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TRANSCRIPT OF PROCEEDINGS

O/N 81428

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

**FRENCH J
TAMBERLIN J
MANSFIELD J**

**No VID 52 of 2008
No VID 269 of 2008
No VID 270 of 2008**

ARTHUR DENT

and

**AUSTALIAN ELECTORAL COMMISSION
and ANOTHER**

MELBOURNE

10.16 AM, MONDAY, 19 MAY 2008

**MR A. DENT appears in person
DR S. DONAGHUE appears for the respondent**

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FRENCH J: Mr Dent, you are representing yourself?

MR A. DENT: That's right.

5 FRENCH J: And Dr Donaghue appears for the respondents?

DR S. DONAGHUE: Yes, I appear for the respondents in all three matters.

10 FRENCH J: Now, Mr Dent, we have from you, I think, a notice of appeal against Gordon Js decision, an application for an extension of time, T5170 is an appeal from the judgement of Jessup J - - -

MR DENT: Yes.

15 FRENCH J: - - - and I think there was another application for leave to appeal against the – out of time against the AAT decision; is that right?

MR DENT: That's correct, yes.

20 FRENCH J: Yes, all right. Well, perhaps we can sort of integrate your argument on those matters. We have read your submissions so it's over to you now to speak to those.

25 MR DENT: Okay. Well, I presume that you got the affidavit that was filed in the Jessup leave - - -

FRENCH J: Yes, thank you, yes.

30 MR DENT: - - - and that is full of great apologies about the lateness of the - - -

FRENCH J: Yes, yes, I understand that.

35 MR DENT: - - - and I don't know whether you have got the chronology that I have been working on all night, I just emailed it this morning.

FRENCH J: I've seen the chronology.

MR DENT: Okay.

40 DR DONAGHUE: Yes, thank you.

45 MR DENT: Well, you are certainly not expected to have read it. The first seven pages or so are obviously just historical background and largely irrelevant to the matters, but the rest of the chronology is a detailed cross-reference to exactly what happened when – in the series of events that just took place, and it also does extend back because the events actually started in 1987, rather than as the respondents will maintain that they started on 16 October of last year. As I understand it, if this case does go to trial, the respondents' defence has to be that okay, maybe we made a

mistake but it's a mistake that judges have confirmed and obviously a public servant could make that mistake too.

5 There was no real damage done. If there was damage it's pretty minor and it's not the sort of thing that you would expect a public servant to be liable for. They are bound to make mistakes occasionally, and that will be the case that I have to answer if it goes for trial, and given the normal prejudices of a court regarding itinerant professional revolutionaries and public servants doing their job and so on, I can sympathise to a certain extent with Gordon J assuming that I haven't got a hope.

10 But the actual case is one of misfeasance in public office, that what I'm saying is that these guys were maliciously out to do me injury, that it wasn't some routine administrative wonder, it wasn't just the expediency of the moment, that it's part of a systematic campaign that's been going on for 20 years, and at the end of the
15 chronology you will get your first indication of why I will be seeking, when the trial actually begins, to be joining various other parties: that Ross McLure shows up for the first time this millennium on page 18 of the chronology, that he is writing as a senior executive lawyer at the Australian Government Solicitors and he is writing a long letter objecting to various documents going in the appeal book, and in particular
20 he objects to anything to do with the AAT hearings.

He doesn't want the court to have in front of it the material that was before the AAT that the respondents provided a section 37 document, and I am sure you are all
25 familiar with section 37 documents, that they are the key material that the decision maker has to have, and basically you three are the decision makers and you have to have it and I have to apologise again that the form you have got it in is mixed in together with a lot of other relevant stuff in this 630 page volume that basically I have seen the words "bundle of documents" used in affidavits, this is a bundle of
30 documents.

It does have a sort of index at around page 555 and I wish that I had made a separate copy of that index but I haven't. Page 550 is where Ross McLure turns up with a very neat set of points objecting to things, quite successfully. Page 556 to 57 is him
35 filing a draft index of appeal papers which is pretty much like the index of appeal papers he has got that the registrar basically agreed with his view. He has accidentally filed it on my behalf but I'm sure that's just a template error, but you will see the name Ross McLure there.

40 Then on pages 559 to 563 is the closest thing that exists to an index to the bound volume. That is what we wanted to put in the appeal papers and from that I will be able - if you could keep that page open for me in one of the volumes - be able to locate things like the section 37 statements which re what I will be referring to continuously while going through the chronology.

45 FRENCH J: Well, I think first we have to focus. What you have here is an appeal against - let's just deal first with the appeal against Gordon Js decision, and what we are looking for is you to identify what you say she got wrong. It was a - - -

MR DENT: Well, she started getting it wrong by hearing a strike-out motion with no notice and - - -

FRENCH J: Yes. That is a procedural issue.

5

MR DENT: Well, it was a pretty fundamental issue that meant that she had been reading documents for three days in expectation that I had been reading documents for three days, and that they had a great deal to do with what the issues in the ultimate case would be. There were no documents there about any misfeasance in public office. The strike-out affidavit provided no evidence about anything.

10

I think the only fact that Paul Barker swore to was that polling day was November 24, which I imagine one could take judicial notice of and if not you would prove it by the Gazette or something, but we didn't need his affidavit to know when polling day was, and the rest of it was documents that were already in the court file and the judgment of the AAT which I certainly agree had to be before Gordon J. Regardless of what was happening at the directions hearing, she had to know about that hearing, and it was basically filed in an effort to make sure that the section 37 documents wouldn't be in front of her, but I won't go straight to them now.

15

I'll go to the points you are probably wanting to hear or I'm not sure what you want to hear, but I would presume by the end of this morning, if not by the end of the day at least, you will want to hear some arguable case on each of the claims that I put in the amended application, that there is some series of points which I can establish by evidence, which the respondents would have to refute by evidence, which, if I establish them, would entitle me to those 13 items of relief claimed.

20

FRENCH J: I suppose the primary issue is something to the procedural argument about saying she dealt with the strike out without adequate notice to you, but the primary question is, on the materials before her Honour, how did she get it wrong in terms of making a decision that you had no reasonable prospect of success?

25

MR DENT: Well, first I would say she fundamentally misconceived it – well, she was acting as though it was some kind of special leave to appeal from some decision that had already been made somewhere else by somebody that has authority to make binding decisions. The manner in which she approached it was as though the case had already been tried and - - -

30

FRENCH J: By?

35

MR DENT: By, well presumably by either Ryan J or by Deputy President Forgie of the AAT.

FRENCH J: So you say there was a kind of undue deference to the AAT and/or Ryan J on matters of fact?

40

MR DENT: Well, undue deference to both simultaneously despite the fact that they agreed with – had completely opposite views on the state of the law.

FRENCH J: Yes, all right, yes.

MR DENT: I wouldn't call it deference, it sort of indicated to me that she hadn't
5 actually read their judgments properly because she adopted both of them when they
were essentially saying – reaching opposite conclusions. If I could just outline that,
that probably is a central point that you should hear.

FRENCH J: Yes, I think we need to go to the central point. If you take it to perhaps
10 the part in the reasons where you say it crystallises - - -

MR DENT: Well, Ryan Js view was that yes, the Australian Electoral Officer may
have some kind of authority to make inquiries as to what my name is and to require
me to produce documents - - -

15 FRENCH J: Yes.

MR DENT: - - - and I should be reasonable about it and give him something and I
wasn't reasonable about it and wouldn't give him anything on the day that Ryan J
20 asked for it, and so Ryan J wasn't prepared to make a - - -

FRENCH J: He adjourned it over, didn't he, to - - -

MR DENT: It was a two day – there were two separate days. He – that's one of the
25 findings that I think Gordon J would have entirely missed by not having the
transcript. It appears from Ryan Js judgment that he simply made no orders in my
favour at all, but actually I got on the first day exactly what I was there for. He did –
it wasn't in the form of – an order for mandamus or an injunction requiring him to do
anything. He seems to approach it fairly subtly, he simply required an undertaking
30 that they would have the decision by the next morning.

Now, Gordon J has concluded that he found that they hadn't contravened the Act.
Now, he made no such finding implicit in his requiring an undertaking from them
that they would have a decision by the first thing next morning, it was an implicit
35 finding that they had contravened the Act. If that wasn't his implicit finding I would
call that an error by Ryan J but my impression was that he understood perfectly
clearly why I was there on the day before the close of nominations and it is
completely unacceptable for the Electoral Commission to be refusing to tell a
candidate whether they are enrolled or not. Right from the close of - - -

40 FRENCH J: Sorry, just with Ryan J, on 31 October, and I'm looking at page 44
under the tab which says Ryan J day one.

MR DENT: On the appeal book or the - - -

45 FRENCH J: Yes, on the appeal book.

MR DENT: Yes.

FRENCH J: Page 44. The position at that point was the commission had not made a decision and there was a question whether you were going to provide any further information. You made it clear that you weren't, or you had done everything you had to do, and he said that:

5

Well, I take the view that it's only been made clear this morning that you do not intend to place any further information before the commissioner. I am disposed to give, in fact, I consider it to be a pre requisite to the exercise of jurisdiction by this court that a decision be made and I am disposed to give the commissioner an opportunity to make that decision as quickly as it reasonably can –

10

and he asked Dr Donaghue whether he had any instructions and then he adjourned it over.

15

MR DENT: Well, I haven't found the page you're referring to but that corresponds entirely - - -

FRENCH J: It's page 17 of the transcript before him on the first day.

20

MR DENT: Right, but that corresponds exactly to my recollection.

FRENCH J: Yes.

25

MR DENT: Because I remember being rather startled about him using the expression "it's just emerged". If you look again at the section - - -

30

FRENCH J: Well, we needn't get into that, we are just characterising what he was doing because we're going back then to what Gordon J saw as the position when she was dealing with the matter.

MR DENT: Yes. What he was doing was what I came for. I couldn't go to the AAT to force them to make a decision - - -

35

FRENCH J: No.

MR DENT: - - - because until they had made a decision the AAT clearly hasn't got any jurisdiction - - -

40

FRENCH J: Yes.

45

MR DENT: - - - but a superior court of the Federal jurisdiction can order a recalcitrant Electoral Commission to take a bloody decision and that is effectively what he did. I was told as I was going in that he has got a bit of a reputation for taking up to two years to reach conclusions before he will issue a judgment but he reached that conclusion pretty quickly that morning and it doesn't stand out in his judgment. He seems to have a fairly subtle approach. You might get the impression that he hasn't resolved something when he has resolved it, just by the parties

knowing exactly what they've got to do when they leave his court, and I rather respected that, that it applied to both sides.

5 They knew they had to come up with a clear written decision by the next morning
and I knew that if it went against me I was going to have to give them something,
because if Ryan J says that I can't just stand there and say I've given you my word in
writing on the form and you have just got to accept it, if he is saying that I know that
I'm give them something, but I'm certainly not going to give them the official
documents they ask for, so I believe he resolved matters quite successfully.

10 FRENCH J: So what he did on 1 November was to refuse your claim for
interlocutory relief and then stand the matter over for directions?

MR DENT: No.
15

FRENCH J: Well, that is the order that he made.

MR DENT: On 1 November, sorry. On 31 October he - - -

20 FRENCH J: He adjourned.

MR DENT: - - - he got a decision out of it, right? Then - - -

FRENCH J: On 31 October he said:
25

I will adjourn it so they can make a decision.

So there was no decision.

30 MR DENT:

I will return it till the next morning –

right?
35

FRENCH J: Yes.

MR DENT: And they are to make a decision and communicate it to me in time for
him to review it at 10.15 the next morning.

40 FRENCH J: That is a refusal to enrol you?

MR DENT: Well, they hadn't made – they claimed that they hadn't made any
decision.

45 FRENCH J: Yes.

MR DENT: Right? My position, which you will notice in the application to the AAT when we get to it, my position is that they made that decision the moment I applied and they communicated it to me in a most extraordinary fashion which will be a highlight of the evidence that it is in fact malfeasance rather than blundering.

5 You have heard of the excuse, "The dog ate my homework," well, normally one just has to accept that kind of excuse and tell them to be more careful in future, but they actually served up the vomit and said, "And this is the vomit that the dog left after eating my homework."

10 FRENCH J: Okay. Well, in any event, just getting back to Ryan J for a minute, his formal orders made on 1 November and published on 7 November - - -

MR DENT: Right. That was the following day after they made their decision.

15 FRENCH J: Yes, that's right, that's the point I'm coming to, refused the application for interlocutory relief and then adjourned the matter to a date to be fixed for a directions hearing.

MR DENT: Yes, for substantive relief and - - -

20

FRENCH J: That's right.

MR DENT: - - - and where it goes, so it wasn't any suggestion from Ryan J that he was under any illusion that it was all over. It was clear that he wasn't going to make - overrule the Electoral Commission when what Dr Donaghue who was representing the AEC at one of the days - I think on the first day, said, "You haven't got the materials." Right.

25

FRENCH J: Yes.

30

MR DENT: "That the AEC is an administrator, they've got the materials, you haven't. You're a judge, you can't review a decision unless you've got the materials."

35 FRENCH J: Anyway, the next thing - sorry, just to get it crystal clear, the next thing that happened was the AAT decision of 23 November, I think, right?

MR DENT: Well, the next thing that happened was my application to the AAT which followed as soon as - - -

40

FRENCH J: My apologies, I'm sorry. Actually, the next thing that happened was Jessup Js order - - -

MR DENT: Oh, I'm sorry, yes.

45

FRENCH J: - - - of 1 November.

MR DENT: I'd rather forget that.

FRENCH J: Yes.

MR DENT: Okay.

5 FRENCH J: And that was a cost issue and you are raising an issue about that?

MR DENT: Yes.

10 FRENCH J: And then, just – let’s not delve into the details of it, we’ve all read it,
and then you’ve got the AAT application, and you’ve got the AAT decision given by
Deputy President Forgie on 23 November, which, of course, is a separate stream, as
it were, of litigation and then you’ve got in the primary proceedings in this court,
which you would categorise, as I understand it, as malfeasance proceedings in part;
15 you’ve got Gordon J acceding to an application to dismiss you summarily under
section 31A.

MR DENT: Yes, and it’s at that point that I would want to take you to that
chronology that you haven’t seen yet, and apologise - - -

20 FRENCH J: Yes.

MR DENT: It was a very - - -

25 FRENCH J: And really, what I was trying to get to – the core of what I was trying
to get to right at the outset, having got that sort of setting, is what do you say was her
error?

