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## TRANSCRIPT OF PROCEEDINGS

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O/N 73185

**FEDERAL COURT OF AUSTRALIA**

**VICTORIA REGISTRY**

**BLACK CJ**

**Nos. VID 953, 979, 996, 992, 1048, 1085, 1087,  
1152, 1153, 1155, 1162, 1168, 1173, 1187, 1188,  
1193, 1215, 1223, 1229 of 2007**

**Nos. VID 23 and 52 of 2008**

**CALLOVER MATTERS**

**MELBOURNE**

**9.31 AM, TUESDAY, 5 FEBRUARY 2008**

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**THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE**

**No. VID 979 of 2007**

5

**RODERICK NEIL SALFINGER**

**and**

10

**NIUGINI MINING (AUSTRALIA) PTY LTD and ANOTHER**

15 MR MITCHELL: If it please the court, I appear for the appellant in that matter,  
your Honour.

HIS HONOUR: Yes, Mr Mitchell. And then there are some appearances by video  
link in Brisbane. Gentlemen in Brisbane, Mr Brady and Mr Freelegus, I just called  
for appearances.

20

MS FREELEGUS: It is Ms Freelegus, your Honour.

25 HIS HONOUR: I am sorry, Ms Freelegus. Two problems: one, I can't see you,  
and, secondly, I couldn't read the writing. So I am sorry about that. Well, now, Mr  
Mitchell, what is the position in this case?

30 MR MITCHELL: There are a couple of matters that I have discussed with my  
learned friend, Mr Brady, yesterday afternoon, which have just been added to the  
status report that I think was faxed to the court earlier in the week. I haven't had the  
opportunity to provide this copy to my learned friends in Brisbane, so I might just  
quickly run through them.

HIS HONOUR: Yes.

35 MR MITCHELL: On page 2, there are two matters that I wanted to draw to your  
Honour's attention. The first is the estimate. On the version that was faxed through  
to the court, the boxes for half day and one day were both ticked.

40 HIS HONOUR: Well, the half day had a tentative tick, and the one day had a  
heavier tick, so I assumed that that meant somewhere between half a day and one  
day.

45 MR MITCHELL: Yes. It was my view, your Honour., that it should be able to be  
completed within a day, but I was hesitant to commit to a one day estimate on the  
basis that it may trickle over.

HIS HONOUR: It won't. It is a one day case, at most.

MR MITCHELL: Thank you, your Honour. Turning then to whether there are any motions still to be dealt with. Grounds 1 and 2 that have been listed in the notice of appeal require leave to appeal. I have discussed with my learned friend, Mr Brady, but haven't had the opportunity to discuss with Ms Freelegus. Mr Brady was  
5 amenable to that application being heard at the commencement of the appeal, and if leave granted that the appeal be heard instanter.

MR BRADY: Your Honour, I don't have any difficulty with that course, and I  
10 understand nor does Ms Freelegus.

MS FREELEGUS: That is correct, your Honour..

HIS HONOUR: Yes, thank you. Very well, I will so order.

15 MR MITCHELL: Turning then to annexure B, which is the names of counsel appearing for the appellant. I will be leading the appeal. I don't as yet have a leader. That being the case, if an appeal date is fixed, then we will obviously have to choose counsel based on their availability on that date.

20 HIS HONOUR: Nothing novel about that.

MR MITCHELL: The final matter that I wanted to bring to your Honour's attention was in respect of the second respondent's notes at annexure C. Referring to the case of Kaminko Gold v Findlay and Co, while Mr Salfinger was – there were no adverse  
25 credit findings made against Mr Salfinger in that matter.

HIS HONOUR: The only reason for that is although adverse findings may not technically be a matter by reason of which a judge would not sit, we simply try to avoid those possibilities, that is all. So it wouldn't matter if those judges were to sit  
30 in this case.

MR MITCHELL: No.

HIS HONOUR: Thank you.

35 MR MITCHELL: Those are all the matters, your Honour..

HIS HONOUR: Well, can we take it that the usual order for written submissions, and so forth, be sufficient?

40 MS FREELEGUS: Your Honour, the second respondent was seeking leave for submissions to be confined to no more than 20 pages, and that was based on the concern that if the written submissions were quite fulsome, then it wouldn't spill over into a second day.

45 HIS HONOUR: But the standard order is 10 pages.

MS FREELEGUS: Yes, that is correct, your Honour., but past experience in this matter has indicated submissions have exceeded - - -

5 HIS HONOUR: Well, if the submissions exceed 10 pages, I would imagine that the Full Court would simply reject them. There has got to be some discipline in these cases, and 10 pages means 10 pages, and it doesn't mean 10 pages in a 6 point type either.

10 MR MITCHELL: I can indicate to your Honour that at the trial Mr Salfinger represented himself, and I have no difficulty committing to the 10 page limit.

HIS HONOUR: Thank you. Lengthy submissions, generally the longer they get, the less useful they are to the court. You are content with 10 pages, Ms Freelegus, I take it?

15 MS FREELEGUS: Yes, we are.

HIS HONOUR: Not to exceed 10 pages. Now the other matter, I noticed in the court file that the fees have not been paid; some \$3000. It is a matter of concern because the fees do not, of course, come to the court. They are imposed by the Commonwealth, but the court has an audited responsibility to collect them, and it would not be seemly for the court to be chasing fees at the same time as there is an appeal. So could you do something about that?

25 MR MITCHELL: Yes, I will contact my instructing solicitor today, your Honour..

HIS HONOUR: No doubt it is an oversight, but the reason it is of interest to me is that I know our administrative staff spend a lot of time chasing these things, and I would sooner they spent it assisting in the primary business of the court. If you would just mention that. I am sure it is an oversight, and can easily be corrected.

35 MR MITCHELL: Yes, your Honour./ The one final matter was in relation to submissions. Again yesterday I discussed with my learned friend, Mr Brady, a slightly longer timetable starting from the trial date. So that the reply would be filed a week beforehand, the response two weeks before the hearing date, and the appellant's submissions three weeks beforehand, to allow the parties a little bit of extra time in preparing.

