institution'.[8] Professor Hocking unsuccessfully applied to the Federal Court of Australia for judicial review of the Director-General's decision.[9] Professor Hocking's appeal to the Full Court of the Federal Court was dismissed by majority.[10]

In handing down its decision, the High Court proceeded in accordance with the technical rules of statutory interpretation. The High Court left no scope for Buckingham Palace in London to continue any resort to the 'reserve' or 'prerogative' powers of the Crown resisting public access to the correspondence between Sir John and The Queen which were Commonwealth records. However, in accordance with the applicable provisions of the *Archives Act*,[11] the High Court decision might still have left it open for the NAA to restrict public access to parts of this correspondence that the Palace or others may have considered sensitive through the application of the exemptions contained in this legislation.[12] On 14 July 2000, the NAA provided the public with full access to all this correspondence.[13]

II Background

A *The Supply Crisis*

The Whitlam-led government[14] had been the 'first Labor government in 23 years, had been elected in a climate of great hope and optimism' on 2 December 1972 'with a large popular acclaim for reform'.[15] It had been re-elected on 18 May 1974 with another majority in the House of Representatives. The numbers in the Senate were evenly divided between the ALP-led government and the Liberal–National Country Parties Coalition Opposition.

The death of Bertie Milliner (ALP, Queensland) on 30 June 1975, gave the Leader of the Federal Opposition, Mr Fraser, a 'significant boost' in the 'opposition strategy'.[16] Mr Fraser was able to adopt the tactic of merely having Supply deferred in the Senate[17] until the Prime Minister announced he would advise Governor-General to

8 *Archives Act 1983* (Cth) s 3(1).

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

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

11 Pt V (Commonwealth records), divs 3 (Access to Commonwealth records) and 4 (Review of decisions).

12 *Archives Act 1983* (Cth) s 33 .

13 'The Kerr Palace Letters', *National Archives of Australia* (Web Page) <https://www.naa.gov.au/explore-collection/kerr-palace-letters>.

14 More detailed factual background is recorded by Matt Harvey et al, *Australian Constitutional Law and Government* (LexisNexis Butterworth, 2021) 349–360 [11.1]–[11.45].

15 Sexton (n 6).

16 Ibid 206.

17 *Constitution* s 23.

call yet another general election for the lower House of Representatives, the third in less than three years.[18] Senator Alan Missen (Liberal, Victoria) agreed to abide by a Liberal Party room majority decision to defer Supply in the Senate while voicing 'open reservations' about actually blocking Supply.[19] Senator Neville Bonner (Liberal, Queensland) 'was reported to have told an Aboriginal delegation at Parliament House that he could not and would not see money for Aboriginal advancement cut by the Senate' voting to block Supply.[20] Senator Donald Jessup (Liberal, South Australia) 'wrote to the Adelaide *Advertiser* on 17 September 1975 to stress that he was opposed to a rejection of the budget except in the most exceptional circumstances'.[21] Mr Fraser 'broke conventions, precedents and the norms that had guided politics for generations'.[22]

Shortly before 1pm on 11 November 1975 Mr Whitlam visited Government House for a pre-arranged appointment with Sir John. The purpose of this meeting was for Mr Whitlam to formally to hand over written advice to the Governor-General, which recorded his oral advice of the previous week, on or about 6 November 1975. Sir John had indicated that he would accept that advice, subject to it being put to him formally in writing.[23] Had, at the commencement of the crisis, on 16 October 1975, the Governor-General granted a half-Senate election, there would have been no issue about Supply continuing until at least the end of November, by when there would have been a newly constituted Senate.[24]

Mr Whitlam's advice was that Sir John should call an election for the one-half of the Senate whose term as Senators was due to end on 30 June 1976, a little over six months' time. Section 13 of the *Constitution* provides that the election to fill vacant places in the Senate shall be held within one year before the places are to become vacant. It had become a regular feature of electoral cycles for the Governor-General to call half-Senate elections to be held in the month before the Christmas which preceded 30 June vacancies.

18 Sexton (n 6) 207; The *Constitution Alterations (Senate Casual Vacancies) Act 1977* (Cth) has subsequently received the requisite support in a referendum to substitute a new s 15 into the Commonwealth *Constitution* 'so as to ensure so far as practicable that a Casual Vacancy in the Senate is filled by a Person of the same Political Party as the Senator chosen by the People and for the balance of his [or her] Term'.

19 Sexton (n 6) 210, 215.

20 Ibid 210.

21 Ibid.

22 Paul Kelly and Troy Bramston, *The Truth of the Palace Letters: Deceit, Ambush and Dismissal in 1975* (Melbourne University Press, 2020) 117.

23 Hocking, *The Palace Connection* (n 5) 57–75.

24 Kelly and Bramston (n 22) 101–16.

By 11 November 1975, a group of five 'small-L' liberals among the Liberal Party Senators, namely Senators Missen, Bonner, Jessop, as well as Eric Bessell (Tasmania) and Condor Laucke (South Australia), opposed to the hard-line conservatives, had agreed to abstain on any further motion to defer Supply. They had a pact allowing the budget to pass and the country to proceed to a half-Senate election. There would have been no need for a third election for the House of Representatives in less than three years.[25]

B *Governor-General's Dismissal of the Prime Minister and the House of Representatives*

Before Mr Whitlam could hand over his formal written advice, Sir John handed Mr Whitlam a letter stating that:

> In accordance with section 64 of the Constitution, I hereby determine your appointment as my Chief Adviser and Head of the Government. It follows that I hereby determine the appointment of all of the Ministers in your Government … I propose to send for the Leader of the Opposition and to commission him to form a new caretaker Government until an election can be held.[26]

Sir John noted that on 16 October 1975, the Senate had deferred consideration of *Appropriation Bills (Nos 1 & 2 1975–1976)*; and that the determination of the Senate to maintain its position in this regard.[27] Sir John relied on written advice tendered on 10 November 1975 by the Rt Hon Sir Garfield Barwick GCMG, Chief Justice of Australia.[28] At the National Press Club in Canberra on 10 June 1976, Sir Garfield said that no section of the *Australian Constitution* specifically supported his advice, but it was required as 'you couldn't carry on a government otherwise'.[29] There was serious concern to strong objection among other High Court Justices to the Chief Justice

25 Hocking, *The Palace Letters* (n 3) 107–10.

26 'Sir John Kerr's Letter of Dismissal', *November 11, 1975: The Dismissal of the Whitlam Government* (Web Page) <https://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>.