30 MR DENT: She didn’t have – well, I’ve had the good fortune to read her judgment
in Jefferson Ford which was just delivered on 28 April where she seems to have
given a great deal of thought to what criterion judges should use. It’s obviously not
an area where I can comment in great depth as to what you should use, but she has
certainly given it a lot of thought and I would say she gave it no thought at all on that
day. She has listed a series of criteria that in particular pleadings should be over and
it should be clear what the case is supposed to be about and I think I just got handed
35 a copy of Jefferson Ford now, but are you familiar with the recent case?

FRENCH J: Yes. But, sorry, can I just understand where we are going to?

40 MR DENT: But she wasn’t – she wasn’t conducting - - -

FRENCH J: Are you saying that she – sorry, just hang on a second, let me put the
question to you. Are you saying that she misapplied the criteria under section 31A?

45 MR DENT: She wasn’t using those criteria. The criteria she was using was that
she’d read the judgment, decided that I didn’t have a hope and was going to strike it
out. There was no question of any argument to her about what the case was about, it
was just that Paul Barker had filed his affidavit, she had read the two judgments and
she had made up her mind. That was as simple as that. And the reason that that

situation arose was because there was a deliberately misleading course adopted by the respondents which I would characterise as further evidence for the fact that this isn't just blundering.

5 They filed it so that she would have in front of her a notice of motion with a date on it saying that she was conducting a hearing on a strike out motion and they gave me notice but with a notice of motion which I will take you to in the appeal book because I saw in the respondents' submissions that they want to see affidavit evidence on this and they've got an affidavit in reply, that I'm saying they didn't
10 give me notice, and - - -

TAMBERLIN J: Mr Dent, can you just give us the propositions you are putting forward as to why there was an error? You are wandering all over the place, with the greatest of respect, if you would just pinpoint the question.

15

MR DENT: Okay.

TAMBERLIN J: What errors did she make; would you please give us some propositions which set out the error so we can make a decision on the issue?

20

MR DENT: Okay. On the procedural issue - - -

TAMBERLIN J: At the moment it's being obfuscated, with great respect.

25 MR DENT: Okay. On the procedural issue the simple error she made is she did not give an order dispensing with notice that would enable me to present reasons why she shouldn't dispense with notice. She didn't indicate that she was about to make such an order, and what I thought she was doing was hearing a discussion about whether there should be a hearing to strike out, and I indicated that it might be quite
30 helpful in avoiding going to the court to dispute her returns if she was going to her the case on each side and express an opinion about it. What she thought she was doing was actually deciding a strike out and I do want to pause for a moment and take you to the exact spot in the - which I have been provided here, and - - -

35 TAMBERLIN J: Does that summarise all the errors that you say Gordon J made?

MR DENT: It conclusively - - -

TAMBERLIN J: Before we turn to the - - -

40

MR DENT: Not all the evidence, it conclusively demonstrates a single, sufficient error, because I do believe I only have to establish I have got an arguable case on the one point. This isn't on the substantive matter. It's a conclusive error - proof that Gordon J did not properly strike it out. There is the notice of motion, it is in tab A on
45 page 4, it is the very second document in the appeal book, and I want to take you to that. That is the notice of motion. It was a notice of motion for that directions hearing to be replaced with a strike-out. And at the very end of tab A, just before tab B starts, you will see a certificate from Craig Lawson who had carriage of the

proceedings for the respondent certifying that the appeal book was correct, and it is correct. That is the notice I got. I was not expecting a strike-out; I was attending for a directions hearing, and - - -

5 FRENCH J: Now, this is a notice dated 10 December 2007.

MR DENT: Yes.

10 FRENCH J: It doesn't contain a return date on the notice. Are you saying this is a copy of what was actually served on you?

MR DENT: That's correct. The affidavit was served correctly on the 10th. The 10th gives me the bare minimum three days. The affidavit was served with that and so my understanding was the affidavit doesn't say anything. If they had filed it and it had
15 been set for three days from now it would have a return date on it.

TAMBERLIN J: You say it didn't have a return date?

MR DENT: That's the document.
20

TAMBERLIN J: Do you have the originals?

MR DENT: That is a direct copy of the original.

25 TAMBERLIN J: There was no stamp on it at all from the court?

MR DENT: No stamp on it at all; no date filled in. Okay, Gordon J, on the other hand, did receive one, and that's why she was misled rather than making the error herself; I believe she did make some errors herself, but she would have honestly
30 believed that the document in front of her was the notice that I got because that's - - -

TAMBERLIN J: So you read this one as being a directions hearing only, did you?

35 MR DENT: It was a directions hearing. That was what it was listed as. Ryan J said, "A directions hearing on a date to be fixed". I then got a letter saying the date is fixed and I prepared for a directions hearing.

TAMBERLIN J: The date was what? 14 December?
40

MR DENT: 14 December at 9.30 am, Gordon J. And I asked the AAT to avoid holding a hearing on that date because I had a directions hearing. The - - -

TAMBERLIN J: Sorry, where is the letter that talks about the directions hearing?
45 Is there a letter that talks about it?

MR DENT: It's not in the appeal book. I do have it. It is in the large bound volume if you want to see it but there is a letter dated 14 November from the registry.

TAMBERLIN J: It's in the large volume, did you say?

MR DENT: In the large volume.

5 FRENCH J: In the large - - -

MR DENT: But it's simply a routine – if that be a copy of - - -

10 TAMBERLIN J: Well, let us have a look at it. I mean, it's important because this is your point. You said you came along for a directions hearing and got faced with a strike-out application you weren't expecting. Is that what you are saying to the court?

MR DENT: Yes, that's correct.

15

TAMBERLIN J: All right, well, let us have a look at what you have got.

MR DENT: This is from the court registry and it will take me a moment to find it.

20 FRENCH J: That's all right.

MR DENT: It's simply the routine letter informing you for listing date. Yes, it would be in your court file.

25 FRENCH J: Yes.

TAMBERLIN J: So what you are looking for is the notice of motion, is it, copy of the notice of motion in your affidavit?

30 MR DENT: No, I am looking for the letter from the court - - -

TAMBERLIN J: Yes.

MR DENT: - - - saying that I am to attend a directions hearing. Here it is.

35

TAMBERLIN J: All right, which page?

MR DENT: Page 129 it would be.

40 TAMBERLIN J: One hundred and twenty-nine.

MR DENT: My number is very poor on this. It is a letter dated 14 November containing a listing - - -

45 TAMBERLIN J: Matters of listing:

The matter has been listed.

It doesn't say anything about a directions hearing.

MR DENT: Listing for first directions.

5 FRENCH J: Yes, first directions.

TAMBERLIN J: First directions.

10 MR DENT: And that was very clear.

TAMBERLIN J: I see.

MR DENT: And that was what Ryan J ordered, that there - - -

15 TAMBERLIN J: And you protested, of course, before Ryan J, did you, that this was being - - -

FRENCH J: Gordon J.

20 TAMBERLIN J: - - - sorry, Gordon J, this was being treated as a strike-out application.

MR DENT: Yes and no. What I did was Rowena Orr, the counsel at that hearing for the respondent, wanted to get to the microphone first to move her strike-out
25 motion, and I insisted, "Look, I have got carriage of these proceedings and I am entitled to speak first".

TAMBERLIN J: Yes.

30 MR DENT: And I spoke first.

TAMBERLIN J: Right.

MR DENT: And I said, "I have given an undertaking to Jessup J to file proceedings
35 against the - in support of my oral application to him, and I believe that I have to apply to you for leave because what I have done is that I have put in an amended pleading, which was the first volume in the appeal book, and that the first order of business has to be my application for leave to amend the original motion". That - - -

40 FRENCH J: Now, the transcript of your appearance before Gordon J on 14 December appears in the appeal book at, I think, page 103.

TAMBERLIN J: One hundred and four, yes.

45 FRENCH J: Yes, starts at 104.

TAMBERLIN J: And you said, "That's fine". Her Honour said:

Mr Orr, on behalf of the respondents, seeks to strike it out.

And you say:

5 *That's fine.*

MR DENT: I don't mind them seeking to strike it out. I have got both the original transcript numbers and that page 104 you are referring to.

10 TAMBERLIN J: Yes.

MR DENT: In the chronology I have been referring to them by the original transcript numbers.

15 TAMBERLIN J: All right. Well, pages 1 and 2, the questions raised.

MR DENT: Yes, that's the start of it. She tells me for the first time that my amended application been and I am off the stage.

20 TAMBERLIN J: I see.

MR DENT: Right, I have no longer got carriage; it's now, from then on, their strike-out application. I tried to indicate but when I got my turn to speak again I explained what directions I was there for.

25 TAMBERLIN J: You do say that – it's pointed out to you that it's a strike-out and you say, "Understood" I think:

The amended application is before me.

30 You say, "Understood", and:

Mr Orr seeks to strike it out.

35 "That's fine". Now, where do you say you raised any problem?

MR DENT: Well, I mentioned to her that I had only received the documents the night before.

40 TAMBERLIN J: I see, where is that?

MR DENT: I will leave them to find it, but I certainly mentioned that I only got the documents the night before, but I was quite confident that when she was discussing it she was discussing whether to consider a strike-out motion, because I didn't even
45 hear any submission that made sense to me for a strike-out. It just sort of, you know – what I kept saying was, "I have got to get directions because it appears that it is a combination of mandamus and injunction and order for review, and there is AAT

proceedings mixed up with it.” And at that stage I didn’t even know whether she would want to proceed via a statement of claim or an affidavit.

5 So how she could imagine that she has heard the pleadings when there haven’t been any pleadings, there hadn’t even been a decision – I mean, she ought to have known that what she had in front of her was the hastily written affidavit for an interlocutory, very urgent, short notice hearing. It was quite plain on the affidavit that that was what it was. It didn’t even list what provisions of what legislation it might be brought under. It had no statement of claim, whatever, it simply sought the
10 interlocutory relief and said that that would be sought as final relief as well. And it included the damages and in the amended one included the exemplary damages but said nothing about why. And I don’t see how any judge could imagine that pleadings were clear and she could evaluate the case. The case hadn’t started.

15 FRENCH J: Well, the point is you have made the observation at page 5 of the transcript, which is page 108 of the appeal book, that – you said:

I’ve only seen these documents yesterday –

20 etcetera, that is - - -

MR DENT: Sorry, which page was that?

FRENCH J: Page 5 of the transcript, page 108 of the appeal book.

25

MR DENT: Yes, that sounds like the one I was looking for, yes.

FRENCH J: Yes, it says:

30 *... the respondents’ notice to strike-out or would they be in the affidavit accompanying it?*

I have only seen these documents yesterday so may or may not have got them.

35 So you made that observation, but then it appears, if I just skim very quickly through what follows, that you simply engage with the argument on the question of whether it was futile and useless and all the rest of it.

MR DENT: I thought I did, apparently I made no impression at all.

40

FRENCH J: No, no. The point is that you actually engaged on a field of battle on the substantive strike-out motion.

MR DENT: Yes, I didn’t say, “Look, I’m not going to put up with this. I won’t
45 tolerate being invited to a directions hearing,” I engaged, yes.

FRENCH J: Yes, okay.

MR DENT: And I pointed out, “How can you possibly call it futile under these circumstances?”

5 FRENCH J: Well, that’s right. You went to the merits of the motion.

MR DENT: That’s me engaging.

FRENCH J: Yes, okay.

10 TAMBERLIN J: So you argued the case.

FRENCH J: And now you are saying – you are saying, in effect - - -

15 MR DENT: My attention has just been drawn on the very first part of the page.

FRENCH J: - - - you are saying, in effect, though, Mr Dent, that there was a – as I understand, the way you formulated an answer to Tamberlin Js question, that there was basically a failure of procedural fairness so far as you were sort of ambushed by the strike-out motion.

20 MR DENT: I felt ambushed by both the respondents and the judge.

FRENCH J: Yes.

25 MR DENT: It was clear that they had misled her but it was clear she wanted to be.

FRENCH J: So it’s a procedural fairness argument. In other words, you say it was an unfair process.

30 MR DENT: I say there was no process.

TAMBERLIN J: No, but you say you went there for - - -

35 MR DENT: There has been no trial, it’s as simple as that.

TAMBERLIN J: - - - no, you say you went there for directions, you were faced with a strike-out application you had got shortly before.

40 MR DENT: Yes.

TAMBERLIN J: You dealt with it as best you could and now you say you are at a disadvantage, is that so?

45 MR DENT: No. I believe if I was a lawyer that’s what I would say. I would refer to the term “procedural disadvantage”. What I say is there was absolutely nothing resembling a trial, and if I was a religious person I would start quoting the first book of Genesis - - -

TAMBERLIN J: Well, let us not get into that.

MR DENT: - - - where an omnipotent, omniscient god asks the guy has he got any explanation before deciding what to do. Gordon J didn't. She is not omnipotent, she
5 is not omniscient, but she thought that by reading Paul Barker's evidence she would know exactly what to do.

TAMBERLIN J: All right, so that's your main point in relation to Gordon J, is it?

10 MR DENT: To the procedural, yes.

TAMBERLIN J: Yes.

MR DENT: I think the strong preliminary point than that procedural one, which, in
15 my view, is sufficient. It doesn't solve the problem, we are all - - -

TAMBERLIN J: Well, what is your other point, if you have one?

MR DENT: Right, the - can I just explain this. Both of these two points end up
20 being a waste of everyone's time, right, but ultimately somebody is going to have to - - -

TAMBERLIN J: Well, don't worry about that, just tell us what your second point
25 is.

MR DENT: The second point is that it was very obviously going to result in a constitutional matter if any of these excuses that were brought up, from what I was saying, had nothing to do with errors of law. They knew what they were doing was not permitted by the Act. But if any of these excuses made sense then obviously the laws that allow them to behave like this would be challenged. And I made it very
30 clear to Gordon J that I hadn't filed a notice of the constitutional matters because, in my view, the case can be won without it. That's not what any of this legislation says; it does not authorise them to behave this way. But if at anyone - if at some stage of the case it is concluded that it's the legislation that has caused my problem, then
35 obviously that legislation is under challenge.

TAMBERLIN J: Yes.

MR DENT: And I spelt that out to her and said, "I don't want to file a constitutional
40 matter. If they are raising a constitutional issue then they should file the notices".