40 HIS HONOUR: Is that agreed?

MR MITCHELL: It is agreed with Mr Brady.

MR BRADY: It is from my perspective, your Honour..

45 MS FREELEGUS: ..... a date, your Honour.

HIS HONOUR: Yes. Well, you could perhaps do a draft and give it to Ms Jo Sandley, Appeals Registrar, and we will so order.

MR MITCHELL: Thank you, your Honour..

5

HIS HONOUR: Very well, if there is nothing else. The matter will be heard in the May sittings on a date which we will notify you of as soon as possible. Thank you very much.

10

**No. VID 1155 of 2007**

15 **COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**

**and**

20 **STAR CITY PTY LIMITED (ABN 25 060 510 410)**

MR THOMAS: Your Honour, I appear for the appellants.

25 MR KUHN: Your Honour, I appear for the respondent in that matter.

HIS HONOUR: Yes. What is the position in this case, Mr Thomas?

30 MR THOMAS: Well, I am not sure if your Honour has the Full Court status report in front of you?

HIS HONOUR: I do now.

35 MR THOMAS: There is just one late amendment I need to make to that document, if I could.

HIS HONOUR: Yes.

40 MR THOMAS: In the last box on the bottom of page 1, where it says, "Mr ..... A3 the Australian Crime Commission" – if your Honour could delete "A3" and replace that with "MM-DD".

HIS HONOUR: At the bottom of page 1, yes.

45 MR THOMAS: If you could delete "A3" and replace it with "MM-DD". It is a pseudonym.

HIS HONOUR: Yes, very well.

MR THOMAS: Other than that, the status report is accurate. The matter is ready to be listed for hearing. The appeal index has not been settled. It is scheduled to be  
5 settled on 5 March. The Appeal Books haven't been ..... I spoke to counsel at this  
send. Mr Neil Williams is appearing as senior counsel in this case. He estimates that  
the matter will take no more than two days.

10 HIS HONOUR: Yes, I thought that was a fairly generous estimate, but I think we  
can give it two days.

MR THOMAS: I apprehend that there may be a problem with dates, and I think  
that may be the most particular problem for counsel. As I read the unavailable dates  
15 for both sides, the only dates that are available in May are 14, 15 and 16 May. There  
has been communication between the parties, and if the appeal could not be heard on  
one of those days, or two of those days, then the parties would suggest that the  
matter be stood over until August, though I understand that is a matter for your  
Honour.

20 HIS HONOUR: It is indeed, and I am not keen on doing that. The court has been  
criticised for not hearing tax cases quickly, and then the parties come along and by  
consent ask for them to not be heard quickly. So I am very disinclined not to have  
this case heard and determined at the appropriate time. Why should I in that  
25 circumstance adjourn it over for another three months, so that the rights of the parties  
and the general administration of the taxation laws are delayed accordingly?

MR THOMAS: Well, your Honour, as I say, it is ultimately a matter for the court.

30 HIS HONOUR: It is indeed, of course it is, but I am asking you why I should do it.

MR THOMAS: ..... your Honour to support that, other than the fact that the case  
raises some very complex issues of law. And if counsel in the case weren't able to  
attend, it would be a matter of re-briefing counsel, and there would be added costs.  
But apart from that, I have nothing further to say in support of it.

35 HIS HONOUR: Tell me – I didn't look at the last page of her Honour's judgment –  
are the same counsel to be briefed as those who appeared at the trial? Yes, well,  
obviously that is an important consideration. How long did the case take at first  
instance?

40 MR THOMAS: It was a two day case.

HIS HONOUR: Well, your present application is simply – what? If we cannot fit it  
45 on those days, it should go over to the next callover?

MR THOMAS: Mr Kuhn has something to say about that as well.

HIS HONOUR: Yes, Mr Kuhn.

MR KUHN: Yes, a couple of things, your Honour. It was a two day trial before Justice Gordon. It was squeezed at the end. There were some extra submissions  
5 filed towards the end, to allow our colleagues to return to Sydney. Our view is that there is quite a risk it will go over one day, having regard to the volume of documents.

10 HIS HONOUR: Yes, I understand. I can see that.

MR KUHN: Yes, and the respondent would like the matter heard in May, if possible, and urges the court to look closely at the window of opportunity that there is, because we believe the court will be assisted by having the counsel who appeared  
15 before her Honour addressing the court in the appeal.

HIS HONOUR: Yes, I can see the force of that. Well, there does seem to be a reasonable prospect that we can accommodate those dates, and of course, if we can, we will do so. But if we can't, my present inclination is that the matter should  
20 proceed in the May sittings. You will, of course, be given plenty of notice to brief other counsel, should that be necessary. We will do our best to fit it in, and I am reasonably confident that we can do that. Yes, very well. The usual order for written submissions?

MR THOMAS: Yes, your Honour.  
25

MR KUHN: Yes, your Honour.

HIS HONOUR: Yes, very well, I will make the usual order. Ten pages should be sufficient, should it?  
30

MR THOMAS: I would have thought so.

MR KUHN: Yes, your Honour.

35 HIS HONOUR: Excellent. Well, 10 excellent pages are better than 20 or 30 less excellent ones. Thank you, gentlemen. Nothing else you wish to raise, either of you? Fine. I will make the usual orders, and the matter will be heard in the May sittings.

40 MR KUHN: There was one other matter.

HIS HONOUR: Probably on the dates that counsel want.

45 MR KUHN: I apologise, your Honour. Can I mention, I was contacted by your Honour's associate about mediation at one stage, and I did take instructions on that. I have had a discussion with my learned friend's instructor as well. Just in case that has been overlooked.

HIS HONOUR: Well, thank you for raising it. In quite a number of the appeal courts in the common law world, notably the Court of Appeal for England and Wales in London, and the /Seventh Circuit in Chicago, and also the Ninth Circuit in San Diego, and other places, there are active programs for mediation, and it is surprising  
5 the number of appeals that actually do settle when they are mediated. So the court is here to resolve disputes. I don't want anyone to get the impression that mediation is some means of clearing the lists, but it can often be a good idea, and my staff routinely raise it with parties. And there have been plenty of tax cases that have achieved a compromise solution. I take it that is not thought likely in the present  
10 case?