27 'Kerr's Statement of Reasons', *November 11, 1975: The Dismissal of the Whitlam Government* (Web Page) <https://whitlamdismissal.com/1975/11/11/kerr-statement-of-reasons.html>.
Sir John's account of his dismissal of the Whitlam-led government is most fully set out in his book *Matters for Judgement* written in 1978 and published in 1979 by St Martin's Press in New York.
Cf The dismissed Prime Minister's rebuttal currently available in Gough Whitlam, *The Truth of the Matter: His Powerful Account of the Dismissal* (2005) Melbourne University Press; and the defence of Sir John's actions, and his own in advising Sir John to dismiss the Whitlam-led government, by the Chief Justice of the High Court of Australia throughout 1975, in Sir Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983).

28 'Sir Garfield Barwick's Advice to Sir John Kerr', *November 11, 1975: The Dismissal of the Whitlam Government* (Web Page) <https://whitlamdismissal.com/1975/11/10/barwick-advice-to-kerr.html>.
This is the full text of Sir Garfield' letter of 10 November 1975 to the Governor-General.

29 James A Thomson, 'Sir Garfield Barwick: Sir John Did His Duty' (1983) 6(2) *University of New South Wales Law Journal* 255, 259 n 17.

placing himself 'in the position of giving extra judicial advice'.[30] Sir Garfield asserted that certainly: '[i]t was not a matter which could ever come before the court in any sense, shape or form.'[31] However, it has been counter-asserted that Barwick CJ's actions 'could be seen to be unconstitutional'. They conflicted with the High Court's own rulings.[32] The giving of advice is not part of the judicial power of the Commonwealth. There must be a strict separation of Commonwealth judicial from other power. Commonwealth judicial officers should not exercise powers entirely outside Commonwealth judicial powers.[33]

C *Ramifications for the Subsequent Litigation to Obtain Access to the Palace Letters*

In the Federal Court, the NAA included in its arguments that the correspondence was personal because they reflected an aspect of the Governor-General's vice-regal relationship over which The Queen had no power and no direction. In response, Professor Hocking's legal team submitted that any such powerlessness argument was most extraordinary and fundamentally destructive about a constitutional monarchy. It was not the case that The Queen was powerless. Her power was of a particular kind. She could only exercise any power on the advice of the elected Australian government.[34]

The *Constitution* confers on the Governor-General such powers as to dissolve the House of Representatives, call a half-Senate election, grant a double dissolution of both Houses of Parliament, commission a Prime Minister and other Ministers, terminate any such commission and to exercise the command-in-chief of the Australian Defence Force. While The Queen's representative, the Governor-General exercises such powers in his or her own right, not as some surrogate.[35]

The Governor-General is conferred with the powers which were at the heart of 1975's constitutional crisis.[36] In the early years of Federation, the monarch was able to set some parameters within which the Governor-General had to exercise the powers

30 Ibid 260 n 27.

31 Ibid n 34.

32 See eg, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; *R v Kirby: Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

33 CJ Sampford, 'Some Limitations on Constitutional Change' (1979) 12 *Melbourne University Law Review* 210, 226.

34 Hocking, *The Palace Letters* (n 3) 152.

35 Sir David Smith, 'An Australian Head of State: An Historical and Contemporary Perspective' (Papers on Parliament No 27, March 1996) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=D704CA6CD1B549AF8654FDCFBA383150&_z=z> ; Kelly and Bramston (n 22) 21–34.

36 'The Role of the Governor-General', *The Governor-General of the Commonwealth of Australia* (Web Page, 2020) <https://www.gg.gov.au/about-governor-general/role-governor-general accessed 29 July 2021>.

of that office. This kind of control was able to be exercised through such measures as the issue of Royal Instructions and of Letters Patent to the Governor-General.[37]

Well before The Queen came to the throne in 1952, those pathways which allowed her grandfather, King George V, to influence how a Governor-General performed the constitutional functions of that office in the early years of his reign, had long fallen into desuetude.[38] Since 1926 at the latest, a Governor-General 'is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government'.[39] By 1926, the constitutional position of a Governor-General had changed and developed so as to require the Governor-General to act only on the advice of his or her country's Prime Minister analogous to the constitutional requirements mandated on the monarch in Great Britain. This constitutional development applied to the Commonwealth of Australia. Accordingly, any encouragement by a monarch of a Governor-General to act independently of his or her Prime Minister, or in British interests, had become unconstitutional by 1926 at the latest.[40]

The Queen has performed some constitutional functions as Australia's Head of State particularly while physically within Australia, such as the opening of Parliament, the giving of Royal Assent to Bills of Parliament and proclaiming commencement of Acts,[41] and presiding at meetings of the Federal Executive Council.[42]

By 1975, the number of constitutional functions which The Queen performed as Australia's Head of State, particularly when outside Australia, had mostly been referred by the monarch, on the advice of Australian Prime Ministers, to the Governor-General.[43]

37 See, eg, Anne Twomey, *The Australia Acts: Australia's Statutes of Independence* (Federation Press, 2010) ('*The Australia Acts*'); Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) ('*The Chameleon Crown*').

38 See, eg, Twomey, *The Australia Acts* (n 37); Twomey, *The Chameleon Crown* (n 37).

39 George Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, Parliament of Australia, 2004) 156.

40 Inter-Imperial Relations committee, 'Imperial Conference 1926' (Report No E(IC/26), 1926) <https://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf>; Twomey, *The Australia Acts* (n 37); Twomey, *The Chameleon Crown* (n 37).

41 See, eg, the *Australia Act 1986* (Cth) proclaimed by The Queen to commence operation on 3 March 1986, supplemented by the *Australia Act 1986* (UK); *Australia (Request and Consent) Act 1985* (Cth); *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Vic); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (WA); and *Australia Acts (Request) Act 1985* (Tas). See also Anne Twomey, *The Australia Acts* (n 37); Twomey, *The Chameleon Crown* (n 37).

42 Michael Coper, *Encounters with the Australian Constitution* (CCH Australia, 1987) 19, in respect of the commencement of the *Australia Act 1986* (Cth) on 3 March 1986 when The Queen was at Government House in Canberra. This historic occasion is illustrated by the photograph of The Queen of Australia signing in Canberra the proclamation severing what had remained of Australia's then legal ties with the United Kingdom ('UK'). The solemn witnesses were then Federal Executive Council Secretary, Mr David Reid, and the then Prime Minister of Australia, Mr Robert Hawke.