TAMBERLIN J: Where did you say that, that you were seeking mandamus against the Commonwealth officer, is that - - -

45 MR DENT: I will ask you to find out while I am temporising, but my proposition was that I am in a Federal Court of superior jurisdiction and somebody is making the extraordinary claim that the whole issue is moot because polling day has gone past. Now, to me there would have to be some constitutional argument to suggest that the

Federal Courts don't have jurisdiction to uphold the law during elections. And I don't know what that argument is and I doubt that it could possibly be successful because courts generally guard their jurisdictions fairly jealously, but whatever it is it certainly can't be determined by Gordon J, or at least can't be determined at a first
5 directions hearing that's a hearing strike-out.

She knew perfectly well that there would be a constitutional challenge if she did what she did. And look, I genuinely do not know, that may be an expedient way to bring it on quicker. I mean, I have used a form of words there that would be familiar
10 from Gordon J; it's the American language of acting completely without all jurisdiction, and she seems rather familiar with the American jurisprudence where those are the traditional words to introduce a claim that malfeasance against a judge. Well, I have no intention whatever, because there was no damage done and I didn't see any hint of malice. As far as I can see, all she has done is expedite it and brought
15 it before the Federal Court.

FRENCH J: Well, in terms of the strike-out, you are saying that there was a constitutional issue implicit in your case and she should have adverted to that or recognised it.
20

MR DENT: Well, it was implicit in their case. If they are saying the Federal Court can't - - -

FRENCH J: Well, okay, sorry, there was a constitutional point implicit in the case and that she should have recognised that and that would have been a reason for not striking out your application. I mean, it has to - - -
25

MR DENT: Unless, in fact, a strike-out is just an interlocutory procedure; if it was vexatious or frivolous or something like that - - -
30

FRENCH J: Well, that's right, yes.

MR DENT: - - - then she could.

FRENCH J: But in any event - - -
35

MR DENT: But she acted under section whatever of the Federal - - -

FRENCH J: - - - sorry, I am just wanting to get clear the error. You say that she failed to recognise. As I understand the gravity of what you are saying, she failed to recognise a constitutional issue.
40

MR DENT: Again, if I was a lawyer I would agree with you whole-heartedly, but I think on the contrary she recognised a constitutional issue and recognised it would be
45 pointless continuing a trial before a single judge when the facts were clear and it was going to head straight upwards.

FRENCH J: Right, okay. Now, are there any other points of error that we – we have got two points.

MR DENT: Those two points I - - -

5

FRENCH J: We have got the procedural fairness point and the lurking constitutional point.

MR DENT: Okay, those two errors are sufficient to request that you uphold the appeal - - -

10

FRENCH J: Yes.

MR DENT: - - - and award costs both for the, what should be, the directions hearing and for this appeal hearing and send it back to a single judge. Now, I imagine having convened a Full Court, and I requested it be an expedited hearing and it's certainly earlier than I was able to cope with, I regret that the circumstances were that way, you are here. I imagine - - -

15

FRENCH J: You shouldn't always ask for what you don't want.

20

MR DENT: I wanted it; I didn't realise I would get it. It has been expedited, we are here and you should be deciding – she is right, that it would have been a waste of time for a judge to be hearing evidence on it because the evidence is clear.

25

FRENCH J: Just going back to the first point for a moment. I just looked at the original file; it looks as though Mr Barker sent a letter with the proposed notice of motion to the court on 10 December and it was then made returnable. He asked for it to be made returnable on 14 December, which was the date already fixed for the directions hearing before Gordon J, and that's what happened. Now, it may well be that if he sent that – we will hear from the respondent I guess, but if he sent off a letter on 10 December asking for the motion accompanying that letter to be returnable on the 14th, that you might have been given a copy of the motion on the same date as on the 10th without any date written into it because it wouldn't have been fixed at the time it was sent by Mr Barker.

30

35

MR DENT: Yes. That's very likely and he sent me a copy of the letter, the conclusion - - -

FRENCH J: He sent you a copy of the letter he sent to the court.

40

MR DENT: There was a letter accompanying the notice - - -

FRENCH J: Yes.

45

MR DENT: - - - and they proposed to file it that day.

FRENCH J: Seeking it to be returnable on the - - -

MR DENT: All right, seeking it to be returnable.

TAMBERLIN J: So you had - - -

5 MR DENT: And it was plain that they had served me when they hadn't filed it, right.

FRENCH J: Yes.

10 MR DENT: But if they had filed it - - -

FRENCH J: Well, they maybe served you contemporaneously with sending it into the court.

15 MR DENT: Well, I would – no, they certainly – it wasn't me personally; it was Harry Nowicke, my address for services at his offices, and he actually signed for the affidavit and it was at close of business that day that it was clear if they bring around the affidavit without the stamped notice that it hadn't been filed that day. All right, it wasn't served through the post or anything, it was delivered in a form that, you
20 know, they would have delivered the other one if they had had it.

FRENCH J: All right.

MR DENT: Okay, so those to be sufficient to settle the costs issue and to send it
25 back, but I don't want to go back. If there is some basis for striking out I am sure Dr Donaghue will be anxious to present it and I will be anxious to answer it. I have read their submissions and I couldn't see anything in them that I need to answer.

FRENCH J: Well, you can wait and hear what he says and then respond, of course.
30

MR DENT: Yes, but it's up to you which way you like it. If I had been called on to respond then I would have been pretty unprepared then. I am a bit better prepared now.

35 FRENCH J: Well, I think what we are looking to at this stage is to see whether there has been some error of substance or procedure in the way the matter was dealt with by the primary judge, Gordon J, and if there was and if that makes a difference, then there would be a question of the appeal could be allowed, subject again to issues of futility which might arise but that would have to be raised by Dr Donaghue. Now,
40 have you said everything you want to at this point on the actual notice of appeal itself?

MR DENT: No, definitely not. The question you asked earlier, if you turn to page
45 10 of the transcript which is page 113 - - -

TAMBERLIN J: Page 113?

MR DENT: Yes, page 10 of the transcript numbering.

TAMBERLIN J: Yes.

MR DENT: The paragraph that starts – it goes from line 5 to 10.

5 FRENCH J: This is under the Gordon J tab, yes.

MR DENT: Yes, where I say:

10 *This is quite an extraordinary piece of legislation which is rather new –*

FRENCH J: Okay, so this is where you raise the constitutional issue?

MR DENT: Yes:

15 *I believe that in the course of these proceedings, if they do go forward, at some
point it will be necessary to file a notice of constitution of a constitutional
matter because if her analysis is correct, it may not be, then that is a very plain
constitutional matter. But I don't want to be filing it unless it does arise in the
course of the proceedings.*

20

Now, my view is that Ryan Js view of the law was incorrect, that I am entitled to just
stand down and say, "I have given the – I have filled in the correct forms, I have
provided the required ID," but despite that being my view I then did exactly what he
recommended. I had five witnesses, I think, at the AAT and the AAT confirmed my
25 view, that I might as well have just stood there because it had nothing to do with the
fact that, "Yes, my name is Arthur Dent". That her view, which was the complete
opposite of Ryan Js - - -

30 FRENCH J: Her being Deputy President Forgie?

30

MR DENT: Deputy President Forgie. Her view was that she couldn't possibly be
being asked to exercise her discretion on these matters and weigh evidence and so
on, it has to be a clear cut statutory matter that the Electoral Office you can decide
off the cuff, and that the only way that could be would be that the name on your
35 drivers licence is the name you enrol a person under and so she enrolled me under it.

And to me that makes a lot of sense – a lot more sense than Ryan Js view, because it
is just not possible for electoral offices to go around holding AAT hearings about
what peoples' names are. If they discover people putting in fraudulent applications
40 they can refer it to the investigations department, which can prosecute, but they can't
hold hearings about that kind of thing and neither could she.

FRENCH J: I just want to make clear what territory we are in at the moment. We
are still talking about Gordon Js judgment?

45

MR DENT: Well, we are sort of not. She didn't make one, right.

FRENCH J: Okay. All right. Well, all I'm concerned about, you have given us two points of challenge to Gordon Js judgment.

MR DENT: Yes, they are the two - - -

5

FRENCH J: All right, they are the two, so let's leave it at that and see what Dr Donaghue has to say and see what you say in reply and then the next question then are these two applications for leave that you have filed.

10 MR DENT: Okay. Well, do you want me to refer to the leave?

FRENCH J: I think it would be good if you could move to both. Unless there is some other error you want to point to in Gordon Js judgment.

15 MR DENT: Okay. On the – there is an - this will help connect it together.

FRENCH J: Okay.

MR DENT: Okay. The reason for the leave to the AAT, it's very clearly out of
20 time.

FRENCH J: Yes.

MR DENT: Is that I honestly can't think of any reason to appeal the AAT decision,
25 therefore I don't need leave to appeal it and that's why I didn't appeal it, but
Gordon J apparently thinks that's my remedy. Now, the only point of the AAT
decision that I need overturned is her view about silent enrolment. She expressed a
very definite view in her judgment that if you are an itinerant elector, you don't have
an address, and therefore there is no question of publishing your address and
30 therefore you can't apply to have it suppressed.

That was a very definite view she expressed in her judgment. But she made no order
about it and I don't think that was in any way accidental, she's a very experienced
Deputy President of the tribunal and she doesn't accidentally forget to make an order
35 about something. And I was there and Gordon J wasn't and the reason she didn't
make an order about it is that there was no hearing about it. The application clearly
said that I'm applying for review of a section 104 decision as well as the enrolment
decision. Now, section 104 is the suppression of address.

40 TAMBERLIN J: Sorry, this is a complaint about Gordon Js understanding of
Deputy President Forgie's decision.

MR DENT: Yes, that's the connection between the two. Right. But it's the reason
45 for the leave to appeal Forgie as well - - -

TAMBERLIN J: It's the reason for it, but you are not really proceeding against
Forgie.

MR DENT: No, no, to me - - -

TAMBERLIN J: You are saying Gordon J misconstrued the effect of the judgment.

5 MR DENT: Yes. To me Forgie acted correctly in saying, “We have to have an urgent hearing about this before polling day.” So she had one. And we don’t have to have an urgent hearing about silent enrolment because it is automatically suppressed until there is a hearing. Until both the AAT and this court had made a decision they are not allowed to publish my address; that’s provided for in section 104.

10 It’s the only sensible way to handle it and it is specified in the legislation, so there’s no urgency about that. They went a long way out of their way to hold an AAT hearing that quickly and when the matter does have to be resolved, which is after the election, I’ve got no reason to believe that it would require an order for mandamus
15 for Deputy President Forgie to hear it.

FRENCH J: Well, is this a third error attributable to Gordon J, that is the way she dealt with the AAT decision?

20 MR DENT: Yes. Well, I wouldn’t attribute that one to Gordon, I would attribute that entirely to the respondents. They deliberately gave her the impression that the AAT had heard that one.

FRENCH J: But however she arrived at it, she has somehow taken a wrong view of
25 the AAT decision?

MR DENT: Yes. The AAT made no decision on some term.

FRENCH J: All right. So really that is a third error which you rely upon in the
30 appeal against Gordon Js decision?

MR DENT: Whatever way you want to put it, yes.

FRENCH J: Well - - -

35 TAMBERLIN J: You’re putting it, Mr Langer.

MR DENT: It’s Mr Dent, thank you. And it really – okay, that’s the fourth error. It
40 is a really natural thing that I don’t object to at all. Deputy President Forgie had a nine year FOI hearing with me, so she couldn’t help referring me to as Mr Langer some of the time. Dr Jessup had similar problems, having been the counsel for the AEC.

45 I don’t think I’ve ever encountered Ryan J before, and I don’t remember whether he did actually make any slips, but I notice the other two judges I have seen are Tracey and Smith JJ, who had no hesitation in just writing it down, D-e-n-t and making a real point of the fact that yes, there’s no problem, you have changed your name. Right. It is very natural and I’m very glad you are all from interstate, but people in

Melbourne do know me and they know me under my previous name. Now, I have - - -

5 FRENCH J: We have even heard of Langer in Western Australian, even in the sixties, Mr Dent.

MR DENT: Fair enough. Right. Well, that - - -

10 TAMBERLIN J: Well, I don't have that privilege, not knowing Mr Dent.

MR DENT: Well, it's a bit of a problem for me that I'm still regarded as a sixties person and then mainly – I'm glad that you have heard of me from the sixties, because what I'm seen to be best known for is something that happened in the nineties with the High Court.

15 FRENCH J: Anyway, just moving on for a moment.

MR DENT: No, but it is a genuine problem, people assume - - -

20 FRENCH J: Okay, Mr Dent, moving on.

MR DENT: People assume - I don't want to move on from this, this is a point I want to make now.

25 FRENCH J: Well, is it a point relevant to the appeal.

MR DENT: Yes, it is a very relevant – I will stop all the relaxed manner about it.

30 FRENCH J: Okay.

MR DENT: It is a very relevant point, right. It is a natural assumption of people that I am still living under the name that they have known me under. I have, in fact, not as an election stunt, right, but for the last three years I've been living under the name Arthur Dent. It is something I can prove. If you want me to I can prove it now.
35 I have taken the trouble of bringing the bag full on every hearing - - -

FRENCH J: We don't require - - -

40 TAMBERLIN J: No, we don't need - - -

FRENCH J: We are only concerned about the evidence of it.

TAMBERLIN J: Yes.

45 MR DENT: Right. Yes.

FRENCH J: It's a question of whether - - -

MR DENT: But although you are not concerned, it is a natural assumption which I don't hold against any judge, but - - -

FRENCH J: Yes, but it's not an argument that is really relevant to the appeal.

5

MR DENT: Okay. It's not relevant - - -

FRENCH J: Now, the other question is - - -

10 MR DENT: No, I want to address it.

FRENCH J: Hang on, hang on, just hold on for a second. I was asking you about the leave to appeal against the AAT decision and what you said about that, in effect, became a complaint about the way, innocently or otherwise as you would put it, Gordon J construed the AAT decision. So it really turned into a third complaint about Gordon Js decision.