MR KUHN: Well, from the respondent's point of view, we would be happy with an order for mediation. I suspect it really is if the Commissioner thinks that it is of a benefit as well.  
15

HIS HONOUR: Well, I certainly am always happy to encourage parties to discuss mediation. We have had cases mediated, almost improbably to a successful conclusion; that is to say, a settled conclusion. I am reluctant to order it, but I certainly am quite prepared and have ordered parties to attend before the District  
20 Registrar here to discuss the prospect of it. It actually has the effect of focusing the minds of those who make these decisions on the possibility of it. If you would like me to make such an order, I am happy to do so.

MR KUHN: Well, I invite my learned friend to – I am not suggesting the court  
25 make an order which will waste everyone's time.

HIS HONOUR: No, no, certainly not.

MR KUHN: It really requires my learned friend to make a comment, I believe.  
30

HIS HONOUR: Do you have anything to say about that, Mr Thomas?

MR THOMAS: I do, your Honour. We certainly don't think it is a waste of time. We would consent that the matter be referred to a Registrar to at least explore the  
35 possibility of mediation for a successful resolution of the case. We do believe it has some very important issues of law in it.

HIS HONOUR: Yes, exactly.

MR THOMAS: That is not to say that there cannot be a mediator necessarily.  
40

HIS HONOUR: Well, the only question then is, since it is being heard in Melbourne, my inclination would be to refer it to a District Registrar in Melbourne.

MR THOMAS: Yes, we have no problem with that.  
45

HIS HONOUR: Do you have any problem with that?

MR THOMAS: Not at all.

HIS HONOUR: Very well. I will order that within 14 days the parties seek an appointment with the District Registrar of the Victorian District Registry to discuss the prospect of a mediated outcome of this matter. That is only an obligation to  
5 make an appointment to discuss, but it will be a framework within which there is some prospect that may occur. Public law can be mediated, and are, and the court will be happy to facilitate it, if that is going to be useful. Thank you, gentlemen. I will make those orders.

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**No. VID 1173 of 2007**

15

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

**and**

20

**RAVI AMRIT NARAIN**

MR MIRIKLIS: If your Honour pleases, I appear on behalf of the appellant.

25

MS TRELEAVEN: I appear on behalf of the respondent, your Honour.

HIS HONOUR: Yes, what is the position in this matter?

MR MIRIKLIS: Your Honour, I have spoken to Ms Treleaven. An unavailable date to add on her side of the Full Court status report is 26 May. Ms Treleaven wants to inform you that she is involved in another matter, and also that her client intends to file a notice of contention. Apart from that, I think the status report is fairly accurate. We have maintained a view that one day is a reasonable estimate, but I will  
30 let Ms Treleaven address you on that.

35

HIS HONOUR: Yes, very well. This is the Citrafresh matter, isn't it?

MS TRELEAVEN: Yes, your Honour. Yes, Ms Treleaven.

40

MS TRELEAVEN: Your Honour, first if all, if I may confirm – I have found the original status report in my brief, and I just wanted to confirm that the court had in fact received it from my instructors, their version of it. If so, at the bottom of page 1, unfortunately my instructors didn't include me in the list, although I will be  
45 appearing with Ms McLeod. I am also appearing in another matter due to be listed in these sittings, which is number 11 in today's list – VID 953 of 2007.

HIS HONOUR: Yes, we have noted that. Is there anything else?

MS TRELEAVEN: As Mr Miriklis noted, the respondent proposes to file and serve a notice of contention in this matter, and accordingly it would be appropriate for  
5 directions to be made for that today.

HIS HONOUR: Yes. When will you be in a position to do that?

MS TRELEAVEN: Within 21 days, your Honour, so by 26 February.  
10

HIS HONOUR: Very well, I so order. Anything else.

MS TRELEAVEN: Your Honour, Ms McLeod indicated to me that she thought that the estimate of one day was reasonable, but in light of the proposed notice of  
15 contention, it may tick over, only slightly.

HIS HONOUR: What is the contention?

MS TRELEAVEN: Well, the notice of contention will relate to the breaches of  
20 director's duties. If the court finds against Mr Narain in respect of ASICs appeal, then the questions will raise as to whether in fact the conduct that was alleged against him gives rise to a breach of section 180, and therefore exposes him to a penalty.

HIS HONOUR: I still think it is a day case, I would have thought. We will note  
25 that, but most likely it will be listed for a day.

MS TRELEAVEN: Yes, your Honour.

HIS HONOUR: Anything else?  
30

MR MIRIKLIS: Obviously the dates that are available, there is a limited window. I have calculated there is five available dates, effectively. Mr Bathurst has been retained for ASIC. He was not trial counsel, but Ms McLeod and Ms Treleaven were, for the respondent, and if the court can fit it in to those five available dates,  
35 bearing in mind the 26<sup>th</sup> is out, we would be very grateful.

HIS HONOUR: Yes. Well, we will certainly do the best we can. That is all I can say about the matter. The so called convenience of counsel is only relevant because it is for the assistance of the parties to have the counsel they most wish, but the  
40 primary thing is to get the business of the court done expeditiously. Anyway, we will do the best we can, and we usually succeed.

I will make the usual order for written submissions, and the order that you seek to filing of the notice of intention within – was it 21 days?  
45

MS TRELEAVEN: Yes, your Honour.

HIS HONOUR: Yes, very well. I will make those orders, and the matter will be listed for hearing in the May sittings in Melbourne. Thank you.

5

**No. VID 1193 of 2007**

10 **RICHARD JAMES PORTER AS OFFICIAL LIQUIDATOR OF TAYCORP  
THREE PTY LIMITED (IN LIQUIDATION)**

**and**

15 **MILLER STREET PTY LIMITED (AS TRUSTEE FOR THE TAYLES  
DISCRETIONARY TRUST NO 3)**

MR ZINDILIS: If it pleases the court, your Honour, I appear on behalf of the  
20 appellant.