43 Functions which The Queen of Australia presently exercises while outside Australia, other than the

Following Sir John's retirement, a sealed package containing contemporaneous copies of correspondence sent by him to The Queen and originals of correspondence received by him from The Queen was deposited with the NAA.[44] The package was deposited by the Official Secretary to the Governor-General.[45] The deposited correspondence became 'records' forming part of the 'archival resources of the Commonwealth'.[46]

D *Professor Jennifer Hocking: Her Pre-existing Published Research Regarding the Dismissal*

Professor Hocking had established a particular interest in the period of Australian constitutional and political history in which Sir John's was the Governor-General. She had written in 2012 that during HRH The Prince of Wales' visit to Australia in 1974, Sir John had discussed with him the possibility of the Princes' own future appointment as Governor-General.[47] The two met in Port Moresby during a series of Independence Day ceremonies held during 15–17 September 1975 to mark Papua New Guinea's formal independence on 16 September 1975. Sir John raised his possible dismissal of the Whitlam-led government and his grave fears that the Prime Minister might advise The Queen to dismiss him first:

appointment of Governors-General, include the issue of letters patent, on the advice of the Australian Prime Minister, commissioning State Governors to serve as Administrators of the Commonwealth of Australia when the Governor-General dies, resigns or is away from Australia: *Constitution* s 4; and specifying all the orders, decorations and medals which constitute the Australian honours and awards system: 'Australian Honours and Awards System', Wikipedia (Web Page, 29 September 2021) <https://en.wikipedia.org/wiki/Australian_honours_and_awards_system>.

44 Commonwealth, *Gazette: Government Notices*, No C2019G01110, 9 December 2019 <https://www.pmc.gov.au/sites/default/files/publications/aao-5-December-2019-effect-1-February-2020.pdf?>

45 Under cover of a letter expressing The Queen'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 Governor-General's Official Secretary, sent not long after Sir John's death on 24 March 1991, announced that The Queen had 'reduced' the closed period to 50 years, so as to allow release to the public after 8 December 2027 with the agreement of The Queen's Private Secretary and the Governor-General's Official Secretary: *Hocking 2020* (n 1) 397 [2] (Kiefel CJ, Bell, Gageler and Keane JJ).

46 Within the 'care and management' of the National Archives of Australia, the powers of which are exercisable by the Director-General. The 'archival resources of the Commonwealth' consist of 'Commonwealth record' and 'other material' that are 'of national significance or public interest' and that 'relate to', amongst other things, 'the history or government of Australia'. 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'. 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: *Hocking 2020* (n 1) 397–8 [3]–[4] (Kiefel CJ, Bell, Gageler and Keane JJ).

47 Subsequently corroborated by Kelly and Bramston (n 22) 166.

> Apparently oblivious to constitutional expectations, Charles replied, according to Kerr's notes of their exchange, 'But surely Sir John, [T]he Queen should not have to accept that you should be recalled at the very time, should this happen when you were considering having to dismiss the Government.'[48]

Professor Hocking wrote that, on his return to England, The Prince of Wales took up Sir John's concern with The Queen's Private Secretary, Sir Martin Charteris. Sir Martin then wrote to Sir John before the Supply crisis began, with what Professor Hocking described as 'equally remarkable advice'. Should, Sir Martin termed, 'the contingency to which you refer' arise, The Queen would 'try to delay things':

> Neither Kerr nor the Palace ever revealed that, weeks before any action in the Senate had been taken, the Governor-General had already conferred with the Palace on the possibility of the dismissal of the Prime Minister, securing in advance the response of the Palace to it.[49]

On 12 November 1975, the Speaker of the House of Representatives, Mr Gordon Scholes, having been refused access to the Governor-General before the dissolution of Parliament the previous day, wrote to The Queen. Describing Sir John's actions as 'contrary to the proper exercise of the Royal prerogative and an act of contempt for the House of Representatives',[50] Mr Scholes called on The Queen to restore Mr Whitlam to office.

The Speaker wished to ensure that the Palace was aware of the events of the previous day.[51] However, by 2012 Professor Hocking had ascertained that neither Mr Whitlam nor the Speaker knew that the Palace had been in regular contact with the Governor-General throughout the crisis and had been forewarned of the dismissal months earlier. Within days of the dismissal, a relation of The Queen conveyed to the Governor-General complete support for the dismissal.[52]

Writing in 2012, based on the little that she had been able to sight, Professor Hocking believed that Sir John's letter to The Queen reporting the day's events 'contradicts his claim that Whitlam had insisted that he intended to hold the half-Senate election, much less discussed the question of securing Supply for it, when Kerr announced that he was no longer Prime Minister', contradicting the Governor-

48 Jenny Hocking, *Gough Whitlam: His Time* (The Miegunyah Press, 2012) 312 ('*Gough Whitlam*').

49 Ibid 312.

50 Quoted in ibid 353.

51 Ibid.

52 Admiral of the Fleet the Rt Hon The Earl Mountbatten of Burma KG GCB OM GCSI GCIE GCVO DSO ADC PC (the last Governor-General and Viceroy of India) described by Professor Hocking as The Queen's cousin and Prince Philip's favourite uncle, wrote to the Governor-General expressing his admiration and complete support, the next month arriving in Australia; visiting Admiralty House to personally convey his strongest admiration for the Governor-General and for his 'courageous and correct' actions: ibid 354.

General report to the Australian public.[53] From what Sir John wrote to The Queen, Mr Whitlam ceased to be Prime Minister not with any tense exchange, such as that which Sir John purported to 'inform' the Australian public as having left a Governor-General with no choice but to use the Royal prerogative to dismiss the Prime Minister, after inviting Mr Whitlam to proceed to a House of Representatives election as Prime Minister. Instead, the Governor-General had dismissed the Prime Minister 'from the time Kerr had signed the document terminating his commission' before Mr Whitlam could say anything to Sir John.[54]

On 31 March 2016, Professor Hocking requested access to the file within the custody of the NAA, which contains the deposited correspondence between Sir John and The Queen. On 10 May 2016, the Director-General rejected her request for access on the basis that the deposited letters were not Commonwealth records. Professor Hocking's legal team challenged this rejection. Their central submission was that the Palace letters were Commonwealth records because, first, they were between The Queen of Australia and the Governor-General, written when both were acting in their official capacities; and, second, because their subject matter related to the performance of the Governor-General's role and functions.[55]

The NAA's characterisation of the deposited correspondence was upheld on judicial review by Griffiths J of the Federal Court, at first instance[56] and on appeal by a majority of the Full Court of the Federal Court (Allsop CJ and Robertson J, Flick J dissenting).[57]

In 2019, emphasising that she had recently sighted material from certain previously unpublished letters 'which are not the letters at the heart of my legal action against the Archives', which letters 'provide remarkable and disturbing new material on the dismissal of the Whitlam government and the role of Buckingham Palace', Professor Hocking reported that the Palace presided over a carefully crafted distortion of Australian history as presented by Sir John to hide the role of the Palace in London as Sir John moved towards dismissing Mr Whitlam.[58]

53 Hocking, *Gough Whitlam* (n 48) 354.

54 Ibid.

55 Hocking, *The Palace Letters* (n 3) 116.

56 *Hocking 2018* (n 9).