15

MR DENT: Okay. She held that my remedy for Deputy President Forgie's remarks about silent enrolment was an appeal from the AAT. I don't - - -

20

FRENCH J: Okay. So that's why you bring that leave application - - -

MR DENT: I believe that's an error - - -

25 FRENCH J: Okay, all right.

MR DENT: - - - because I believe you cannot appeal against some remarks in a judgment, you have to appeal against an order and I also believe that the AAT is obliged to make an order. But once you have applied, and I should take you there to the section – to the application, where I clearly list section 104, so there's no question that my application to the AAT was for a review of decisions under four sections of the Electoral Act. Deputy President Forgie knew that, she also knew that she was not hearing it that day, on the 19th, she was hearing my enrolment and she didn't need to hear the other one.

30

35

And also I want to take you to, in the bound collection, there are the handwritten notes of Deputy President Forgie of exactly what went on at the hearing, where there is no mention of silent enrolment. And I've also listed in the chronology the exchange of correspondence at which the respondents argue that there was no – they first argued that the decision is unreviewable, that the AAT has no power to review a decision by the Australian Electoral Office on silent enrolment; that was their first letter, and then in a later letter they argued that it wasn't raised at the hearing, which was true, and that it's not applicable, right, which I believe is an error of law. Right. But there was no question in Deputy President Forgie's mind or in Dr Donaghue's mind, he knows as well as I do that there was no discussion of silent enrolment before Deputy President Forgie and that's why there were no orders about it.

40

45

FRENCH J: Okay. All right.

MANSFIELD J: Now, can you just point to me in Gordon Js reasons where you say this error emerges?

MR DENT: In her reference – again I take you - - -

5

MANSFIELD J: Is it at page 10 of the appeal book in the first paragraph or somewhere else? Paragraph 11 of her Honour's reasons?

MR DENT: I've got to get there first. Page 10 of part A. There's the end of –
10 there's page 4 of the judgment.

MANSFIELD J: Page 4 of the judgment.

MR DENT: Which paragraph number?

15

MANSFIELD J: Is it the top of that page, paragraph 11, or is it something - - -

MR DENT: Paragraph 11, yes, that's exactly - - -

20 MANSFIELD J: Which particular words demonstrate the error that you say?

MR DENT: If she's correct, she may not be in error, I'm not a lawyer.

MANSFIELD J: Well, which words are you complaining about?

25

FRENCH J: Yes.

MR DENT: The words:

30 *If the applicant is dissatisfied with the decision of the AAT he has a remedy by way of appeal.*

FRENCH J: What's wrong - - -

35 MR DENT: If that's true, then I seek an extension of time to exercise that remedy. If it's not true I seek – I ask you to find that she was in error about that. My view of it is that she was in error, that I don't have a remedy against – by way of appeal against no order having been made. If I want her to make an order and she is
40 reluctant to do so I might have a remedy by way of mandamus, but I don't believe that she would be reluctant to do so, I think that once the law has been clarified as to whether it is as she thinks it might be or not, she will be happy to hold a hearing either way.

45 If the law is that whatever name is on your drivers licence is the name you get enrolled under, then there certainly won't be an appeal because that's exactly what she thought and there's no dispute on the fact that that's the factual situation; my drivers licence is in my previous name. If on the other hand, that is not the law, then she hasn't had a merits review. The respondents have said that I am not entitled to

silent enrolment and I'm sure that she would be willing to conduct a merits review. If she doesn't I'd rather - you know, I could always put in another application for it, but Gordon J has told me that that's my remedy, it's an appeal. So if it is I want an extension of time to do it.

5

MANSFIELD J: Against the decision of the AAT.

MR DENT: Yes.

10 MANSFIELD J: The decision of the AAT was that you could be registered as Albert Langer.

MR DENT: Under my previous name.

15 MANSFIELD J: Yes.

MR DENT: Yes. And that I see no reason to appeal, I can just put in another enrolment form.

20 MANSFIELD J: All right. Then you don't have a - if you are not dissatisfied with that decision.

FRENCH J: But the point is a section 104 - - -

25 MR DENT: I'm not - that decision was quite sufficient to get me a vote on election day and to get me to the Court of Disputed Returns. My complaint on that decision is that the respondents refused to carry it out. Right. The AAT ordered them to enrol me and they decided not to and that to me has far more to do with a nonfeasance in public office and there was no way Gordon J could make an error about that, because
30 she didn't know about it, the respondents deliberately concealed it from her. The impression that they gave her was of course they would comply with the AATs orders. It was only afterwards that they wrote me a letter saying that they hadn't enrolled me.

35 FRENCH J: Well, so far as section 104, that's the silent enrolment issue is concerned - - -

MR DENT: From that one I would appeal Forgie if that was her decision.

40 FRENCH J: Yes, but what she said was - Mr Dent, this is at 82 of her decision - - -

MR DENT: Yes.

FRENCH J: - - - at page 70.

45

MR DENT: I would appeal that if that's all - - -

FRENCH J:

In a letter sent to the tribunal by facsimile after the hearing, Mr Dent indicated that he wanted to have his application considered under section 104 if he were not successful under section 96. I do not consider that I can take that course.

5 MR DENT: Yes. I would certainly appeal that if it was an order. It's factually
wrong. I sent no such letter. I did send a letter with what I thought was some
humour, but it obviously didn't go over about fictional electoral officers and so on
and she's invented a fictional request after the hearing. My request was before the
hearing for a review of the decision on silent enrolment. There was no hearing about
10 it, in my view correctly, and her conclusions from that paragraph number onwards –
I still haven't got to, but I know you are correct, it was paragraph 82 - - -

FRENCH J: Yes.

15 MR DENT: - - - that I would certainly appeal those paragraphs if that resulted in an
order. I believe she's dead wrong on that and I can spell it out to you with a letter I
wrote to the Electoral Commission, because they decided at the same time that they
notified me that they had enrolled me after the election, right, they sent a letter and
this is why the chronology is absolutely essential. We were talking about 10
20 December affidavit and notice of appeal.

On the same day Australia Post postmarked a letter dated 7 December, but it was
postmarked on the tenth, that had been held up somewhere – I would suspect in the
AGS offices, a letter from the Electoral Office telling me that they had just enrolled
25 me and that meant that they had enrolled me after the election and Paul Barker didn't
want to have that letter in front of him when he was swearing his affidavit for
Gordon J, because if there was – if they had given any evidence as to when they had
enrolled me the natural question would be, "Well, was he enrolled before the election
or not?" And that would make it very clear as to why there's an action for damages.

30 But I wasn't enrolled before the election so I didn't get a vote. But that was – you
know, I can't call that Gordon Js error. I insist on calling that deliberate deceptive
conduct by the respondents, who are the Australian Government Solicitor and the
Electoral Commission. They did not want her to know that they had – and I
35 wouldn't say failed - to refuse to comply with the AATs order.

We will have to wait for evidence at the trial where they can say they only got it the
day before the election and so on, but the fact is that the declaration votes aren't
counted until a week after the election and it's at that point that they inspected my
40 declaration envelope and they would've – they have a supplementary roll, which Dr
Donaghue explained to Deputy President Forgie, because she needed to be reassured
that it wasn't futile, she was hearing the hearing on the 19th, and Dr Donaghue
explained that it wouldn't be futile for her to issue an order because there's a
supplementary enrol to cater for last minute errors – correction of errors. But
45 somebody deliberately decided not to place me on that.

FRENCH J: All right. Well, no, I'm sorry, we went to the question of the leave to
appeal against the AAT. You have explained that that really feeds back into the

Gordon decision and your complaint about that. Now, the other application for leave is an application for an extension of time to file and serve a notice of appeal against the judgment of Jessup J.

5 MR DENT: Well, you have seen the affidavit and you don't want the details. If at
the end of the case I get ordered to pay costs I would have a great deal to say about
Jessup J's order, but I think it's sufficient to adopt what was said in the submissions
by the respondents where they draw attention to the words in the transcript where
10 Jessup J indicated that the only reason he made the order was that he thought the
proceedings were over there and then, right.

That he was under the impression that the proceedings were over, they quoted the
exact part of the transcript – I haven't got it in front of me, but it's in their response.
I would simply adopt that and say, "Now, that's the reason he made that order, it
15 should be vacated now because they are not over and we should discuss any costs
order at the end of the proceedings." If you want me to elaborate I will, but you
know what I would be elaborating about.

20 FRENCH J: All right, thank you, Mr Dent. We will hear from Dr Donaghue now.
Yes, Dr Donaghue. We have read your written submissions.

DR DONAGHUE: Thank you, your Honour. I'll be relatively brief. Could I ask
your Honours to start with the amended application on page 1 of part A of the appeal
book? This is the document that defined the proceedings that Gordon J dismissed
25 pursuant to 31A and you will see that there are eight numbered claims spanning the
bottom of page 1 to page 2 of the appeal book. But the substance of the application
was an application for judicial review of two decisions.

30 One was a decision of the Electoral Commission on 31 October. Now, it is not
expressed clearly in that way but what is sought is a claim that the Electoral
Commission enrol the applicant and it had refused to enrol the applicant on 31
October 2007, with an unparticularised claim for damages and costs. And then the
claims in paragraphs 5, 6, 7 and 8 were added by amendment on 2 November: that's
35 the day after Jessup J's orders.

And the reason that that was done is that Jessup J required the applicant to give an
undertaking that he would commence proceedings seeking the substantive relief that
Jessup J declined on an interlocutory basis. That application was made orally, there
being no proceeding before the court and Jessup J said, "If you give an undertaking
40 to commence proceedings, then I will hear you." And that undertaking was given
effect, although not perhaps in precisely the way his Honour expected by an
amendment to the existing proceeding that had been before Ryan J.

45 So what Gordon J was confronted with was an application for judicial review of two
decisions, one of which had been completely overtaken by an AAT decision, setting
it aside and substituting a different decision and the other of which had been
overtaken by reference to the fact that it sought a declaration that the respondent be
enrolled for the purposes of a particular election and that election was over.

Now, my friend says this case was actually a case about misfeasance in a public office, but nowhere until today, as far as I'm aware, had that suggestion ever been previously been made, but that's what this case was about. This case was about the two decisions that I have just identified and we submit that her Honour was plainly
5 right in finding that there was no reasonable prospect of success in relation to the claim as there set out.

Now, as I understand the submissions that have been made this morning, it's put that there are three errors. The error that has been perhaps hardest pressed is the
10 procedural fairness complaint about the service of the motion. I hope shortly to have an affidavit that I can give to the court explaining how the facts that led to that motion came about. Your Honours will appreciate that there were a very great many assertions in these documents and we didn't actually know which ones were going to
15 found the application made, but the facts, I am instructed and this will be supported by an affidavit that I will seek leave to file shortly, are that on the 10th of – and part of this emerges from what French J said about what is shown by the court file,

The AGS filed the motion, or provided the motion to the court on 10 December, together with a request that it be made returnable on the existing directions hearing
20 on the 14th. That letter was – so the motion, without a return date, was provided in draft to the applicant on that day, on the 10th. I'm instructed that the covering letter stated - from the AGS to the applicant – stated that:

*We are proposing to have the notice of motion made returnable at the
25 directions hearing listed for 9.30 am on 14 December.*

MR DENT: And there's no need for an affidavit. I can confirm that.

FRENCH J: And that was received by?
30

DR DONAGHUE: Well - but the affidavit will exhibit a receipt from a courier saying that it was delivered at the end of the day at 4.40.

FRENCH J: I don't think Mr Dent disputes that it was received without a return
35 date, and that is confirmed by what you say.

DR DONAGHUE: Indeed, without a return date on the 10th. The affidavit will say, I'm instructed, that the next morning the AGC received a phone call from the court, advising that Gordon J had given leave to issue the motion, and that it was made
40 returnable at 9.30 am on the 14th. So this is about a quarter past 11 on the next day, the 11th.

FRENCH J: Sorry. Did you say that was a Saturday?

45 DR DONAGHUE: No, that's a Tuesday, I think.

FRENCH J: Tuesday.

DR DONAGHUE: I think that the 10th was a Monday, and that it was provided on the Tuesday. I'm also instructed that in that telephone call the officer of the court who spoke to the AGC advised that a sealed copy of the motion did not need to be served on the appellant, and there will be exhibited a file note of that conversation.

5 And then on the same day, on the 11th, I am instructed that a facsimile – another facsimile was sent to the – well, sorry, not another facsimile – a facsimile was sent to the applicant advising him that the motion had been made returnable on the 14th.

10 So we submit that he was told by a letter late on the day on the 10th that we were seeking to have the motion made returnable, when it was in fact made returnable on the 14th, and that that was confirmed the next day. Then, as your Honours have observed already from the transcript, when the matter came on there was no complaint made that the applicant wasn't ready to proceed.

15 He didn't seek an adjournment of the hearing. He engaged in substantive argument on the point. And we submit that in those circumstances, if there was ever going to be any foundation for a complaint, it was waived at that stage by the way in which the applicant chose to conduct the hearing that occurred. He plainly had the motion. Indeed your Honours will see at the start of the - - -

20

FRENCH J: But he doesn't dispute that he had the motion. He said he got it without a return date, that's all.

25 DR DONAGHUE: Yes. But his complaint, insofar as it appears at the start of the hearing before Gordon J on the middle of page 104, was about order. He wanted to go before the submission on the motion. But there was no suggestion that the motion shouldn't be heard, and, we submit, in those circumstances there isn't any foundation in the procedural fairness complaint. In relation to the suggested constitutional matter, I can be very short, because the matter that is said to arise was never
30 identified. The applicant has taken your Honours to one passage where he said that a constitutional issue would arise. At the very end of the hearing before Gordon J – this is on page 119, just a few lines before the court adjourned – the applicant said – I'm looking at lines 13 and onwards on page 119:

35 *The way I understand what has just happened is that this has been shaped from the AAT and from your decision.*

And her Honour said:

40 *It's been what, sorry?*

That the way the AAT decision and your decision are shaped leads directly to a constitutional matter on 93A, without having to resolve questions of evidence and so on. Am I misunderstanding what just happened?

45

Her Honour:

I don't understand your point.

The applicant:

Well, then I won't persist.

5 So that's as high as it gets, as far as we can tell, and if there was a point it's clear that her Honour didn't grasp it, and, we submit, she can't be expected to have grasped it because the point was never identified.

10 MANSFIELD J: It wasn't identified in the affidavit in support of the application, when the initiating process was commenced, was it?

DR DONAGHUE: No, your Honour. And then I'm not actually - - -

15 MANSFIELD J: I just had a look at that.

DR DONAGHUE: I'm not actually sure that there – I was trying to recall what was in that affidavit.