MR HAGER: If it please your Honour, I appear on behalf of the respondents.

HIS HONOUR: Yes. What is the position in this case?  
25

MR HAGER: Your Honour, there was a request on our part for these proceedings to  
be adjourned for 28 days to allow – and I understand I have to seek the court’s leave  
to file a cross appeal and/or notice of contention. Service was in early January, I  
think the 5<sup>th</sup> or 6<sup>th</sup>. Both I and my client’s director were overseas at the time and  
30 have just come back about two weeks ago. Counsel has not even seen the papers yet,  
so we would just like a bit of time to get our documentation together.

HIS HONOUR: Is this a matter where the parties should be required at least to  
discuss mediation?  
35

MR HAGER: Correct, your Honour. We had a call from your associate, I think  
yesterday or the day before yesterday, and there was an incorrect reference in  
correspondence with my learned friend’s instructing solicitor about mediation. There  
has never been mediation in the case, and we are not in principle opposed to  
40 mediation.

HIS HONOUR: Well, it is just a lot of money. I mean, it is still the costs are going  
to mount up,

45 MR HAGER: The case has dragged on and - - -

HIS HONOUR: I know, and it is a commercial matter.

MR HAGER: It swapped counsel three times.

HIS HONOUR: It is about money, and no doubt a bit of face saving, or face loss, or things like that.

5

MR HAGER: There is a huge issue at stake with respect to – it is a trial about whether my friend’s client liquidator acted appropriately.

10 HIS HONOUR: Yes, I saw that. The liquidator had some difficulties, and the judge took those into account.

MR HAGER: Yes. It presents, however, to go to mediation at this stage, it is a bit too soon, until we get a chance to - - -

15 HIS HONOUR: It is never too soon. The sooner the better, before the costs get any bigger.

MR HAGER: Rather than file our – have leave to file our - - -

20 HIS HONOUR: You know, in Chicago, where I have actually seen this happen – it is a turned on place – you don’t get into the list until you have discussed mediation. And that is before the costs are really incurred. They have a mediation unit; that is what they do. The idea is that you talk about these things before the costs get even bigger. Look, we are here to decide cases, and I am very un-keen on mediation as  
25 some sort of list clearing process, but I just did wonder about this case.

MR HAGER: Your Honour, we cannot have any opposition to mediation. It is a question of when. Now, if you so deem it necessary to have mediation before we cross appeal, so be it.

30

HIS HONOUR: You all know what this dispute is about, surely. No doubt it can all be closely refined, and so forth, but it is pretty clear what it is about. I mean, do you want to talk about it? It doesn’t worry me, but it just seemed to me this is one where a bit of a push to the parties might be of some assistance.

35

MR ZINDILIS: My instructions are very clear, your Honour. I am here to seek orders for mediation. But I understand that - - -

40 HIS HONOUR: I tell you what I would like to do – what I think should be done. I think I should ask you to work out your timetable on the basis that the matter will be heard in the May sittings. Give me some consent orders for the things you want, and the timetable within which you want to achieve it. But on top of that I would order that within seven days the parties by their representatives attend before the District Registrar to discuss the prospect of mediation. It is not going to cost you very much  
45 to do that.

MR HAGER: In comparison to the rest of the costs.

HIS HONOUR: Exactly. Would you work out some consent orders, based on the footing that we will hear this case in May if it is not otherwise settled. Then subject to anything else you might say, I will simply order you to attend before the District Registrar. We are in the process in the court of accrediting all our – any Registrar of  
5 the court who engages in mediation will be accredited according to national standards, but the District Registrar here is very experienced at it anyway. Anyway, it is a possibility. If it is not attractive, we will determine the appeal and get judgment out as soon as we can in May.

10 MR HAGER: Does that mean to say if we cannot work out a procedure, that we can just - - -

HIS HONOUR: You will work out a procedure, If not, I will work one out for you, but I would like you to get some consent orders as to the times you want, and I am  
15 quite flexible about that. Then just come back when you have done that, and I will make those orders, and I will also make an order for attendance before the District Registrar to mediate.

MR HAGER: If your Honour pleases.

20

MR ZINDILIS: Thank you, your Honour.

HIS HONOUR: Very well, thank you. You can just sort of interrupt the next matter by looking anxious, and I will hear you when you have got some consent  
25 orders.

MR ZINDILIS: Thank you, your Honour.

30

**No VID 23 of 2008**

35 **TREVOR JOHN KENNEDY**

**and**

40 **THE HONOURABLE JUSTICE R F EDMONDS IN HIS HONOUR'S  
CAPACITY AS A PRESIDENTIAL MEMBER OF THE ADMINISTRATIVE  
APPEALS TRIBUNAL and ANOTHER**

MS DONNENBERG: If it please the court, I appear on behalf of the applicant.

45

HIS HONOUR: Yes, Ms Donnenberg.

MR TAVOLARO: If the court pleases, I appear for the secondnamed respondent.

HIS HONOUR: Yes, Mr Tavolaro. I should say there is a letter here from the Registrar of the Administrative Appeals Tribunal, which refers to the matter. It notes  
5 that Justice Edmonds in his capacity as a presidential member is a named respondent. The tribunal seeks leave to excuse him from attending the callover and from any further hearings. As noted in the tribunal's notice of appearance, the tribunal submits to any order of the court save as to costs. And that will be on the court file, so it follows the usual practice. Now, this matter. I just haven't seen the status report. Is  
10 there anything in particular you need to draw to my attention, either of you?

MS DONNENBERG: Your Honour, the parties would like to extend the timetable in relating to the preparation of submissions. We have drafted some consent orders.

15 HIS HONOUR: This is a Sydney case. Why is it being heard in Melbourne?

MS DONNENBERG: All of the solicitors – all of counsel and the applicant's solicitors are based in Melbourne. It is for convenience of the parties.

20 HIS HONOUR: Well, the parties are content for it to be heard in Melbourne?

MR TAVOLARO: Yes, your Honour.