57 *Hocking 2019* (n 10).

58 Pearls and Irritations, '"Distortion": How the Palace Airbrushed Sir John Kerr's Memoirs', *Independent Australia* (Web Page, 14 August 2019) <https://independentaustralia.net/politics/politics-display/distortion-how-the-palace-airbrushed-sir-john-kerrs-memoirs-,12997>.

III High Court Decision

The outcome of the appeal turned on the construction and application of the elaborate statutory definition of 'Commonwealth record'. In particular, the appeal turned on the application to the deposited correspondence of that part of the definition which, on its proper construction, operated to include records the physical custody of which was within the lawful power of control of specified functional units of government. One of these was the 'official establishment of the Governor-General'.[59] The legally endorsed concentration of power in the 'official establishment of the Governor-General' to control the physical custody of the correspondence, rendered this correspondence a 'Commonwealth record'.[60] The correspondence was a record over which the Official Secretary of the Governor-General in an official capacity had the legally endorsed power.[61]

Transfer of the package of correspondence to the NAA was controlled by the Official Secretary, in that capacity, on behalf of the official establishment of the Governor-General. This crucial consideration brought the Palace Letters within the *Archives Act* outweighing such factors as any claim that the correspondence was personal and confidential, and the fact that the letter of deposit stated the papers were closed.[62]

The definition ultimately was adopted in terms that recognised the difficulties for the Commonwealth to prove 'ownership' where the Commonwealth sought to recover what it believed to be official records from private custodians.[63] The NAA was 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. While a record remained in the lawful physical custody of the NAA, it remained a Commonwealth record. The access regime in div 3 of pt V of the *Archives Act* applied irrespective of its true ownership.[64]

Whether the correspondence was 'exempt' from access pursuant to such provisions of div 3 of pt V as s 33 on grounds of their private or confidential nature involving The Queen was a separate issue. Division 3 of pt V of the *Archives Act* applied to each item of the deposited correspondence that had become, and had remained, a 'Commonwealth record'.[65]

59 *Hocking 2020* (n 1) 398–9 [9] (Kiefel CJ, Bell, Gageler and Keane JJ).
60 Ibid 420 [92]–[95] (Kiefel CJ, Bell, Gageler and Keane JJ) and 429 [129] (Nettle J).
61 Ibid 439–41 [172]–[179] (Gordon J).
62 Ibid 444 [189]–[190] (Gordon J).
63 Ibid 450 [207] (Edelman J).
64 Ibid 421–2 [98]–[102] (Kiefel CJ, Bell, Gageler and Keane JJ).
65 Ibid 426–7 [118]–[119] (Kiefel CJ, Bell, Gageler and Keane JJ); 437 [165] 604 (Gordon J).

A conclusion that the correspondence was personal and confidential did not prevent the further conclusion that it was also official (thereby being open for classification as an 'exempt record' under s 33 of the *Archives Act*).[66] It could hardly be supposed that confidence would be more likely to be protected if title to the correspondence were held privately to the exclusion of the Commonwealth, so that a former Governor-General personally could sell, publish or distribute the correspondence at any time 'for a fancy sum' or for 'the profits to be divided among his [descendants]', such as in the case of President Monroe in the United States.[67]

Justices in the High Court majority of six cited such obligations in the *Archives Act* as of s 35. It required arrangements for determining the Commonwealth records in the open access period that are to be treated as exempt records:

> 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. And, of course, depending on the precise contents of 'any information or matter that [each record] contains or that can be obtained from it' reconsideration of the request for access to each Commonwealth record may give rise to different answers.[68]

The fact that the correspondence between the Governor-General and The Queen constituted 'Commonwealth records' within the ambit of the *Archives Act* did not necessarily mean that the public would have access to all of them. The confidentiality of such correspondence was protected not only by the general law of confidence. It was also protected by the categories of exemption in div 3 of pt V of the *Archives Act* which, included among the 'exempt records', 'information or matter the disclosure of which under the *Archives Act* would constitute a breach of confidence'. Other relevant exemptions included 'information or matter the disclosure of which under the *Archives Act* could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth'. These exemptions, however, were neither absolute nor perpetual. Considerations which could be strong with respect to the confidentiality pertaining to current documentation for freedom of information ('FOI') purposes may be weakened where such considerations instead pertain to historical documentation for NAA purposes.[69]

66 Ibid 446 [199] and 468 [264] (Edelman J).

67 Ibid 469 [266] (Edelman J).

68 Ibid 444 [190] (Gordon J).

69 Ibid 468 [263] (Edelman J). As illustrated, e.g., by *Secretary (Department of Prime Minister and Cabinet and Summers (Freedom of Information)* [2019] AATA 5537 (20 December 2019) (refusal of request for access under the *Freedom of Information Act 1982* (Cth) for 'all letters sent from the Prime Minister(s) of Australia to Queen Elizabeth II (or her representatives) since 1 January 2013)' on such grounds as these letters remained strictly confidential).

Only Nettle J handed down a dissenting judgment.[70] Sir John regarded the letters from the Monarch and the copies of his own letters to Her Majesty as subject to an established understanding of confidentiality. Control of the correspondence in accordance with Sir John's and The Queen's wishes prevailed over any right to possession by a government organ over the correspondence.[71] By contrast, the other six High Court Justices held consistent with the position[72] that:

> where a statutory scheme is established to govern a particular statute and it imposes limits on the government, the government cannot exclude itself from the legal requirement to comply with those limits by instead relying on a prerogative power.[73]

The plurality proceeded on the basis that, whatever conventions might have operated in respect of royal correspondence, those conventions could not supplant an Act of an Australian Parliament, where there had been substantial changes to the status of the monarch since federation in 1901:

> 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 [T]he Queen shall be Her Majesty's representative in the Commonwealth'. Both accept that the nature of the relationship between the Governor-General and [T]he 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, 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'.[74]

70 Ibid 428–37 [125]–[163].

71 Ibid 432 [144], 435[154], 438 [162]–[163] (Nettle J).

72 Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) ('*The Veiled Sceptre*'); *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508 requisitioning – prerogative abrogated to extent its exercise would be inconsistent with statute.

73 Twomey, *The Veiled Sceptre* (n 72) 8.

74 *Hocking 2020* (n 1) 423 [104] (Kiefel CJ, Bell, Gageler and Keane JJ).