20 MR DENT: It was simply to get me enrolled.

DR DONAGHUE: Yes. It all came on very quickly before Ryan J. So there was no – and, likewise, your Honour, with the misfeasance point that's said to have been raised, nothing in the supporting affidavit, as your Honours well know. Usually applications for judicial review are supported by pleadings. There were no orders for pleadings in this case, and her Honour was entitled, we say, to take the case that the applicant had filed on its face, and to assess, as she did, that there was no substance in it. Finally, your Honours, in relation to the AAT, as I understand it this is pressed as a ground of appeal against Gordon J, although the matter wasn't completely clear.

30 If the complaint made is just about the sentence where her Honour says that the applicant has a remedy by the way of appeal, then that sentence is plainly unobjectionable. Plainly he did. The appeal was still within time, there had been – as your Honours will see at the end of the hearing before Gordon J – a discussion about time limits, and when it would be possible to commence that appeal. Most of that discussion related to time limits from an appeal from Gordon J's judgment herself, but towards the end of the transcript my client indicated that it would be content to consent to an extension of the time to appeal from the AAT, until the same time as time would run out against Gordon J: that is, near the end of January.

40 And the applicant chose to file his application to appeal Gordon J within time, but nothing was done in relation to the AAT. More fundamentally, your Honours, we submit that the suggestion that there was some error in relation to section 104, and the way that the tribunal handled it, is completely without substance. And if your Honours could turn to page 71 of Part C of the appeal book you'll see that this is the section, I think, your Honour, Justice French, already directed attention to paragraph 45 82. But if I could also invite the court to look at paragraph 83, you'll see that the application for enrolment that was being considered was under section 96 of the Commonwealth Electoral Act.

That's a provision that allows you to enrol as an itinerant voter, and a voter who has no address – or, rather, a voter who's not entitled to enrol in any particular subdivision, because they don't reside in any particular subdivision. Now, we submitted before Ryan J – and the applicant's memory may be better than mine - I can't recall whether it was discussed before the tribunal, but it may well not have been.

But, in any event, we submit that clearly is a matter of law a section that is designed to allow an address to be withheld from the role can have no possible application to a category of enrolment that is designed to cater to a person who has no address. And if the matter were in any doubt then your Honours – I don't think I need to take you to it – but your Honours will note that section 83(1) of the Electoral Act provides that:

Subject to subsection (2) and to section 104 –

that's the silent elected provision –

the rolls may be in the prescribed form, and shall set out the surname, Christian or given names, and place of living of each elector.

So that's the obligation which usually requires a roll to show an address, and section 104 is an exception to it. But if there is no address because of enrolment under section 96 then the provision has no operation. That is what - - -

FRENCH J: There's an exception in 83(2), isn't there, where the elector is an itinerant elector?

DR DONAGHUE: Itinerant elector, yes. So the Act is internally consistent, and supports what we say: that clearly there is no obligation to put an address on the role when you're enrolled under 96, and therefore no occasion to rely upon section 104. And that, we submit, is what the deputy president found in paragraph 83. My friend talks about it as if it needs to be an order. This is an administrative decision making process, all you need to have is a decision in order to challenge it if that decision involved an error of law.

We submit that that error of law could have been raised on an appeal, but the difficulty that the applicant confronts is that his appeal is many months out of time, and there is no explanation at all in the evidence filed as to why the appeal wasn't filed within time, notwithstanding that it's quite clear, as at 10 December, in the discussion before Gordon J, that he knew all about the time limit. He actually raised the time limit himself as an issue, and that was why there was this discussion of extension. So he knew that the time limit was there. He hasn't explained why he didn't comply with it, and he has, in any event, no prospects of success. So we submit that leave should be refused to appeal against the AAT. The final matter is the application to appeal against - - -

MANSFIELD J: Are you treating the AATs decision as having made an order about section 104 and its application, or non-application?

DR DONAGHUE: A decision about it, yes.

5

FRENCH J: But an order? An appeal lies from an order, not from a reason.

DR DONAGHUE: Well, it lies from a – it lies on a question of law from an administrative decision, and, in my submission, that administrative decision doesn't need to be reflected in a formalised order. There was no occasion for any formalised order to be made here, but we submit that it's quite clear that – from paragraph 83 – that the tribunal decided that the matter couldn't be considered against – or 83 and 83 – couldn't be considered against 104. But in the end there's no practical ramifications for that.

15

FRENCH J: I suppose if you sought an order from the AAT - or a particular order from the AAT – and they declined on the basis whether of futility, or incompetence, or otherwise, then, subject to there being a question of law identified, though you could have a go at that, even though the actual formal orders were – it's got to be a decision of course.

20

DR DONAGHUE: It's got to be a decision, but it doesn't have to be a formal order. That's what I'm saying.

MANSFIELD J: They can make orders as to the production of documents and so forth, can't they, the AAT?

25

DR DONAGHUE: They can, yes. Sometimes they do make orders, and sometimes they're given statutory backing by various parts of the AAT Act.

30

MANSFIELD J: Yes.

DR DONAGHUE: And if there was a question of law then it may well be that - - -

MANSFIELD J: There's an appeal.

35

DR DONAGHUE: - - - there's an appeal. But, likewise, it may often be the case that an administrative decision involves a decision not to do something, and usually that wouldn't be reflected in a formalised order.

40

FRENCH J: Well, they're not a court, they're part of the administrative continuum of administrative decision making - - -

DR DONAGHUE: Exactly.

45

FRENCH J: - - - as somebody said a while ago.

DR DONAGHUE: Yes. So the submissions that are directed to what would be quite right in relation to Gordon Js decision, and the need to appeal against orders, we say don't carry across in an unchanged form to the AAT.

5 MANSFIELD J: Could you just explain to me, why is section 104 significant in the present context, if the appellant was entitled to be entered on the roll by the AAT decision?

DR DONAGHUE: Your Honour, it was not significant. The applicant believed it to be significant, and he believed that because of section 166 of the Act, that related to his nomination as a senator. Section 166 provides that – paraphrasing at 166(1):

A nomination may be in various forms as the case requires, and shall: (a) set out the name, place of residence, and occupation of the candidate.

15 So the nomination would usually show your address. But then subsection (6) of that Act says:

Nothing in this Act is to be taken as requiring a person who is a candidate, or the nominator of a candidate, and whose address is not shown on the roll, because of section 104, to set out his address on the nomination paper.

So the applicant believed that if he was enrolled under 104 – sorry, if he was enrolled and then his application under 104 succeeded, he could nominate for the senate without being required to disclose his place of residence on the nomination form. In fact we – and I think the Deputy President said she didn't need to decide whether it was possible to nominate without having an address. But, in any event, 104 wasn't the right route, we submit, to get the applicant where he sought to go, because, having successfully sought enrolment under section 96 of the Act, which is a section that, under subsection (1), can only be used – (1)(b) – because the person does not reside in any subdivision, and is not entitled to be enrolled for any subdivision.

So once his application there was accepted, the 104 point just fell away, we submit. Your Honours, finally, in relation to Jessup J, it seems that my friend does press this, although he hasn't advanced anything in support of it. The order that was - - -

MANSFIELD J: I'm sorry, just to go back. If a person registered under section 96 wants to nominate for the senate, they can't do it?

40 DR DONAGHUE: Well - - -

FRENCH J: Well, that depends on whether the words “if any” are in parentheses after place of residence in 166(1) doesn't it?

45 DR DONAGHUE: It does. And that was the question that the Deputy President didn't need to decide, because there was no matter before her about enrolment for the senate. But that was the background. It was clear from the proceeding before Ryan J that it was 96 and – the original applications were an application for enrolment under

section 96, and for a 104 – decision under 104. And it may well be that the provision should be read in the way your Honour, Justice French, suggests. And the basis for the refusal of the applicant’s nomination was not that he didn’t have an address, it was that he had sought to be enrolled pursuant to a name that was not a name he was
5 entitled to be enrolled under.

That following, because the decisions had been made just previously, saying he was not entitled to be enrolled under the name, Arthur Dent. And that was a matter upon which the Deputy President agreed with the Electoral Commission. The Deputy
10 President differed on the question of whether the applicant should be enrolled as Albert Langer, but she agreed in her reasons that – in what were really alternative reasons, in the event that she was wrong – that he should not be enrolled as Arthur Dent. Your Honours, in relation to Jessup J, his Honour made an order at the end of an interlocutory hearing that costs follow the event, the interlocutory application
15 having failed.

There are various suggestions of some wrong doing on his Honour’s part in proceeding in that way. He disclosed at the commencement of the hearing that he had once appeared about 10 years previously against the applicant, and was told that
20 that was no problem. Proceeding to hear the application in those circumstances, we submit, can’t be regarded as in any way improper, and the applicant did not in fact advance any submissions against the making of the cost order. There was a question; what should happen to the costs of this proceeding? And the applicant rather hopefully said that he hoped that they would drift off into the ether.

25 But the judge, not being certain whether anything was going to proceed with this application, decided that it was better to make the costs application – the costs order then. And we submit that the appeal not having been commenced until many months out of time there is no prospect of success against a discretionary exercise – or a
30 discretionary decision to order that costs follow the event. So, again, because there are no prospects of success, and because there is no explanation for the delay, we submit that leave to extend – sorry, that an extension of time for that proposed appeal should also be refused. Unless the court has any questions, those are our
35 submissions.

FRENCH J: Thank you very much. Yes, Mr Dent?

MR DENT: Well, on the silent enrolment, I think that you could make a ruling in your judgment from these proceedings that would settle the appeal one way or the
40 other. That if you agree with Dr Donaghue’s submission that itinerant electors have no residence and therefore it can’t be put on the role and therefore there’s no scope for section 104 to operate, then I would take that as being the law that applies to itinerant electors.

45 I believe the Parliament would have to review it and to change it because it would be a very strange law, but I wouldn’t be bothered filing an appeal either against you or against the AAT so there would be no need to grant leave to appeal the AAT. If – or on the other hand, you reject Dr Donaghue’s suggestion, which I will submit to you

why you should, then your judgment that is wrong on that would tell Deputy President Forgie that she's wrong on that too and I imagine it would merely be a matter of communicating it to her and she would resume her hearing on the question of silent enrolment instructed by your judgment.

5

Now, the reason Dr Donaghue is wrong about that is that itinerants do have residences. There may be some people who live on trains or ships and travel around continuously, but even homeless people who sleep in very odd places have residential addresses and the 7000 or so that are enrolled are mainly not homeless people who are sleeping out in parks. A lot of them are retired couples who decide to travel round Australia.

10

When you read through the detailed provisions of the Act, you're not entitled to enrol under section 101, the compulsory – the words “entitled to enrol in Australia” mean you're required to enrol. You're not entitled and required to enrol under section 101 unless you've lived at a residence for the period of more than a month, right? And if you're in a situation where your real place of living was not where you are at the moment and you haven't been there for more than a month, you can't enrol there.

15

A common situation is when you change from one address to another, you've only been there for a couple of weeks and an election is called, there is a provision in the Act that says no inquiry can be made as to whether you've lived at your new address or not for a month, but technically you should enrol as an itinerant then but the Act more or less tells the Electoral Commission to ignore it if you enrol at your new address.

20
25

But if you haven't either got an address that you were living at for the last month or an address where you're planning to live at for the next month, if your real place of living isn't defined from month to month then you've got no fixed address and that's what the term is defined as on the enrolment form. It's for people who do not have a fixed address. Your address is fixed if you've been anywhere for more than a month and then you've got 21 days' grace to enrol. So it's not a question of people who haven't got addresses, it's people who haven't got fixed addresses. And the enrolment form is in the section 36 documents. I would like to take you to it. The enrolment form - - -

30
35

FRENCH J: Well, we're really only concerned with the construction of the Act at the moment, I think, so - - -

40 MR DENT: Okay. The Act requires the use of approved forms - - -

FRENCH J: Yes.

MR DENT: The Act requires that a person enrolling as having no fixed address provide an address for enrolment. They're required to provide two addresses. The address they're enrolled under and the postal address, and everyone is required to do that, whether they're itinerant or not. So you have to have a postal address as your

45

fixed address may change even if you've been living there for 10 years and you have to have a residential address so that they can assign you to an electoral division.

5 And this suggestion that was made about there's no constitutional issues defined, in fairness to the numerous Attorney Generals who I would be very surprised if any turned out, there's one where I defined it very clearly because it would be completely unexpected to anyone, that there is no earthly reason why people who are resident in the State of Victoria should be assigned to an electoral subdivision by the Electoral Commission and if, as a consequence of doing so, 70,000 voters are going to be told
10 on election day we're not counting your vote because you haven't kept us up to date as to which electoral subdivision you live in then I would say that also raises a constitutional issue. That it's a completely arbitrary division of Australia into electoral divisions for the purpose of maintaining a two-party - - -

15 FRENCH J: No, we're drifting off on to something else now.

MR DENT: Yes. Okay. Yes, I agree.

20 FRENCH J: Can you just focus on responses to Dr Donaghue, please?

MR DENT: Okay. I'm drifting off into a constitutional issue, but there is one. On enrolment, there's no doubt about it. The Act envisages that if you've got no fixed address you have to tell them what your no-fixed address is and they have to put it in a particular electoral division.

25 FRENCH J: Okay. I understand that.

MR DENT: That's where they enrol you. And then I want to take you to section 104 itself, which is in the Electoral Act and section 96 itself and to a letter I wrote
30 back on 4 January which will be found in the bound volume and it's listed in the chronology, that after it was all over despite the alleged decision by Deputy President Forgie and despite the strike out by Gordon J, the Electoral Commission suddenly had the bright idea that now that they've enrolled me they'd better write and also tell me that they're refusing to enrol me as a silent elector and that they gave me 30 days
35 or - no, I think 21 days to ask them to review that decision.

So on 4 January, I wrote to them and told them that they can't review the decision because it's still before the courts, it's still before the AAT and it's before this court. That until both the AAT and this court have upheld Dr Donaghue's view, whether
40 it's Deputy President Forgie's or not, they can't do anything about their previous decision to enrol me, but just to emphasise the point they did decide again to refuse my silent enrolment. So I've asked them to review it on January 4. I've given them reasons which explain why Dr Donaghue is wrong and I'll take you through those reasons through the specific provisions of the Act that show he's simply wrong.

45 FRENCH J: Well, I think it's best if you take us straight to the Act rather than the subsequent history.

MR DENT: Okay. Well, I still have to look at that letter in order to find the - - -

FRENCH J: Well, the letter doesn't matter, does it, it's the sections we're concerned with?