HIS HONOUR: All right. Well, at the moment, it certainly convenient to the court,  
25 because the Sydney building is being reconstructed. We have got some difficulties up there. Ordinarily the court has Melbourne matters heard in Melbourne, and Sydney matters heard in Sydney, but I will say no more about it in this instance. If the parties are quite content anyway – yes, that is fine.

30 MS DONNENBERG: We also have some consent orders removing his Honour, Justice Edmonds as the first respondent, and making the AAT the first respondent/

HIS HONOUR: Yes, I was going to look at that. In relation to the Industrial Relations Commission, there is now a protocol where – I think I published something  
35 about it – that is what we do. I didn't check what we do with the AAT, but I am perfectly happy to make that order. So do you have a list of the variations that you want?

40 Yes, well I have signed the consent order as to the change in title. Of course, this is judicial review, so do I need to make a special order for it to be heard by three? No, it is dealt with by the Federal Court of Australia, isn't it?

MR TAVOLARO: Yes, section 20, your Honour, is the relevant section.

45 HIS HONOUR: Subsection (2).

MR TAVOLARO: It relevantly provides, your Honour, that the Chief Justice consider the matter coming before the court, and the original jurisdiction - - -

HIS HONOUR: I think it is the other one.

5

MR TAVOLARO: Well, subsection (2) – sorry, subject to three:

*The jurisdiction of the matter coming before the court from a tribunal or authority while constituted by or by members who include a person who is a judge of the court or of another court created by Parliament shall be exercised by the Full Court.*

10

HIS HONOUR: The – I suppose we should really call them application books, shouldn't we, rather than appeal books?

15

MR TAVOLARO: Yes.

HIS HONOUR: Well, subject to that, I don't see any difficulty with those orders. The only matter in the application book will be – what will it be? What will be in the application book?

20

MS DONNENBERG: I believe it will just be the court documents./

HIS HONOUR: That is all it is, isn't it?

25

MR TAVOLARO: Well, I am not sure whether all of the documents that have to date been filed with the Administrative Appeals Tribunal would necessarily need to be reproduced. The fact of the matter is they really don't help, because the complaint being made is that the lack of documents that were not there, or at any rate the complaint being made as to his Honour's ruling was to the effect that the respondent not be required to produce further documents.

30

HIS HONOUR: You will need to attend before the Registrar, won't you, to settle the - - -

35

MR TAVOLARO: Yes.

HIS HONOUR: Well, we can worry about that, when you do that.

40

MR TAVOLARO: Yes.

HIS HONOUR: And you propose Friday 11 April to settle the application books. Yes, well I make those orders.

45

MR TAVOLARO: The only observation I would make there, for what it is worth, your Honour, is that my understanding is that usually appeal books are settled on a

Wednesday, but I am not sure whether – I dare say if your Honour orders it be done on a Friday, it will be done on a Friday.

5 HIS HONOUR: Madam District Registrar, is that a problem? No problem.

MR TAVOLARO: The only other matter to draw to your Honour's attention is the proverbial issue about dates. As your Honour will have noted from the Full Court status report – I am not sure whether your Honour has that in front of you?

10 HIS HONOUR: Yes.

MR TAVOLARO: Regrettably there are quite a number of dates that are not suitable. The bottom line is that there are three days in May that are convenient to all the parties. They are 19, 20 and 23 May, and we are in your Honour's hands.

15 HIS HONOUR: Well, we will just do the best we can.

MR TAVOLARO: No, we understand that. I just thought I would draw that matter to your Honour's attention.

20 HIS HONOUR: Yes, thank you. We will do the best we can. I don't want taxation matters to be delayed on such account. We will see what we can do. I will make those orders, and with that small modification. Thank you very much.

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**No. VID 1085 of 2007**  
**No. VID 1087 of 2007**

30

**WILLIAM MARIJANCEVIC (ALSO KNOWN AS JOHN WILLIAM HENDERSON)**

35 **and**

**A DEPUTY COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**

40

MR LINDEN: If your Honour pleases, I appear for the respondent in those matters.

MR FERRARO: If your Honour pleases, I appear for the appellant in both matters.

45 HIS HONOUR: Yes. What is the position in these matters?

MR LINDEN: Your Honour, my learned friend has completed a Full Court status report. I didn't get a chance to fill in counsel for the respondent, but that will be Stephen Sharpley. The only unavailable date for him is 8 May. The main issue in the matter, as I understand it, is adverse inferences – what adverse inferences could  
5 be drawn against the Commissioner. It was an application to challenge the validity of assessments under 36 and 39B.

HIS HONOUR: Yes. So what is the principal issue on the appeal?

10 MR FERRARO: It is an appeal against the decision of Sundberg J for failing to apply the High Court decision in *The Queen v Eisenstein*, in that inferences ought to have been drawn when the Commissioner fails to call any evidence from any of his officers as to their conduct which would be able to explain what transpired in relation to assessments and garnishee notices unlawfully issued.

15 HIS HONOUR: Why should those inferences be drawn from the failure to call them? All this jurisprudence makes it plain that it doesn't operate in a vacuum. Anyway, that is the point. It is a short point.

20 MR FERRARO: Yes, it is a short point.

HIS HONOUR: Yes, very well. I will make the usual order for written submissions, and set the matter down for hearing in May. I would have thought have a day would be appropriate.

25 MR LINDEN: Yes, we would agree with that, your Honour.

HIS HONOUR: Very well. Thank you, gentlemen. Those orders will be made, and the matter will be heard in May. Thank you.

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**No. VID 1187 of 2007**

35 **No. VID 1188 of 2007**

**THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**

40

**and**

**DAVID SPRIGGS**

45

**THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**

**and**

**MARK RIDDELL**

5

MS KOW: If your Honour pleases, I appear for the Commissioner of Taxation, and I am in both matters.

HIS HONOUR: Yes, thank you.

10

DR OROW: If your Honour pleases, I appear for the respondents in both matters.

HIS HONOUR: Yes. What is the position? These are matters – I mean, they are very small amounts, but they are matters of principle, I take it.