A *Would Access Actually Be Granted Following Professor Hocking's High Court Win?*

Professor Hocking subsequently wrote:

> We had won, but the letters had not been released, and for the next three weeks it looked as if they might not be. The National Archives responded to the High Court decision in a media release later the same day. 'The National Archives is a pro-disclosure organisation' it read, without a hint of irony, 'unless there is a specific and compelling need to withhold it'. The director-general then stated in several interviews that, under the terms of the *Archives Act*, he had ninety working days within which to make his decision on access to the letters and that he was examining them for possible redactions.[75]

Professor Hocking immediately had issued a statement that a 'reconsideration' in terms of the High Court's decision had to be dealt with under s 42 of the *Archives Act*, required to be done 'as soon as practicable, and within 30 business days'. Hers was not a new request, under s 31, for which the statutory time was the '90 working days' claimed by the Director-General. The Palace letters had to be released in full by 14 July 2020.[76]

The Australian Government's resistance to public access for historical government records is illustrated by Professor Anne Twomey who, in preparing a book on the relationship between The Queen and her Australian Governors, which was 'the result of much detective work in tracking down files in government archives and even greater persistence in seeking access to the files of Governments',[77] wrote of how Her Majesty's Government in the UK was 'exceptionally helpful' in giving her 'full access to a vast range of files'. 'In contrast, the Commonwealth Government was absolutely unhelpful' in 'swamping' her 'access requests' 'in bureaucracy', 'a great deal of vetting with few results', refusal of 'access to any legal opinions despite the fact that they were all more than 20 years old', what officials described as 'innocuous' 'eventually released after two and a half years' and 'masterly inactivity' 'of simply not responding'.[78]

Professor GE Dal Pont has cautioned government agencies that '"public interest" in the governmental arena goes to the core of the inquiry into confidentiality rather than operating as a defence'.[79] The court should focus on the specific principles making up the doctrine of breach of confidence, rather than only weigh the public interest in the information being in the public arena against the public interest in

75 Hocking, *The Palace Letters* (n 3) 164–5.
76 Ibid 165–7.
77 Twomey, *The Chameleon Crown* (n 37) xiv.
78 Ibid xiv-xv.
79 GE Dal Pont, *The Law of Confidentiality* (LexisNexis, 2nd ed, 2020) 232 [11.20].

maintaining secrecy. Where 'the dispute involves the government or a governmental body seeking to maintain secrecy', it has the burden of 'discharging the onus of justifying secrecy':[80]

> Being constitutionally obliged to act in the public interest, it is the possible prejudice to the public interest that determines the parameters of the protection government can claim for its own interest.[81]

So: 'the court, when asked to restrain such a publication must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.'[82]

As enunciated in the High Court:

> It is unacceptable in a democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless the disclosure is likely to injure the public, it will not be protected.[83]

The capacity on the NAA's part still to withhold access seems to have arisen from the parties 'choice' not to put the deposited correspondence in evidence before the Federal Court.[84] Professor Hocking subsequently set out in detail how, after a series of manoeuvres by the NAA's lawyers, this 'choice' was forced upon her legal team by the trial judge in the Federal Court, Griffiths J, who had 'ordered at the Directions Hearing that the statement of agreed facts be prepared'.[85]

B *A Relevant Supreme Court (UK) Decision*

By contrast with this 'choice', in *Regina (Evans) v Attorney-General (Campaign for Freedom of Information intervening)*,[86] the correspondence at issue, known as advocacy correspondence, between The Prince of Wales and Ministers in various departments of Her Majesty's Government had been carefully examined. The Upper Tribunal – Administrative Appeals Chamber ('UT–AAC') had conducted this careful examination before deciding to grant access to Mr Rob Evans, a journalist, under the provisions of

80 Ibid 152 [7.3].

81 Ibid.

82 *A-G v Jonathan Cape Ltd* [1976] 1 QB 752, 770–1 (Lord Widgery CJ) approved by the High Court of Australia in *Commonwealth of Australia v John Fairfax & Sons Ltd* [(1980) 147 CLR 39, 52 (Mason J) ('*John Fairfax & Sons*').

83 *John Fairfax & Sons* (n 82) 52 (Mason J).

84 *Hocking 2020* (n 1) 427–8 [118]–[119] (Kiefel CJ, Bell, Gageler and Keange JJ).

85 Hocking, *The Palace Letters* (n 3) 84.

86 [2015] AC 1787 ('*Campaign for Freedom of Information Intervening*').

the *Freedom of Information Act 2000* (UK) ('*FOI Act*'). The essential reason enunciated by the UT–AAC was that 'it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government'.[87]

The Supreme Court in the UK upheld the journalist's right of access to communications passing between The Prince of Wales and the Ministers of seven government departments in the UK between 1 September 2004 and 1 April 2005 said to involve 'advocacy' on the part of The Prince of Wales to these Ministers.[88]

It was known what parts of The Prince of Wales' correspondence with Minsters would be in the public arena. The Supreme Court had to rule whether a purported certificate issued by the Attorney-General as part of the executive government of that country under s 53 of the *FOI Act* seeking to override this judicial decision was invalid and unlawful. This certificate asserted:

> it is of very considerable practical benefit to the Prince of Wales' preparation for kingship that he should engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments … such correspondence and dialogue will assist him in fulfilling his duties … as King … such correspondence enables the Prince of Wales better to understand the business of government; strengthens his relations with ministers; and enables him to make points which he would have a right (and indeed arguably a duty) to make as Monarch.[89]

The contents of this certificate are germane to the Palace Letters. They cover 'Charles' ambition to become Governor-General' of Australia to prepare him for kingship and 'Kerr's encouragement of that ambition and their discussions in September 1975 about the looming constitutional crisis and the decision Kerr might face'.[90]

The Supreme Court held that the Attorney-General's certificate was invalid and unlawful.[91] It also agreed with the UT-AAC's conclusion that, in this particular case, the public interest benefits of disclosure of the Prince's 'advocacy correspondence' falling within Mr Evans' requests generally outweighed the public interest benefits of non-disclosure so as to render Mr Evans entitled to access.[92] Before the Supreme Court were subsequent legislative amendments[93] conferring an absolute exemption

87 Ibid 1813 [35] (Lord Neuberger of Abbotsbury PSC).
88 Ibid.
89 Ibid 1838 [132] (Lord Mance JSC).
90 Kelly and Bramston (n 22) 166.
91 *Campaign for Freedom of Information intervening* (n 86) 1827–8 [86]–[89] (Lord Neuberger of Abbotsbury PSC).
92 Ibid 1837–48 [132]–[146] (Lord Mance JSC).
93 To the *Freedom of Information Act 2000* (UK) by s 46 of, and sch 7 to, the *Constitutional Reform and Governance Act 2010* (UK).