5

MR DENT: It does matter. It's my list of sections of the Act, to tell you about. I have to have it in front of me. So it's a letter of January 4, which is – if you want to go to section 96 of the Act, it will be various subsections of that that I'll be taking you to and to section 104 of the Act.

10

FRENCH J: Well, now, section 96 provides for the enrolment of itinerant electors by reference to a particular subdivision, doesn't it?

MR DENT: No, section 104 is the silent enrolment provisions.

15

FRENCH J: No, I was talking about 96, the itinerant - - -

MR DENT: Section 96 is the itinerant provision.

20

FRENCH J: Yes.

MR DENT: Okay. From memory, it's section 96(12) and (10), but I do need to find it before I can - - -

25

MANSFIELD J: Is your letter at page 290 of that folder that you're - - -

MR DENT: That's very helpful. Thank you.

MANSFIELD J: I don't know if it is yet.

30

MR DENT: Yes. Thank you.

MANSFIELD J: Where are the sections that prompts you to look at - - -

35

MR DENT: Paragraph 8. It must be obviously from section 96(12) and 96(10)(a). Now, if we can turn to that in the Act. I've got it here. 96(12) says:

That for the purposes of this section a person should be taken to reside at a place if, and only if, the person has his or her real place of living at that place.

40

Right? And then section 4 of the Act defines real place of living. So if we turn to section 4, it's the list of interpretations. And this by the way has consequences not just for me, but for any itinerant elector which I'll come to. Real place of living is defined in section 4. It's on page 6 of the version of the Act that was current at the time of the AAT hearing. It:

45

Includes the place of living to which a person, when temporarily living elsewhere, has a fixed intention of returning for the purpose of intending to live at that place.

5 So if you're temporarily living at a holiday house or you're travelling around
Australia with the intention of coming back somewhere in particular, that's not your
real place of living, but if you're travelling around Australia having sold your home
and moving from caravan park to caravan park and intending to go overseas or if
10 you've come back from overseas and you haven't decided what suburb you're going
to be living in and arranged a place, you do not have a real place of living in
Australia, you only have the place that you're currently staying at and you're
required to state that place on your itinerant electoral form.

15 Now, the enrolment provision in section 96 is very clear, that the address that you
will be enrolled with respect to, is normally, unless there is some special
circumstances, will be the place where you are last entitled to be enrolled, and in the
very typical case of an itinerant who has left the family home, it will be the family
home that they've left. It will be - the same address will be the address they're
20 enrolled in and if there is a danger of harm to the person or family members as a
result of there being people who have got vicious vendettas running against them, it's
precisely that address that they don't want published in the electoral roll, so that's
found under section 96 subsection (2)(a), that it is a cascading series there, that you
normally go under (2)(a) paragraph (a), that is your last enrolment address.

25 If you never had a last enrolment address because you've never previously been
enrolled, you might, for example, be a young Australian who has arrived in Australia
after they turned 18, been living with their parents abroad or something, if you never
had a previous enrolment then you enrolled in the subdivision for which your next of
kin are enrolled. If you haven't got any next of kin then it's paragraph (c), enrolment
30 in the subdivision where you were born, and if you weren't born in Australia then it's
the one with the closest connection, but there has to be a subdivision and there has to
be an enrolment address, okay?

35 Now, Dr Donaghue has got a reasonable assumption that despite having an
enrolment address the Electoral Act clearly says - I think it was section 83, that it
won't be published in the case of an itinerant, and that is true, that he has kindly
saved me the trouble of drawing attention to the situation of somebody running for
the Senate or running for any other position, that section 104 is the definition of
40 when they suppress your address. It's suppressed for purposes of nomination, it's
not notified to other government departments. There's a whole range, if you do a
text search through the Act with your word processor, you will find something like
20 or 30 references to section 104.

45 The criteria for doing various things with your address in the nature of suppressing it,
is whether or not you've been enrolled under section 104. It does not just cover
putting you on the public roll, it protects you from a great many things. Now, the
particular provisions of section 96 that I want to draw your attention to, I've drawn
your attention to 12, is provision - subsection (10) but it's quite a common situation,

it's spelt out in all the other subdivisions – in all the other subsections, that Deputy President Forgie listed a large number of provisions of the Electoral Act including a large number of subsection – of section 96 in the catch words to her decision, but she didn't get to subsection (10) which makes it very clear.

5

Well, like everything else in the Electoral Act, it's very foggy and obscurantist, but when you read it carefully it's very clear. The electoral officer can decide that you are no longer an itinerant and if he has decided that you're no longer an itinerant, for example, if he has written you a letter to your enrolment address and you've replied to it, and it's a month later than when he last heard from you there, he might decide you've been living there for a month or if he learns that you've applied for a passport he might decide that you're intending to go overseas. For a number of reasons he could decide that you are no longer entitled to be treated as an itinerant collector, in which case he can do one or two things.

15

Under paragraph (a) if he is aware that you reside in the electoral division he can remove the itinerant that says – the annotation that says you're an itinerant and on removing the annotation you become an ordinary enrolled elector at that address and your address pops into view, and that again is a perfectly normal situation. Somebody who has gone wandering off could come back or they could settle down somewhere, think they're only going to be staying for a month or enrol for the purposes of an election that has just been held, and it turns out three months later they are still living there, so it's still their address. It's no longer an itinerant address, it's a normal address, and paragraph (a) of subsection (10) requires the electoral divisional officer to remove the annotation, leaving your name on the roll. Section 25 83 requires that your address be then shown on the roll, and - - -

30

FRENCH J: All right, so you're saying there's a scope for section 104 protection even if you were initially enrolled as an itinerant elector?

MR DENT: Yes, and that it's utterly clear.

FRENCH J: All right, okay. Well, utterly clear doesn't add much.

35

MR DENT: And that it's the normal functioning of it, there's nothing unusual about it.

FRENCH J: All right.

40

MR DENT: Right.

FRENCH J: I understand the point.

45

MR DENT: Paragraph (b) says:

If the electoral officer is not aware that you're living in the same subdivision then they can't just remove your annotation as an itinerant elector, they have to remove you from the roll entirely and you have to apply for enrolment.

Right? Now, under section 104 you will find that once a silent elector always a silent elector. You don't have to re-register as a silent elector when you move from one address to another. You don't have to re-register as a silent elector when you go overseas and come back, it's a thing about you, not about your address. It's the fact
5 that you're a person whose address being known could cause harm to people, and it would be quite nonsensical for people who leave Australia as silent electors, like, for example, politicians or Rupert Murdoch or – you know, and come back to Australia and find they're not, and it would be quite nonsensical if candidates for election who happen to be itinerant at the time, again you don't have to be homeless or anything.

10 I'd say a lot of politicians in Canberra are itinerant, that their real place of living isn't necessarily in Canberra and isn't necessarily in their electorate and they might be commuting backwards and forwards more than once a month, it would be quite absurd if you were being continuously – your address popping into view unless you
15 put in a silent elector form.

FRENCH J: Anyway, the point is - - -

MR DENT: The point is - - -
20

FRENCH J: - - - that 104, you say, has some purchase on the case - - -

MR DENT: It not only has some purchase - - -

25 FRENCH J: - - - on your - hang on, on your case as an itinerant elector and that goes to the question of (a) the way in which the AAT dealt with it, and (b) the way in which Gordon J treated the AAT decision about it.

30 MR DENT: Yes. And now I will make a third point about it, it has bearing on the way the Electoral Commission treated it because I don't know whether Dr Donaghue knows what he is talking about, but this is routine bread and butter stuff for an Electoral Commission. Anyone who is working in the Electoral Commission knows this, right? Daryl Wight is responsible for about 7000 itinerant voters.

35 FRENCH J: What they know doesn't really matter, all we are concerned about is here, the provisions of the Act and whether there was scope for a legal argument.

MR DENT: Okay. They know and there is no scope for a legal argument, and what
40 I am submitting is not just that I have an arguable case, I'm asking you to make the motion that Gordon J should have made, of disposing with notice for a summary judgment on this issue, right. That you are in a position, when you read the next provisions that I am going to draw your attention to in section 104, to say it's utterly clear the Act required them to enrol you unless they don't accept your statutory
45 declaration as showing grounds for not doing so. There is no discretion, there is no arguable case for Dr Donaghue to argue at a future hearing before a single judge, I am asking you to rule that there is no arguable case as to whether section 104 applies, because you just have to read it. It says, section 104 subparagraph (2), this is what an electoral officer has to do or what an elector has to do:

Where A, the address of a person is included or B, that a person considers that having his address shown on the roll places the personal safety of the person or members of the family at risk, the person may lodge –

5 It's clearly discretionary that –

a person may lodge it with the DRO, keeping the roll for the subdivision request in the approved form, that his or her address be deleted from the particulars agreed to on the roll.

10

That is subsection (2). Subsection (1) is the one that applies to me:

Where a person considers that having his or her address shown on a roll for a subdivision would place the personal safety of that person –

15

etcetera –

he or she may lodge with the claim for enrolment, including a provisional claim for enrolment or transfer of enrolment, a request in the approved form that his or her address not be entered on the roll for a subdivision.

20

Right. That is quite independent of whether it might not be placed on the roll of a subdivision for some other reason. It's not part of section 101, it's an entirely separate section of the Act and if you consider that if your address was shown it would cause harm or it might cause harm, then you can apply for it to be done, so that is what applies to a person. Then subsection (4) says what applies to a DRO.

25

Where the request has been made – and it was – the DRO – the person making – for the subdivision for which the person making the request is to be or has been enrolled as the case may be is satisfied that having the address of the person making the requests shown on the roll for the subdivision would place or place the person's safety at risk, the DRO in the case – blah, blah, blah.

30

It's clear that the DRO just processes it the same, regardless. It wouldn't matter whether they were an Antarctica elector or a Norfolk Islander or an eligible overseas elector, the criterion is would placing the address on the role be likely to produce harm according to the statutory declaration. And that's the way it has to be worded. If Parliament had made a mistake and had had tied the two together, it would be a mistake they'd want to correct because they've got no reason to want to prevent eligible overseas electors from running as candidates when they come back to Australia nor do they have any reason for wanting to prevent itinerants from running as candidates.

35

40

It was the Electoral Office had a particular reason for not wanting this candidate. So I put their interpretation of the Act as contributory evidence towards their malfeasance. It's weak evidence because it's certainly true that you could imagine some blundering idiot in the Electoral Commission who would just get it wrong, but I'm saying it's routine bread-and-butter stuff for them. That's the way they - - -

45

FRENCH J: Anyway, we're dealing with a statutory question. And I think you've made your point on the construction issue - - -

MR DENT: Okay. So I'm asking you to dispense with notice and - - -

5

FRENCH J: Yes, I understand that.

MR DENT: And summarily dispose of that issue so that Deputy President Forgie can go ahead with the hearing of the tribunal on the merits at which Dr Donaghue can show on behalf of the Electoral Commission that I'm not a person who has been subjected to public attacks by Nazis, by - - -

10

FRENCH J: Mr Dent, look, you've made the point. You've given us your rationale. Now, we need to move to the next point. Can we move to the next point?

15

MR DENT: Got it. Okay, the next point that Dr Donaghue made was not on silent enrolment, it was I think that there were essentially – golly, I'm afraid I can't read my own handwriting. No, we're moving on from the silent electors completely to whatever reasons Gordon J had for strike out and I'm trying to recall them because I don't think she gave any, but one of them was that there had been a decision by Ryan and by Forgie and there were two conflicting decisions.

20

I believe that you can similarly, but with greater difficulty it's not as obvious, make a summary finding as to what the law is regarding the name you're to be enrolled under. That it's sort of understandable that Gordon J could believe that Deputy President Forgie would not have written a 32-page judgment explaining her theory about driver's licences and citing all those provisions of the Act unless it was, in fact, clear to people reading those decisions that that's what the Act says.

25

But if you actually wade through it, what she does is explore the 19th Century history of the power of courts and Parliaments to determine what people's names are and conclude that Parliament would have the power to require people to enrol under whatever name they like. But there's absolutely nothing I can see in the Act that shows any legislative intention to get people to enrol under the names of their driver's licence. There may be a hidden agenda of trying to get people to change their births, deaths and marriages registration so that they can change their licences and so on, but the Electoral Office again knows this. On their website they advertised during the election that there's no problem if the name on your driver's licence differs from your legal name or your current name.

30

35

40

FRENCH J: Well, hang on. We're moving into a bit of drift again. There were three matters that you had complained of in relation to Gordon J and one was the procedural-fairness aspect, as I call it, you characterised it with another word, but the same thing. Secondly, there was the constitutional issue implicit in what was being put to her and, third, there was the way in which she dealt with the AAT decision. And, as I understand it, what you've been talking to us about in relation to section 104 and 96 was to do with that third point - - -

45

MR DENT: Concluded, yes.

5 FRENCH J: Now, if we can just come back, in reply do you have anything to say in relation to first of all what Dr Donaghue said on the first point, that is, the procedural – what I call the procedural-fairness point, the motion and the - - -

MR DENT: I've confirmed that he doesn't need an affidavit that I got the letter - - -

10 FRENCH J: No, no, I understand that. So the facts are not in dispute as to what happened? That is to say you were sent a draft copy of the motion, in effect, without the time filled in?

15 MR DENT: Yes, and perhaps he's got some expectation. I know how to stand there defiantly and make life difficult for a judge.

FRENCH J: Sure, sure, I'm sure you do.

MR DENT: I will confirm that I did not do that, right?

20 FRENCH J: Yes, that's right.

MR DENT: I engaged and acted reasonably as he described.

25 FRENCH J: Well, we read the transcript.

MR DENT: Yes, right, if I'd wanted to bring the proceedings to a screeching halt and throw me out of the room I could've done so, but no, I didn't.

30 FRENCH J: All right, well, that just leaves us then with the middle point, which was the constitutional implication.

MR DENT: Well, no, I'll come back to that later.

35 FRENCH J: Well - - -

MR DENT: Sorry, I'm dealing with this other point.

40 FRENCH J: Which point are you dealing with? Because there were three you identified - - -

MR DENT: I'm obviously not doing it clearly enough.

45 FRENCH J: Remember there were three you identified: the procedural-fairness point, the constitutional implication, and the way she dealt with the AAT?