15

MS KOW: That is correct, your Honour. We have filed the Full Court status report.

HIS HONOUR: This is the deductibility of management fees for notable sports persons.

20

MS KOW: That is correct, your Honour.

HIS HONOUR: These will be tax cases that will cause some wider than usual interest, I should imagine. Well, any particular orders that you - - -

25

DR OROW: Yes, your Honour. We seek leave to file and serve a notice of contention out of time. The Commissioner has been served with a copy of it, and consents to that order.

30

HIS HONOUR: What is the point of the notice of contention?

DR OROW: Your Honour, there are two further grounds upon which her Honour's decision can be affirmed, and effectively what we are saying is that the primary contention of the respondents is that the amounts were incurred in gaining or producing the assessable income in general, irrespective of whether or not there were any findings that the taxpayers were engaged in an activity in the nature of business. That is one contention. The second one is the proposition that the notion of business as defined in 9951 of the '97 Act does not apply for the purpose of 818: it only applies for the purpose of 812 of that Act.

35  
40

HIS HONOUR: I see.

MS KOW: We agree to the filing of the notice of contention out of time.

45

HIS HONOUR: Well, what leave do you want – just leave to file a notice of contention out of time?

DR OROW: Out of time, yes, your Honour.

HIS HONOUR: And the notice is done?

5 DR OROW: The notices are ready to be filed today.

HIS HONOUR: Yes. Well, I will grant leave. Within how many days – or just out of time?

10 DR OROW: We could file and serve it today.

HIS HONOUR: Well, I will grant you leave to file and serve a notice of contention on or before 6 February. And the matter is otherwise ready to proceed?

15 MS KOW: Well, the appointment to settle the appeal book is on 20 February, but we envisage by early May the matter will be ready for hearing, that is for sure.

HIS HONOUR: Very well. I will make the usual order for written submissions, and we will endeavour to set it down on a date that fits in with the rather limited  
20 availability that you have given us.

DR OROW: Yes, your Honour. There are certain dates on which all counsel will be available anyway.

25 HIS HONOUR: Well, we will just do the best we can. This is a test case being funded under the Commissioner's test case - - -

MS KOW: Yes, your Honour.

30 HIS HONOUR: It has got to be heard, and will be heard in the May sittings. If we can accommodate counsel, we will. If not, we will nevertheless hear it. It is important that matters in issue in test cases be resolved without delay. We will probably be able to accommodate you. Yes, thank you.

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**No. VID 996 of 2007**

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**CGU INSURANCE LIMITED**

**and**

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**CORRECTIONS CORPORATION OF AUSTRALIA STAFF  
SUPERANNUATION PTY LTD and OTHERS**

MS DUNN: If your Honour pleases, I appear for the appellant, CGU.

HIS HONOUR: Yes, Ms Dunn.

5 MR GREEN: If the court pleases, I appear for the respondents.

HIS HONOUR: Yes, Mr Green. What is the position in this case? Have I got a status report?

10 MS DUNN: Your Honour, I have the status report here, if I could hand it up.

HIS HONOUR: Just remind me – I read these papers last night, but just remind me what the substance of this matter is.

15 MS DUNN: Your Honour, the issues relate to the test applicable in relation to a known circumstance claim under a policy of insurance.

HIS HONOUR: A known circumstance exclusion?

20 MS DUNN: Yes, your Honour. Whether a notification – whether a letter attached to a renewal constituted a notification. The applicable test as to whether or not it was a notification, whether section 54 of the Insurance Contracts Act can be relied on to cure any defects in the giving of the notice. A causation issue as to whether the notice, and the knowledge of a director - - -

25

HIS HONOUR: Yes, I see. There has been other litigation in this matter, has there not, or am I confusing it with something else?

MS DUNN: Not that I am aware of, your Honour. Mr Green may - - -

30

MR GREEN: No, your Honour.

HIS HONOUR: Very well. So fundamentally then it is a not insignificant construction point of insurance law.

35

MS DUNN; Part of the estimate of the hearing is two days.

HIS HONOUR: Yes, why two days, on a construction point?

40 MS DUNN: Well, there are a number of different issues that also relate back to a settlement between the members of the superannuation fund and the trustee, the employer: the reasonableness of that settlement.

HIS HONOUR: I see. So not just a construction point?

45

MS DUNN: No, sorry, your Honour, no. It is really not just the construction. There is the issue relating to the reasonableness of the settlement between the trustee

and the members of the super fund. There is issues relating to apportionment, and the involvement of a settlement with another insurer, and how that is to be taken into account.

5 HIS HONOUR: It is sounding more like two days than it did at the beginning. Yes, I see. Well, the usual order for written submissions be satisfactory, or would you need a little more space? It is 10 pages. It should be enough.

MR GREEN: It is enough, your Honour.

10

MS DUNN: That is sufficient, your Honour, yes.

HIS HONOUR: Shorter is better in these matters. All right, I will make the usual order for written submissions, and the matter will be set down for hearing in the May sittings in Melbourne. Thank you very much.

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20 **No. VID 953 of 2007**

**RURAL EXPORT AND TRADING (WA) PTY LTD and ANOTHER**

25 **and**

**RALPH HAHNHEUSER**

30 MR LASSEN: If it please your Honour, I appear for the appellants in this appeal.

MR ANDERSON: If your Honour pleases, I appear on behalf of the respondent.

HIS HONOUR: Yes. What is the situation here?

35

MR ANDERSON: I think we are ready to proceed, your Honour. There is no notice of contention. It is fairly straightforward.

HIS HONOUR: Just refresh my memory about this one.

40

MR ANDERSON: It principally concerns interpretation of section 45DB(1) of the Trade Practices Act.

HIS HONOUR: This is the Animal Liberation - - -

45

MR ANDERSON: That is correct, your Honour.

HIS HONOUR: And the short issue is whether it is environment - - -

MR ANDERSON: And what constitutes environment protection under section  
45DD of the Act. There are some ancillary issues relating to damages concerning his  
5 Honour's findings about one of the respondents, but the principal issue is the  
interpretation of that particular provision of the Act, which doesn't seem to have  
attracted much judicial attention previously.