in relation to governmental communications with The Queen, The Prince of Wales and HRH The Duke of Cambridge (as her heirs and successors). The Supreme Court held that this subsequent legislation should have no effect on the case's outcome. It was emphatic that executive decisions must not encroach on prior judicial determinations by purporting to find cogent reasons of administrative convenience to try overruling what already had been determined judicially. An Act of Parliament had expressly to give an executive officer that specific authority. The subsequent legislative absolute exemption in favour of the senior Royals conferred by later Act of Parliament only operated prospectively.[94]

The pre-existing provision had required that there be a material change in circumstances since the judicial decision in order to sustain any intervention on the Attorney-General's part seeking to set aside that judicial decision. The Attorney-General's grounds in seeking to withhold The Prince of Wales' 'advocacy correspondence' with Ministers from public access were not reasonable. The judicial decision that the Prince's advocacy correspondence be released for public access was reached after a detailed investigative process. The Attorney-General simply disagreed with the conclusions of a judicial tribunal on the same material as was before what was part of the judicial branch of government. The Attorney-General understood that implementation of this judicial decision could become inconvenient to Her Majesty's Government in the UK. The Attorney-General's certificate did not engage with, or give any real answer to, the closely reasoned decision of the judicial body. The Attorney-General's disagreement with the judicial tribunal's detailed findings and conclusions had not been justified on reasonable grounds:

> public interest in disclosure is normally a defence to a claim for breach of confidence, and it appears to be accepted that it could, in principle, operate as an effective answer to reliance on [a statutory exemption in Freedom of Information legislation for 'information, which if disclosed, would constitute an actionable breach of confidence'].[95]

C *How Hocking in the Australian High Court Differs From Evans in the United Kingdom on Actual Access*

By contrast with the outcome of *Evans* in the UK, the consequence of the forensic 'choice' by the parties in *Hocking* in Australia, which had been forced on Professor Hocking's legal team by the trial judge,[96] not to put the deposited correspondence in

94 *Campaign for Freedom of Information intervening* (n 86) 1818–22; [51]–[65] (Lord Neuberger of Abbotsford PSC).

95 Ibid 1808–9 [11] (Lord Neuberger of Abbotsford PSC).

96 Hocking, *The Palace Letters* (n 3) 84.

evidence before the Federal Court, was that all that could be known for the purposes of the appeal to the High Court about the contents of the deposited correspondence and about the circumstances of its creation, and of its keeping and deposit, was what appeared from facts formally agreed between the parties as supplemented by such inferences as were open to be drawn from other documentary material which the parties had chosen to put in evidence.[97]

This outcome became important in assessing the extent to which, if any, the decision of the High Court to order a writ of mandamus issue to compel the Director-General to reconsider Professor Hocking's request for access in accordance with the provisions of the Act actually would result in Professor Hocking being given access to parts of the correspondence between Sir John and The Queen which the Australian Government might wish to continue keeping secret.

The NAA's public statements following the Australian High Court decision in *Hocking* expressed the expectation that there could be redactions in the correspondence that was to be released, potentially limiting their release dramatically. On 2 June 2020, four days after the High Court handed down its decision in favour of Professor Hocking, the NAA announced: exemptions under s 33 may apply:

> The key question was whether the Archives would claim that any of the letters comprised 'exempt records', and redact them in part or in full. After such a long legal struggle, this was devastating: again, we believed it was wrong. Correctly interpreted, we argued, in a strongly worded letter to the Archives' legal team, those [High Court] judgments precluded the reasonable possibility of redactions. In short, we were again in dispute with the Archives, this time over the meaning of the High Court decision itself and its central order.[98]

Three weeks after the High Court decision, the Director-General stated that he was 'not working to any legislative deadline' and that it might take even longer than 90 working days to prepare the letters for release, stating that he had to spend time reading the Palace Letters to identify what should be redacted from them.[99]

97 *Hocking 2020* (n 1) 398–9 [9] (Kiefel CJ, Bell, Gageler and Keane JJ).
98 Hocking, *The Palace Letters* (n 3) 165–6.
99 Ibid 166.

IV Release of Palace Letters: What They Tell Australians

A *Ultimate Release of the Palace Letters*

In early July 2020, Professor Hocking's legal team sent the NAA's solicitors a final request that the NAA provide a date for providing access by 9 July 2020 with the intention that if a satisfactory schedule for release had not been provided by then, a writ of mandamus would be served the next day. Usually, High Court orders are complied with immediately. Writ of mandamus rarely have to be issued. The NAA then announced that the Palace Letters would be released in full on 14 July 2020, exactly 30 days after the High Court decision, just as Professor Hocking's legal team had argued.[100]

B *Palace Response to the Release of the Palace Letters*

With the release of the Palace Letters, Buckingham Palace issued what Professor Hocking described as 'a rare public statement'[101]. The Palace reiterated, notwithstanding what the Australian High Court had ruled, the 'longstanding convention that all conversations between' The Queen and Governors-General 'are private'.[102] The Palace proclaimed that the Palace Letters confirmed that 'neither Her Majesty nor the Royal Household had any part to play in Kerr's decision'.[103]

C *Palace Letter of 4 November 1975 That Supports Its Claim of No Involvement*

On 4 November 1975, Sir Martin had written to Sir John stating: that 'use' of 'the reserve, or prerogative, powers of the Crown, to dissolve Parliament (or to refuse to give a dissolution) have not been used for many years' and 'to use them is a heavy responsibility and it is only at the very end when there is demonstrably no other course that they should be used':

> With the greatest respect, I am sure you are right in taking the line that your crisis has not yet crossed the threshold from the political into the constitutional arena. Mr Fraser wants to believe it is already a 'constitutional' crisis because he wants you to bring about an election which he thinks he can win … but it is clear that you will only use them [the reserve powers] in the last resort and then only for constitutional and not for political reasons.[104] .

100 Ibid 166–7.
101 Ibid 171.
102 Ibid.
103 Ibid.
104 Reproduced in full in Kelly and Bramston (n 22) 208 who supported by constitutional expert Professor Anne Twomey (eg, cited on page 16: I am unaware of any evidence to suggest a desire on the part of

D *Professor Hocking's Response to the Palace's Claim That It Did Not Have Any-Involvement*

Professor Hocking points out that to rely on statements such as this to claim that '*neither* Her Majesty *nor the Royal Household* had *any* part to play in Kerr's decision' (emphasis added) is to ignore the context. Professor Hocking states that the notion of the Crown's reserve powers is a residue of the doctrine of the divine right of kings. Many had believed before 11 November 1975 that this doctrine 'had long since fallen into desuetude' with 'responsible government through the parliament as the embodiment of the popular will' and 'the passage of time' and that Sir John 'had breathed substance into a largely ceremonial role, providing the necessary precedent for their present revivification'.[105]

Professor Hocking cautions that what matters in examining the Palace Letters is what happened well before the dismissal and what is reiterated in the full 1,200 pages of this correspondence, not just a few words in isolation written just before or after the dismissal.