MR DENT: Right, the point I'm dealing with is the – yes, but as well as adopting – she adopted the decisions of both Ryan and Forgie, right? I'm now dealing with her adoption of Forgie's decision on driver's licence enrolment, right? So this is the

fourth matter I'm – I may have lost count. My submissions from here on at the moment are about, is it the law in Australia that as a result of some new amendments to the Electoral Act relating to either inappropriate names or proof of identity for enrolment, that as a consequence of reading them together Deputy President Forgie is correct and therefore Gordon J is correct in holding that one should be enrolled under the name on one's driver's licence. That's what I'm making a submission to you about now. Can I proceed with that?

10 FRENCH J: Well, what if justice – sorry, let's just go back and just see precisely what Gordon J had to say.

MR DENT: Certainly.

15 FRENCH J: She was at page 9 of the appeal book under the tab related to her – under part A I think it is and at paragraph 9 she says you had the full benefit of a full hearing before the AAT and then she sets out what the AAT found in relation to that and the reference that the AAT made to a VCAT hearing, etcetera.

20 MR DENT: Is this page 9 of the transcript you're talking about or the judgment - - -

FRENCH J: No - - -

25 MR DENT: Or Gordon Js judgment?

FRENCH J: Gordon Js judgment.

MANSFIELD J: Part A.

30 MR DENT: Yes. Sorry.

FRENCH J: That's okay. And then she says:

35 *In light of that history, I see no benefit to be gained by further evidentiary hearings or trial in this court as the extract –*

Which she had just quoted –

40 *makes clear there is no real issue of relevant fact in dispute rather the dispute is over the legal significance of those facts.*

And then there was the reference back to the outcome of that legal – it had already been resolved by the court and by the AAT in a manner unfavourable to the applicant, as such the applicant, hopeless, etcetera. And you would always have the remedy of appeal. So your complaint would have to be, wouldn't it, about the use she made of the AAT decision against you?

MR DENT: Yes, my complaints are on the three halves of that. The use she made of the AAT decision which is what I will deal with next. Then I'll deal with the use she made of Ryan's decision – Ryan J's decision because to me it was quite contrary to the AAT decision, but she adopted them both. I will make a submission about
5 that. And, thirdly, I'll just make a passing remark that she adopted two opposing decisions and, fourthly, I would raise a constitutional question that if either of those decisions are correct, the legislation which underpins them is invalid, okay? So that's where I'm proposing to proceed. Would you like me to - - -

10 FRENCH J: All right. Well, just see if we can keep it concise. First of all, what do you say was wrong about the use she made of the AAT decision?

MR DENT: Okay. The use she made of the AAT decision was she simply quoted the paragraph numbers - - -

15 FRENCH J: Yes.

MR DENT: I don't have any strong impression that she had formed a view in her mind about what it was. The impression I gained was that she just wanted to get this
20 off her books. But those paragraphs - - -

FRENCH J: Well, save the editorial comment and tell us what was wrong.

MR DENT: Okay. The AAT says that there was no point in the hearing before her
25 in the five statutory declarations, in the five witnesses and so on. That I was correct when I said to Ryan J that there's absolutely no need for me to provide anything to them. I provided them with exactly what the Act requires. She held that I was correct and that Ryan was wrong. She didn't express it in those words, but she concluded that the consequence of my doing so is that I'm enrolled under the name
30 that I've proved on my driver's licence.

And that's a straightforward interpretation, which I could live with, all right? If the Electoral Commission had enrolled me under the name on my driver's licence, I'd
35 have been a candidate for the senate under that name and I would've gone on about the absurdities of that particular – among many other absurdities in Australia, right? But it was the Electoral Commission that decided no, they're not going to enrol me under any name. There's no question of malice from Deputy President Forgie. She knew her duty was to enrol me, right, and that's clear. She knew that I provided exactly what the Act required in the forms and her interpretation of the Act is that
40 she should enrol me under the previous name. I think that interpretation is plainly wrong. I think she went round in circles looking up - - -

FRENCH J: Anyway, we know you have said that, but coming back, keep your eye
45 on the ball which is the use that Gordon J made of that decision.

MR DENT: Well, Gordon J simply quoted the paragraph numbers. That's all she did with it. I can't see that she used it, that she applied her judicial training to it, that

she reconciled it with Ryan Js, that she did anything judicial with it at all. She just wrote down some paragraph numbers.

5 TAMBERLIN J: Well, how is it inconsistent with Ryan J? Can you just take us to the bit where Ryan J contradicts - - -

MR DENT: He was making it pretty clear to me that I had - - -

10 TAMBERLIN J: Well, forget that. Where does he say it?

MR DENT: I don't have the page number in front of me.

TAMBERLIN J: Well, could you find it, because that's part of your case?

15 FRENCH J: His judgment is under Part C; it starts at page 21.

MR DENT: Okay, there are particularly words which were quoted in the respondents' submissions which I would agree are at the heart of his judgment, that he didn't think it at all unreasonable for them to – for me to be required by them to provide some additional evidence. So I don't know which paragraph number that was but it's that one. I don't think it's unreasonable for him to say that, but I think he is wrong.

25 TAMBERLIN J: Well, just tell us where he said it first.

MR DENT: Well, I'm trying – I have got to find him first. I might find it quicker from their submissions.

30 FRENCH J: I think you are looking at page 30 actually under tab – Part C, and that's at paragraph 17 of his judgment:

In my view, the test is an objective one. The divisional returning officer is entitled to require a provision of information from persons with whom – etcetera.

35 MR DENT: That's exactly the one. Did you say page 30?

FRENCH J: Page 30 in the appeal book numbering, page 9 of the judgment.

40 TAMBERLIN J: The top paragraph.

FRENCH J: Top paragraph.

45 MR DENT: Okay.

FRENCH J: It's right at the top.

MR DENT: Yes, that's definitely my – okay. I agree that is the heart of his judgment and it appears reasonable, and that's what I am asking you to rule on. I don't think it's correct; I think he is misunderstanding the concept of the test being an objective one and the nature of the evidence of the objective criteria. My
5 understanding is that a name is not the subjective judgment of what a person calls themselves. A name is a designation by other people. But the fact – he was referring to this, both in his transcript and I think in his judgment, I am not sure, but he was stressing his words “subjective” and “objective”.

10 Just because you think your name is Arthur that doesn't mean your name has become Arthur; it's what other people call you, and I whole-heartedly agree with that. The test is objective in that sense that it's – a name is a designation by other people and that's what you are required to enrol under and that's what the Electoral Office would be entitled to refuse if you enrol under a name you call yourself.

15

FRENCH J: And that's the judgment that Gordon J is referring to in paragraph 10 of her judgment when she says:

20 *Moreover, the outcome of that legal dispute has already been resolved by this court in a manner unfavourable to the applicant.*

MR DENT: Because he follows immediately from the fact that the test is indeed an objective one, that it's a designation by other people, that therefore your own evidence of it is something that cannot satisfy an electoral officer if he doesn't want
25 to be satisfied and he is entitled to require you to produce some other person's evidence of it.

FRENCH J: Yes.

30 MR DENT: Right, and I would say that conclusion doesn't follow. It used to be the law but that's probably why they did it, until they recently weakened the identification which – the law used to be that you had to get a witness to sign your enrolment form, but it had to be some other person who was prepared to attest formally and be subject to penalties if they were filling out a false electoral paper, I
35 think it's 12 months imprisonment.

But they had to countersign your enrolment form to say that they know you and they know that is your name. Right, and that would correspond very much to what Ryan J is saying there, and that's the way you would expect it to be. But the new provision
40 does away with that requirement, which I think was a very sensible requirement, and instead says you have got to write down the drivers licence number. Now, it may be that the drafter didn't realise the implications of that or it may be that they did.

45 FRENCH J: But anyway, the relationship between Ryan Js – Ryan J is looking at the legal functions of the commissioner and what the commissioner can do and require. Forgie DP was basically sitting in the commissioner's chair because the AAT is carrying out, what you might call, a substitutive function - - -

MR DENT: Yes.

5 FRENCH J: - - - although with far more evidence and hearing and witnesses and stuff, than a primary decision-maker would ordinarily have. So there is no necessary inconsistency, is there, given the difference in their functions, between – if she says, “I am satisfied. There is a driver’s licence, it has got this particular name on it and I am going to exercise my discretion, or at least conformably with my view of the Act, enrol you under that name.”

10 MR DENT: The difference is in what I was alluding to earlier more informally, that whereas after having heard what Ryan J had to say when I went before Forgie DP I was entirely cooperative, produced the stat decs, produced the five witnesses - - -

FRENCH J: Yes.

15

MR DENT: - - - and demonstrated the impossibility of holding hearings like that.

FRENCH J: So you brought all the information that might have otherwise been asked for.

20

MR DENT: I brought exactly what Ryan J had asked for, right.

FRENCH J: Yes.

25 MR DENT: I certainly didn’t do that with Ryan. I said, “Here I stand. I filled out the form as the Act requires. No, he is not entitled to demand anything else”.

FRENCH J: Yes.

30 MR DENT: And the other very important matter is where I agree with Ryan J and disagree with Gordon J is that Ryan J says that he is entitled to require provision of information from persons with whom the applicant for enrolment is usually in contact or could be expected to be in contact with. That’s what I did on the basis of his advice. What the electoral officer required me to produce were bank statements, 35 the income tax returns, the vehicle registration information and the property information that he has apparently been seeking with an arrest warrant for me to produce at an oral examination in the Supreme Court of Victoria for the past four years. And I don’t think it is at all normal for an Electoral Commission officer to write to an itinerant - - -

40

FRENCH J: We are moving into drift again, I’m sorry. Let us come back again to the misuse which you say Gordon J made of the AAT decision.

MR DENT: Of the AAT decision?

45

FRENCH J: AAT and Ryan Js decision.

MR DENT: Well, you took me – well, I can move back to the AAT decision or I can continue on Ryan Js one. I thought we had moved to Ryan Js one.

FRENCH J: Well, how did she misuse Ryan Js decision?

5

MR DENT: She misused Ryan Js decision by thinking that I had failed to meet exactly what he said I should do. That, in fact, at the AAT I provided exactly the statements required.

10 FRENCH J: All right, so in other words the Ryan J decision did not resolve the matter unfavourably to you because you moved on from it to the AAT.

MR DENT: Yes.

15 FRENCH J: Okay.

MR DENT: And the reason I was before – I don't think I would have been entitled to go to Ryan J.

20 FRENCH J: Yes, okay.

MR DENT: There is a provision to go to the AAT and that's where I would have gone straight away.

25 FRENCH J: So you went to the AAT.

MR DENT: The only reason - - -

30 FRENCH J: Now, do you accept or do you dispute the proposition that the outcome of your legal dispute was resolved by the AAT in a manner unfavourable to you or not? My impression was you said it was not unfavourable because you were prepared to live with the name they enrolled you under.

35 MR DENT: I am sorry, I will have to take you to my terms rather than yours. I was there not, as Dr Donaghue says, on an application for review of an administrative decision, because I told Ryan J right at the start that I knew perfectly well that should be done to the AAT. I was there in an application under section 383 of the Electoral Act as a candidate who was being stuffed around by the Electoral Commission. I went to the Federal Court because it was the only way to deal with the fact that the
40 Electoral Commission was trying to prevent me running for the senate. That was why I was in Ryan Js court; not for his view on it.

45 I needed to get a decision from him, forcing him to make a decision, which I could subsequently take to the AAT. If they had made the right decision and enrolled me under my correct name, which is the name I am usually known by, then I would have been a candidate under that name. If they had made the wrong decision, like the AAT, and had enrolled me under my previous name I would have been a candidate under that, but they had refused to make any decision. And the reason they refused

to make it was because they wanted to be free to reject my nomination, and that's why it is a malfeasance action.

5 FRENCH J: All right, do you dispute the proposition by Gordon J that so far as Ryan Js decision was concerned the outcome of the legal dispute had been resolved by the court?

MR DENT: No, it had not.

10 FRENCH J: Okay. I understand that, I just wanted to make clear how you are putting it.

MR DENT: It had not in any sense been resolved by the court.

15 FRENCH J: Yes, all that had happened was that there had been a decision to refuse your enrolment, and he refused you interlocutory relief.

MR DENT: He – exactly.

20 FRENCH J: Okay.

TAMBERLIN J: It's the word "resolved" that you are arguing about, in effect.

25 MR DENT: There was no question in Ryan Js mind that he was making an interlocutory decision, is he prepared to overrule in the same day that they make the decision without having the materials before him.

30 FRENCH J: And then he said, "All right, it has to move on to a substantive hearing".

MR DENT: Yes, that was clearly what Ryan J did and I don't think there was any question in Gordon Js mind that that's what happened either.

35 FRENCH J: Okay, all right. Now, the next question then is to the AAT. How did she misuse the AAT when she said:

It has been resolved by the AAT in a manner unfavourable to the applicant.

40 MR DENT: Well, the – and here I can't suggest that it was the respondents misleading her. Rowena Orr on behalf of the respondents said in the transcript that I had been successful at the AAT, because I had. The AC had tried to prevent my enrolment and the - - -

45 TAMBERLIN J: So it's an interpretation of the word "successful". Your name was entered, your previous name was entered on the roll, you weren't successful there, were you, but the application for enrolment was granted so that you were successful there. Is that what you are - - -

MR DENT: Yes. The application was to - - -

TAMBERLIN J: So you say you were partially successful? Well, no, sorry, you were wholly successful?

5

MR DENT: Well, if you turn to the original application the - - -

TAMBERLIN J: No, sorry, looking at the judgment of the AAT do you say you were wholly successful there?

10

MR DENT: No, I think she got it – she enrolled me under the wrong name but that can be corrected.

TAMBERLIN J: Well, you weren't successful on that aspect?

15

MR DENT: No, but it's not an aspect of what was before Gordon J.

FRENCH J: Anyway, the point you are making as I understand it, is her conclusion, Gordon J's conclusion, as such, the application is hopeless, but that doesn't follow from what the AAT decided and what Ryan J decided.

20

MR DENT: Turn to page A1 of the appeal book.

TAMBERLIN J: I'm just trying to characterise your argument, okay?

25

MR DENT: I'm characterising my argument. My argument is turn to page A1 of the appeal book now.

TAMBERLIN J: I'm asking you this, do you say the application was not hopeless by reason of anything the AAT or Ryan J decided?

30

MR DENT: Yes.

TAMBERLIN J: Okay.