HIS HONOUR: Not any judicial - - -  
10

MR ANDERSON: Only in the context – in relation to environment protection,  
none, your Honour, yes.

HIS HONOUR: It is a section that has had an airing at Portland before, or in  
15 connection with Portland. Yes, I see.

MR LASSEN: Your Honour, there is also the issue as to whether 45DB(1) actually  
applies to the first appellant at all. The first appellant was not involved in the  
movement or export of sheep at all, so there is an issue as to – not just simply as to  
20 whether 45DD(3) applies to both appellants, but whether 45DB(1) applies to the first  
appellant.

HIS HONOUR: Yes, I see. Well, it is an important point. Well, I notice you have  
agreed it is a day's case. Anything – or I can just make the usual order for written  
25 submissions, and we will hear it in May. Yes, all right. Sorry you had to wait here,  
but it probably is the best way to do things; go through the list. The fact that nothing  
unusual appears is probably – I am sure if we didn't have a callover, everything  
would be unusual. Yes, thank you both.

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**No. VID 1229 of 2007**

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**TELSTRA CORPORATION LIMITED (ACN 051 775 556)**

**and**

40 **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

MR PARMENTER: If the court pleases, I appear for the appellant.

45 MR O'BRYAN: Your Honour, I appear for the respondent.

HIS HONOUR: Yes.

MR PARMENTER: I am not sure if your Honour has the Full Court status report.

HIS HONOUR: I don't think – I have just got it.

5 MR PARMENTER: Which sets out that the parties have agreed on a day as the  
estimated duration, and sets out the unavailable dates of my learned friend, Mr  
O'Bryan, who is in a trial from 26 May. And I will be led by Mr Archibald and Mr  
Haughton, and Mr Archibald is in an arbitration on 5 and 6 May. There is an  
10 appointment before the Registrar, I understand, on 27 February to settle the contents  
of the Appeal Book, and I don't expect there would be any dispute about that. A  
notice of contentions has been filed, so we expect the matter would be ready to  
proceed in May.

15 HIS HONOUR: This is not a settleable case, is it?

MR PARMENTER: It seems unlikely from our perspective, your Honour.

HIS HONOUR: Yes. Well, there doesn't seem to be anything to discuss. We will  
20 set it down. What is the estimate – was it one day or two?

MR PARMENTER: One day, your Honour.

HIS HONOUR: All right. Well, we are all mobile phone users. The case is of  
25 interest to everyone. Very well, I will make the usual order for written submissions,  
and thank you for your attendance, gentlemen.

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30 **No. VID 1215 of 2007**

**CHIROPEDIC BEDDING PTY LTD (ACN 052 960 808)**

35 **and**

**RADBURG PTY LTD (ACN 006 020 702)**

40 MS RYAN: Your Honour, I appear for the appellant in that case.

MR SAMARGIS: I appear for the respondent.

45 HIS HONOUR: Yes. What is the position in this matter?

MS RYAN: Your Honour, this is an appeal arising from the trial of a separate threshold question in – the primary matter is a design infringement matter with a cross claim for revocation.

5 HIS HONOUR: This is the one, the International Exhibition point?

MS RYAN: Yes, your Honour. So essentially part of the revocation case would be that the design was pre-published prior to the application being filed. The publication took place at an Australian furniture exhibition known as a New Products  
10 Parade.

HIS HONOUR: I can't recall – did the judge find that was an official exhibition, but not an international - - -

15 MS RYAN: Not an international. So as a result - - -

HIS HONOUR: There is a wonderful nineteenth-century ring about it, this section.

MS RYAN: Yes, it has been wonderful. So in the scheme of things, that threshold  
20 question was heard separately in October.

HIS HONOUR: This is whether it was an official - - -

MS RYAN: Yes, basically whether section 47 applied. Had his Honour found that  
25 section 47 applied to the publication, this particular publication of the design, then the registration would have held, and we would then have gone on to the infringement case and other matters associated with the cross claim.

HIS HONOUR: Do you need leave to - - -  
30

MS RYAN: We have been given leave.

HIS HONOUR: Yes, you would need leave.

35 MS RYAN: Yes, we would need leave, and we have been given leave in the orders that his Honour made.

HIS HONOUR: Wouldn't it have been better to deal with the whole thing?

40 MS RYAN: Your Honour, it was the appellant, who is the applicant in the main case. It was our intention to deal with the whole thing. The trial was vacated on the application, or the rest of it on the application.

HIS HONOUR: Anyway, that is all water under the bridge.  
45

MS RYAN: It is water under the bridge, but we are anxious that the appeal be set down for these May sittings, because of course we have another pilot case to be heard.

5 HIS HONOUR: Yes. It certainly will be set down in the May sittings. Well, all I really need to know, is the usual order sufficient for your purposes?

MS RYAN: Yes, the usual order is sufficient. Could I just raise two other things?

10 HIS HONOUR: Yes, of course.

MS RYAN: Your Honour, in the status report an estimate of one day has been given. That might be excessive. The actual trial went for half a day, and it is our view that it could be a half day trial, but my colleague, Mr Samargis, has other views  
15 on that. The second matter I wanted to raise was the unavailability of Mr Clarke. Mr Clarke seems to be unavailable basically from 3 May through to the 25<sup>th</sup>, which cuts out a large part of the listing. I would simply say that obviously if the matter had to be listed in the final week, or in those first few days, that would obviously not be a problem for us, but we would be very, very concerned if Mr Clarke's unavailability  
20 was cause to push us out of the May listings. Mr Clarke has come onto the case recently.

HIS HONOUR: Mr Clarke wasn't counsel - - -

25 MS RYAN: No.

HIS HONOUR: Well, there is no reason – I mean, obviously if they wish to brief Mr Clarke, we will do the best we can, but if the case cannot be fitted in when he is available, the case will nevertheless be heard in May.  
30

MS RYAN: Yes, that is absolutely what we would want.

HIS HONOUR: Subject to any very special point that Mr Samargis might wish to put.  
35

MR SAMARGIS: You have heard my friend. . His unavailability is from 5 to 23 May.