Professor Hocking refers to the 'unmistakeable hierarchy at work here, in which the governor-general is in every way the junior to The Queens' amanuensis, her private secretary, Sir Martin Charteris'.[106] From the Governor-General's first letter to The Queen of 15 August 1974, 'in every way a marker of what is to come, a common theme is the disparagement of the government and of Whitlam'.[107] Professor Hocking details 'a litany of depredations in what can only be seen as the most extraordinary vice-regal undermining of an elected government':[108]

> Kerr rails against policy decisions, queries the merits of appointments, and reveals details of Executive Council meetings, the most important and confidential of executive government. And yet, while the increasingly truculent governor-general conveys all this to [T]he Queen, he communicates none of it to his prime minister.[109]

[T]he Queen to dismiss Whitlam. By all accounts, [T]he Queen and Charteris got on well with Whitlam'. Anne Twomey, 'Wild Colonial Boys', *The Australian Financial Review* (Sydney, 17 July 2020) maintain that the Governor-General misled the Palace as to his plan to dismiss the Prime Minister without any warning in the first half of November 1975; and that, while certain conduct by such members of the Royal Household as The Queen's Private Secretary and The Prince of Wales in retrospect seems to have been unwise on occasions in excessively indulging the Governor-General, the Palace as an institution played no part in the dismissal and certainly The Queen did not have any involvement.

105 Hocking, *The Palace Letters* (n 3) 203.

106 Ibid 173.

107 Ibid 173–4.

108 Ibid 175.

109 Ibid.

Professor Hocking cites the fundamental principle that the monarch and governors-general of what in 1926 were called the 'Dominions'[110] must act only on the advice of the responsible ministers of the Dominion concerned, as expressly enunciated by the 'Imperial Conference' that year of the Prime Ministers of the UK and of the Dominions. Professor Hocking writes that from his first letter to The Queen, Sir John disputes this fundamental constitutional principle, as he continued to do in his subsequent letters, some of them even of far greater significance. Professor Hocking writes how The Queen, and her Private Secretary, Sir Martin, repeatedly had every opportunity to remind the Governor-General of this fundamental principle.Instead, The Queen, her Private Secretary and the Royal Household repeatedly encourage Sir John in violating this fundamental constitutional principle as the following examples illustrate.

- 'The Queen has read with much interest [your letter].'
- 'I understand that The Prince of Wales, who has just returned to Balmoral, has enlarged to The Queen on the problems you are facing as a result of his talks with you.'
- 'Your two letters of 20th September have been read with great interest by The Queen and Her Majesty has told me to tell you that she also had a very full account from Prince Charles of his talks with you.'
- 'Prince Charles has told me a good deal of his conversation with you and in particular that you had spoken of the possibility of the Prime Minister advising The Queen to terminate your commission with the object, presumably, of replacing you with somebody more amenable to his wishes. If such an approach was made you may be sure that The Queen would take most unkindly to it. There would be considerable comings and goings'.
- 'The Queen sends you her best wishes: she is very conscious of the problems that you may face.'[111]

Professor Hocking points out that this kind of repeated behaviour began and continued well before the Supply crisis of October and November 1975. By late 1974, Sir John had begun disputing the Prime Minister's advice to The Queen on such matters as inaugurating an Australian honours system and an Australian national anthem. Sir John confirms to the Prime Minister who is about to visit The Queen in London that he has supported the advice which the Prime Minister is personally to convey to The Queen. Unknown to the Prime Minister, the Governor-General is secretly conveying his real advice to The Queen, through her Private Secretary,

110 In essence, the Commonwealth of Australia, in addition to Canada, New Zealand, South Africa and what was then called the Irish Free State.

111 Reproduced in Kelly and Bramston (n 22).

contradicting that of the Australian Prime Minister. The Queen's Private Secretary entertains the Governor-General in seeking to find ways around implementing the Prime Minister's decisions.

Months before Supply was deferred in the Senate by the Opposition's artificial majority of one through the death of a Government senator, The Queen's Private Secretary and the Governor-General had begun entertaining the dismissal of the Whitlam-led government by use of the 'Reserve Powers'.

The Queen's Private Secretary commends to the Governor-General the work of a Canadian constitutional expert who supported the Governor-General in commissioning the Leader of the Opposition as Prime Minister in such a scenario to go to an election of Parliament's lower House. This Canadian constitutional expert was totally unaware of the provisions of the Australian *Constitution*, such as s 13,[112] and of the established electoral practice in Australia, for half-Senate elections to be held towards the end of the calendar year where the terms of half the Senate ends on 30 June.

Professor Hocking points out that for The Queen to express a political view to a Governor-General that she would take most unkindly to a decision by her Australian Prime Minister to replace the Governor-General was an 'appalling' breach of a 1930 decision by the 'Imperial Conference' of UK and 'Dominion' Prime Ministers that the constitutional practice requiring the monarch to act only on the advice of each relevant Dominion's Prime Minister also applied, for the removal of doubt (if any), to the appointment of a Governor-General of the 'Dominion'.

Moreover, The Queen's caution that 'at the end of the road' and 'no option' 'as a Constitutional Sovereign but to follow the advice of her Prime Minister' can only be seen as encouraging the Governor-General, being assured of the delay, to dismiss a Prime Minister who was tendering, or might consider tendering, any such advice to The Queen and installing another.[113]

Following Mr Whitlam's dismissal on 11 November 1975, The Prince of Wales, wrote to the Governor-General on 27 March 1976 stating: 'What you did last year was right and the most courageous thing to do'.[114] –Later in 1976, when the Governor-General's relationship with the new Prime Minister was already splintering, in what

112 Requirement to divide the Senators into two classes, as nearly equal in number as practicable. The places of Senators of the first class shall become vacant after the expiration of three years from the beginning of their term of service. The places of Senators of the second class shall become vacant after the expiration of six years from the beginning of their term of service. Afterwards the places of Senators shall become vacant after the expiration of six years from the beginning of their term of service. The election to fill vacant places shall be made within one year before the places are to become vacant. The term of service of a Senator shall be taken to begin on the first day of July.