35

MR DENT: And I'm saying that you will see that by turning to page A1 in tab A. Page 1 is my application that she says is hopeless. Claim one:

That the Australian Electoral - - -

40

TAMBERLIN J: Sorry, which page are we at now?

MR DENT: The very first page of the appeal book is my – after the index - - -

45

TAMBERLIN J: Yes, the application was dismissed by Gordon J.

MR DENT: - - - is my – no, this is the application, this is why I'm in court here today and there – these are my claims. Claim number one: enrol the applicant

forthwith as an elector pursuant to the electoral enrolment form dated 16 October 2000 and - - -

TAMBERLIN J: You say you succeeded on that before the AAT?

5

MR DENT: I succeeded on that before the AAT. If Gordon J said, "Well, okay, you've won, I'm not going to award you costs, there's no need for an injunction because you've won," there wouldn't be a problem, I've won, right? They tried to stop my enrolment, they failed, I'm enrolled, claim one has been satisfied, but for some bizarre theory of theirs I'm required to pay costs for it when they refused to do what they have now been ordered to do by the AAT, what Ryan J should have ordered them to do but wouldn't on an interlocutory basis, and what has to be done by law.

15 TAMBERLIN J: How about claim five, the amended case?

MR DENT: That's where they will have arguments but can we move up to claim two, three and four before we get to claim five?

20 TAMBERLIN J: Yes, okay. You succeeded on the first four, you are saying?

MR DENT: So I succeeded on the first claim.

TAMBERLIN J: And the fifth you go down - - -

25

MR DENT: And I don't want to be receiving bills of costs which I've attached to the affidavit from - regarding Jessup, about having succeeded in defeating their attempt to prevent me enrolling, and I want damages, which is the third claim, because I am running ahead of myself.

30

I want damages because despite succeeding, despite the AAT ordering them to enrol me, they didn't, so I didn't get a vote, and despite the fact that I was entitled to be enrolled, and my claim has ultimately proved successful, they not only rejected my enrolment, they prevented me being a candidate and this is where I would show that the AAT is wrong because if she is right then Daryl Wight clearly does have the power under amendments to the Electoral Act that were made several years ago, they're not recent proof of ID stuff, but he does have the power to reject people who are nominated in the name that they're not usually using, right, and the common case would be somebody just changes their name at the Births, Deaths and Marriages Office where there is basically no questions asked, and it's not the name they're known by in the community, so he does apparently have the power, granted to him by the parliament, and there is a real constitutional issue about it, he did have the power.

45 If I had been to the AAT before and my name had been enrolled as my previous name which is shown on the driver's licence, he, knowing my actual circumstances, but he has not been able to find me for the last four years because I'm not enrolled under that name, knowing that there's court records at VCAT of a year-long hearing

under the name Arthur Dent, and knowing that there's all other kinds of stuff by which I can prove that my name has been Arthur Dent for the last four years, he would be fully entitled, according to the Act, to say, "You're not nominating under the name you're known by in the community," because that's the name I'm known by in the community.

It doesn't matter what name is on your driver's licence, that was – and there's no question of whom maliciously misinterpreting the Act, that's what it's there for. There is a provision that people who change their registration details and update their documents in a name which isn't the one they're usually using and known by in the community, that he is entitled to prevent them being nominated. That's what that amendment was designed for, that there are people who - - -

FRENCH J: Anyway, the damages claim is where this all came out of. The damages claim is based on the fact that they didn't enrol you, notwithstanding what the AAT said?

MR DENT: Well, it's added to it. I'd say the damage payment must succeed in the light of the fact that they even refused to comply with an order, but I would say it succeeded anyway, that they were under a duty to enrol me well before the date for nominations.

FRENCH J: Okay.

MR DENT: Right. The damages claim should succeed simply because they did not enrol me, but I'm seeking - - -

FRENCH J: Is that based on an argument about – which I don't want to hear, but I just want to know, whether it's based on an argument about malfeasance?

MR DENT: Well, yes, it goes back to Ashby and White, it's the foundation of the law of malfeasance.

FRENCH J: Okay, yes, okay. Then there is the cost thing, then five?

MR DENT: Okay, but number two comes before three, four and five.

FRENCH J: Yes. Well, we've just done damages.

MR DENT: I won't repeat myself. I didn't succeed on that.

FRENCH J: Yes.

MR DENT: My belief is I should succeed here and now based on the arguments I've put to you.

FRENCH J: Yes.

MR DENT: And that you should dispense with notice or whatever you need to do to give him an opportunity to argue back again, but he should get a chance to be heard, but at this point you should find that yes, I'm entitled to succeed on that and I should now be enrolled as a silent elector, or what I would prefer is simply refer it back to the AAT. There is a merits review on that. The Electoral Commission is entitled to say we don't accept your statutory declaration and present what arguments they like on it but the law is - - -

10 FRENCH J: Well, we should make it crystal clear, we don't have any power to send this matter back to the AAT, we're just dealing with an appeal from Gordon J here.

MR DENT: Well, you do in respect of the - - -

15 FRENCH J: Well, we don't.

MR DENT: - - - application for leave to extend time.

FRENCH J: Yes, but I'm talking about this appeal.

20 MR DENT: You – well, they're being heard concurrently.

FRENCH J: Yes, but I'm asking you to address the reasons why you said that Gordon J was wrong to conclude that this application was hopeless. You are taking us - - -

25 MR DENT: Because - - -

FRENCH J: You are taking us through your claims for relief to demonstrate that there are certain aspects it is not hopeless.

30 MR DENT: Okay, okay, I've got it now, I will - - -

FRENCH J: And left open because notwithstanding - - -

35 MR DENT: I've got it now, I'll comply with what you're asking.

FRENCH J: Thank you. Good.

40 MR DENT: Right, got it. The reason I'm asking you to uphold my claim now is nothing to do with the AAT, etcetera, it is simply I don't have to go to the AAT. I went to a court, it's a Federal court with jurisdiction over these matters, I've presented my case. The answer to my case has been outlined very clearly by Dr Donaghue who says the Act is not applicable. He's wrong. You should make a finding that he's wrong and either order that I be enrolled forthwith or remit it to the
45 Electoral Commission to take the merit decision on its merits, correct their error of law, so that they take a decision.

They've already done so, it's supposed to be being reviewed by Daryl Wight since January 4. He has put me in the same position as he did before the election. He has refused to review it himself and as a result it's stuck there, so you should simply order that the law does require that they process that enrolment, that the law, in the same way that Ryan J ordered them to make up their minds immediately, you should order him to make up his mind immediately and it should go back to the AAT on the original application because that is already there. The court shouldn't waste their time on a merits review about the statutory declaration.

10 FRENCH J: Okay. Well, that's that. That's 2. We've done damages. Costs is a consequence of success on the others. What about 5?

MR DENT: Thank you. Well, that's achieved everything that I would you to summarily dispose of.

15

FRENCH J: Yes.

MR DENT: I certainly agree that they've got a reasonable case to argue, but the issues are moot, that it's obviously a difficult proposition to say that it matters any more whether I was entitled to be nominated on – to be enrolled under that name on that day. And I've got to persuade you that it's not an academic question, and I would like to go further and persuade you that in fact it's a pretty fundamental constitutional question as well. Because if you find it's a matter of discretion, or it's purely academic, you're finding that the Electoral Commission can get away with this stuff.

25

It may ultimately be resolved by claim 8, that after an election they can be required to pay exemplary damages for it. But it's not a wise policy course to adopt, that governments and their officials be placed in a position where they can select the candidates for an election on the basis of how much it's going to cost them in exemplary damages afterwards. The normal way these things are handled in countries that don't have free elections is that you know - - -

30

TAMBERLIN J: Well, we don't need to go into that.

35

MR DENT: Well, we don't need to - - -

TAMBERLIN J: No, it doesn't help.

40 MR DENT: - - - but I won't then. There is - - -

FRENCH J: Look, we're dealing with a reply to Dr Donaghue. You are focussing – I was hoping – solely on the question of how Gordon J mis-used the decisions of Ryan J, and of the AAT, to conclude that your application was hopeless.

45

MR DENT: Well, that's straight forward.

FRENCH J: You were then responding by taking us to the claims for relief, to say that they weren't all hopeless because of both conclusions.

MR DENT: Okay. Well, we've now got to - - -

5

FRENCH J: And 5 and 6 there's a - - -

MR DENT: We've now got to 5, and I'm certainly saying that's not hopeless.

10 FRENCH J: Yes.

MR DENT: But I'm not claiming that their case is hopeless either.

FRENCH J: Okay. Well, you say you've got an arguable case?

15

MR DENT: Right. But I say more than that, that Gordon Js decision is hopeless, right? She's trying to blame Ryan for a decision that he couldn't possibly have adjudicated, because it wasn't before him. It happened, you know, after he was reading out his judgment.

20

FRENCH J: I understand you're saying she - - -

MR DENT: He can't possible - - -

25 FRENCH J: Look, I understand that. You've made the point. She's read – you say her Honour read too much into Ryan Js interlocutory decision?

MR DENT: Well, no she didn't – she didn't read it, and she couldn't have read it. She made it up, right. She knew that Ryan J had not resolved that question.

30

FRENCH J: Okay. Well, moving on?

MR DENT: And she also knew that Deputy President Forgie couldn't conceivably resolve that question. It's not an administrative decision. It's a matter of a candidate not having gone to court for a review of an administrative decision, having gone to the Federal Court of Australia under section 383 of the Electoral Act about an Electoral Commission that was trying to prevent him being nominated.

35

FRENCH J: 5, 6 and 7 were all related to the question of your entitlement to be a candidate, and am I right in saying that the claim for exemplary damages under 8 - - -

40

MR DENT: Primarily - - -

45 FRENCH J: - - - related to those three heads?

MR DENT: A smaller amount of – it would still be exemplary for mis-handling the thing, but really heavy damages should be payable for having done what we can do.

FRENCH J: Well, that's for punitive damages, in effect.

MR DENT: Yes.

5 FRENCH J: Okay.

MR DENT: And in addition to – yes. There's damages for just misfeasance in public office. Exemplary damages are for punishment, right. If it's done with - - -

10 FRENCH J: I think, Mr Dent, we've heard about as much as you can usefully say, relevant to the appeal against Gordon J's judgment on the question of her use of the AAT, and the Ryan J's decision, and there's a logical argument about how far they went, and whether they went as far as she has apparently concluded. The other issue – again, this is in reply – the other issue which I would invite you to say something
15 about briefly, is on the implied constitutional point, and I think it seemed to be Dr Donaghue's contention that really that wasn't there at all. So perhaps you can just say something about that.

MR DENT: Firstly, on not being there at all, it's quite correct. There's absolutely
20 nothing in the state of claim other than the damages up until nomination was refused, and then the exemplary damages. It doesn't attempt to explain anything. It simply says enrolment, because that's what it was for. It was an interlocutory application to get enrolled. There's no question of the case having been prepared for a malfeasance suit or anything like that, and that's why Gordon is wrong, right, she didn't have the
25 material before her to hear a strike out motion. What her duty was was to decide whether to have a statement of claim filed, or an affidavit filed to find out what the case was about. Okay. On the constitutional issues - - -

MANSFIELD J: I would have thought your affidavit was to indicate what the case
30 was about. That's why you file it.

MR DENT: Yes. The affidavit - - -

MANSFIELD J: Well, it didn't disclose this point.
35

MR DENT: - - - simply spelt out the correspondence, right.

MANSFIELD J: Yes, it didn't disclose the point.

40 MR DENT: They refused to enrol me – sorry?

MANSFIELD J: It didn't disclose the point. It did not disclose a constitutional point.

45 MR DENT: No, it didn't.

MANSFIELD J: And that's what the affidavit is supposed to show when you start a proceeding, what the case is about.

MR DENT: I didn't start a proceeding to raise a constitutional point.

MANSFIELD J: No, it wasn't right.

5 MR DENT: I started a proceeding to be enrolled, right. If, as a result of some
barrier to me being enrolled and nominated is raised, in terms of some law of
Australia that prevents me, an Australian citizen aged over 18, who's called Arthur
Dent, from either being enrolled under that name, or for being nominated, then
10 immediately it calls into question, in my mind, who made this law, and by what
authority? Okay. So that's – there's no reason for me to raise – I do not believe that
the Electoral Commission was implementing some law that the parliament has made.

15 But if somebody finds that they were, then I say the parliament had no right to make
that law, right. But if parliament is saying that they've given a discretionary power
to Daryl Wight, Australian electoral officer, not even a Protestant descent of Princess
Sophia, Electress of Hanover, right, but if somebody is seriously going to say that
Daryl Wight, in his defence on the malfeasance claim, can say he honestly believed
that he had a discretionary power over what candidates are nominated for the senate,
20 or for any other elective office in Australia, then he's running against about a
millennium of English-speaking history.

We do not give officials the power to vet candidates for public office, right. If
what's required is that the candidates declare that they're citizens, they declare their
age, they declare that they're not constitutionally bound - barred. The electoral
25 officer has absolutely no discretion to say, "Oh, no, I think you're under 18." If they
had such a discretion they would be called bouncers. You'll see bouncers outside
nightclubs and so on. They will ask for proof of ID, but it's entirely up to them
whether they accept - - -

30 FRENCH J: I understand the metaphor.

MR DENT: Right. Okay. And we know why they don't have that discretionary
power, because if anyone did have it would be bound to be misused.

35 TAMBERLIN J: Could you, for me, to help me just formulate your constitutional
ground in a few words, in a couple of sentences, what – this is – what's the
constitutional point?

40 MR DENT: If Daryl Wight has a discretionary power to remove a candidate from
nomination, it's not a free election. And it's not so much – there's all sorts of stuff
talked about human rights, and so on. To me it's the other way around. The powers
of the parliament derive from the fact that it's correctly chosen by the people. It's
not that the parliament confers powers on the people to choose it, or something.
Their ability to make laws depends on the fact that we picked them. And if some
45 official has got the right to a pre-selection, it's not a free election under the
fundamental laws of Australia, which are the fundamental laws of England, and it
never has been, and it never could be.

FRENCH J: All right. Thank you, Mr Dent.

MANSFIELD J: Thank you, yes.

- 5 FRENCH J: All right. We'll thank counsel, and you, Mr Dent, for your submissions, and the court will reserve its decision. We'll now adjourn.

MATTER ADJOURNED at 12.31 pm INDEFINITELY