113 Hocking, *The Palace Letters* (n 3) 190–1.

114 Kelly and Bramston (n 22) 173.

Professor Hocking describes as an 'astonishing letter', the Governor-General raises his possible use of the Reserve Powers against the new Government.

This time The Queen's Private Secretary is quite unlike his benign insistence on the possible beneficial use of the Reserve Powers the year before. The Queen's Private Secretary is emphatic in firmly closing off any such discussion 'both for your own sake, and also I think for the sake of the Crown'.[115]

V Conclusion

Records of The Queen's communications within the custody of Australian government agencies are publicly accessible where so provided by Australian legislation. It is the Australian legislation which determines the public accessibility, if any, of any such communication. Where Australian legislation does not contain any provision for the public accessibility of The Queen's communications, there is likely to be no such accessibility. The Queen's position continues to be that these communications are private and confidential, not for public release unless agreed to by her or a successor. Without Australian legislation to the contrary, this position is likely to prevail in court. From what Professor Hocking has revealed, and also to a degree what journalists such as Paul Kelly and Troy Bramston have been able to discover, there might well be other relevant correspondence involving The Queen that pertains to the dismissal in places such as the Royal Archives, which remain closed.

On the basis of the Palace Letters made publicly accessible by the NAA, it is possible to conclude that The Queen had no part in the Governor-General's:

- dismissal of her Australian Prime Minister;
- commissioning of the Leader of the Opposition as Prime Minister; and
- dissolution of Parliament ignoring the House of Representatives' motions of no confidence in the new Prime Minister and of confidence in the former Prime Minister, on 11 November 1975.

There is evidence to support a claim that the Royal Household, through The Queen's Private Secretary, had cautioned against such actions being taken in the first half of November 1975 by the Governor-General. There is, however, no evidence that the Governor-General received the relevant communication from The Queen's Private Secretary with these cautionary notes before he took the actions he did on 11 November 1975. On the evidence, it seems clear that the Royal Household played an important part in the Governor-General reaching the decisions he made to take

115 Hocking, *The Palace Letters* (n 3) (2020) 223–4.

the actions he took on 11 November 1975. The Royal Household, through The Queen's Private Secretary and The Prince of Wales, encouraged the Governor-General to defy the Prime Minister contrary to long-established constitutional requirements.

This encouragement, by The Queen's Private Secretary, extended over a long period of time beginning almost as soon after Sir John became Governor-General. The Prince of Wales' involvement in crucially relevant aspects, providing cover for the Governor-General to dismiss the Australian Prime Minister, began before any deferral of Supply in the Senate. Nowhere can be found any recognition by the Royal Household or The Queen of how the Governor-General's behaviour was exposing The Queen to becoming party to a major breach of the constitutional requirements pertaining to her role as Australia's sovereign head of state and to the Governor-General's role as her representative.

Nowhere is there any recognition of the fundamental constitutional changes which were made by the latest in 1926 which obliged both the monarch and the Governor-General to perform a wide range of their duties only on the advice of their Australian Prime Minister. Nowhere is there any recognition that the matters on which Sir John was defying the Prime Minister, without his knowledge, were within the Prime Minister's constitutional duties. Constitutionally, the Australian Prime Minister had a duty to provide advice to the Sovereign and the Governor-General on such matters as Australia's honours system and national anthem, in accordance with which advice both of them had a constitutional duty to act. In so far as either of their constitutional duties might also have included a duty to warn the Prime Minister, the Royal Household was complicit in the Governor-General's failure to give the Prime Minister any such warning. The Royal Household could not have been proceeding throughout other than in accordance with the wishes of The Queen.

Sir John was performing the vice-regal office as viceroy of The Queen of Australia, not of the UK. The entire process proceeded as if the constitutional changes formalised in 1926 had never been made, and that the Governor-General was representing The Queen of the United Kingdom of Great Britain and Northern Ireland, and not the entirely separate legal personality of The Queen as Australia's sovereign head of state. A natural person might be the chair of the board of directors of more than one listed public company, but must act in a separate legal capacity in relation to each company of which he or she is the chair. Since at least 1926, in relation to all matters within the jurisdiction of the Commonwealth of Australia, the Sovereign had to act in an entirely independent legal capacity from when he or she acted as sovereign of any of his or her other realms, such as the UK.[116]

116 Twomey, *The Australia Acts* (n 37); Twomey, *The Chameleon Crown* (n 37).

In New Zealand, for example, the Letters Patent constituting the Office of Governor-General 'now use the expression "Realm of New Zealand" as a collective term to describe all the countries and territories within the sovereignty of the Queen [of New Zealand]'.[117]

By analogy with New Zealand's development as a separate realm, Australians were exclusively 'British subjects' until 26 January 1949.[118] Australian law then prescribed the national status of Australians as both 'Australian citizens' and 'British subjects' from 26 January 1949 to 1 May 1987.[119] Since 1 May 1987, Australian law has prescribed upon Australians only the national status of 'Australian citizens'. Citizens of The Queen's other realms, including the UK, have become aliens in Australia.[120]

The issue is not the existence of the Reserve Powers as such,[121] but their exercise in 1975 with no apparent regard by the Palace of the Commonwealth of Australia having constitutionally become an entirely separate and independent realm from the UK by 1926 at the latest. This confusion is readily apparent in the Palace Letters.

The events of 1975 provided a major impetus towards Australia becoming a republic in galvanising public support for that move. Somewhat paradoxically, these events also have impeded any such move as they demonstrate that The Queen through her Governor-General has real power. As a result, the republican movement appears to be split. A significant number of republicans have refused to support the appointment of a President by Parliament. They oppose what they call 'the politicians' republic'. Instead, they insist instead on the direct election of a President by the electorate at large. Conversely, ministers are most reluctant to accentuate a head of state's powers by providing for a President to be directly elected, whereas a Prime Minister will remain indirectly elected by being required to govern with the support of a majority in the House of Representatives. Given this split in the republican movement, it has become easier for Australia to continue as a constitutional monarchy. The release of the Palace Letters is likely to result in the continuation of this stalemate.[122]

117 Alison Quentin Baxter and Janet McLean, *This Realm of New Zealand: The Sovereign, The Governor-General, The Crown* 30 (Auckland University Press, 2017).

118 When the *British Nationality and Australian Citizenship Act 1948* (Cth) commenced operation on 26 January 1949.

119 When the *Australian Citizenship Amendment Act 1984* (Cth) commenced operation on 1 May 1987.

120 Kim Rubenstein, *Australian Citizenship Law* (Thomson Reuters, 2nd ed, 2017) 118 [4.140].

121 Twomey, *The Veiled Sceptre* (n 72).

122 Cf Kelly and Bramston (n 22) 175–187.