HIS HONOUR: But this is a half day point of construction. We couldn't possibly, surely, push this over to another - - -  
40

MR SAMARGIS: No, we would hope to have it heard in May as well. The only issue in suggesting that it may go a day is that we have got to look at the history leading up to the introduction of the section, and then also we believe to look at the history after the section, particularly around the time of the ALRC review, and  
45 comparisons with the Patents Act, and also then what ultimately became of the new Designs Act 2003. So there is a bit of historic information to go through.

HIS HONOUR: Look, I can see with people getting fascinated with the history and the topic, it could go for a day, but it is not going to go for more than a day.

5 MR SAMARGIS: Well, we are not saying it will go for more than a day, your Honour.

HIS HONOUR: Well, I can understand it may well go for a day. All right, we will try and fit it in, but if we can't, it just has to be heard in May.

10 MR SAMARGIS: Certainly our position is that towards the end of May is the best window.

HIS HONOUR: Well, you don't have a problem with that, do you, Ms Ryan?

15 MS RYAN: I have absolutely no problem with any date in May, so long as it is heard within the May sittings.

HIS HONOUR: Yes, it will be heard in May, and ideally when everyone is happy. If not, it will be heard in May. I will make the usual order for written submissions.  
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25 **No. VID 1193 of 2007**

**RICHARD JAMES PORTER AS OFFICIAL LIQUIDATOR OF TAYCORP  
THREE PTY LTD (IN LIQUIDATION)**

30 **and**

**MILLER STREET PTY LIMITED (AS TRUSTEE FOR THE TAYLES  
DISCRETIONARY TRUST No. 3)**

35 HIS HONOUR: Yes, just the matter of Porter.

MR HAGER: Thank you, your Honour. We've handed up - - -

40 HIS HONOUR: Yes, look, I've seen the order. That's - I find - the only two comments. The first is you've agreed that the parties will mediate. I mean, I'm happy with that. That's what you want to do, that's a good thing.

45 MR HAGER: We're all in agreement, your Honour.

HIS HONOUR: Yes, very well. All right. Well, the district registrar, Ms Lagos, is, in fact, at the back of the court. So you might want to have a - - -

MR ZINDILIS: We've spoken to her outside the court, your Honour.

5 HIS HONOUR: Excellent. All right. Well, that's good. And the other thing, I just noticed order six, written submissions. I take it you – it's on the understanding that one of you will go first, because one will obviously need to be responsive to the other.

MR HAGER: As the appellant, it's logical the appellant be the first to - - -

10 HIS HONOUR: There is a useful precedent in the standard order which one of you needs to go first. Well, we can – on or before – you pick a date. The appellant file and serve written submissions not exceeding 10 pages on or before 6 May. The respondents – just pick a date that suits you for the appellant's submissions.

15 MR HAGER: Perhaps seven days before.

HIS HONOUR: Whatever that is.

20 MR HAGER: That would be 9 April.

HIS HONOUR: Would be 30 April. Yes, very well. Well, thank you. I'll make those orders and all the best with the mediation.

25 MR HAGER: Thank you, your Honour.

HIS HONOUR: I mean, it's really – it's going to be very expensive if you can't sort it out. And the other thing, of course, if there is any sort of continuing relationship or so forth it's another reason to try and mediate if you can. Good. Thank you.

30 MR HAGER: Thank you, your Honour.

MR ZINDILIS: Thank you, your Honour.

35 MR HAGER: May we be excused?

HIS HONOUR: Yes, of course, thank you. Yes, call the next matter please.

40

**No. VID 1162 of 2007**

45 **PILKINGTON AUSTRALIA LIMITED**

**and**

**VICTOR CLAVERIA**

MR T. DONA: Good morning, your Honour, I appear for the appellant in the case.  
5

HIS HONOUR: Yes, Mr Dona.

MR WEINMANN: May it please the court, I appear for the respondent.

10 HIS HONOUR: Mr Weinmann.

MR DONA: Sir, I'm afraid you don't have a Full Court status report. One was prepared by the appellant and has been hand amended by the respondent to be handed up to your Honour now.

15 HIS HONOUR: I'll just take a moment to read it.

MR DONA: If your Honour pleases.

20 HIS HONOUR: Yes, remind me about *Leuin v Zhang*.

MR DONA: Sir, it may not trouble a Full Court as both of the decisions in *Leuin v Zhang* on this point were probably obiter, but they refer, on the one hand, to complaints and recourse to outside a ministry of authorities being made to outside  
25 authorities only, because the facts of those cases were that complaints had been made only to the employer directly. So I think that this may not trouble a Full Court to some extent – to that extent. However, it appears - - -

30 HIS HONOUR: Could you remind me, are those single judge cases?

MR DONA: Those are both Full Court decisions, sir.

HIS HONOUR: Full Court, aren't they?

35 MR DONA: Yes.

HIS HONOUR: Yes, I see.

40 MR DONA: But they seem at some odds with the facts and the questions to be decided in this matter, your Honour. It's simply that that note at the end of the status report is largely a paraphrase of what's in paragraphs four and five of the notice of appeal.

45 HIS HONOUR: Yes, I see. All right. Well, it's good to have notice that that's – it may be an issue. Anything else I - - -

MR DONA: Your Honour, I think other than the duration, I think my friend has an application he wishes to make in relation to a notice of contention.

5 MR WEINMANN: We seek to file and serve a notice of contention within 28 days.

HIS HONOUR: Yes.

10 MR WEINMANN: Briefly put, that the nature of the contention will be that the worker in this case not only had recourse to administrative authority, as her Honour determined, but also made a complaint. Her Honour did not determine that point. Same facts, but we say that that is - communication with the union also constituted a complaint.

15 HIS HONOUR: Is there any difficulty with - - -

MR DONA: I have no instructions about that, sir, but I can't imagine that it's going to add greatly to the length of the case. So on that basis I think I'm in your Honour's hands.

20 HIS HONOUR: I think that leave should be granted. So within 28 days.

MR DONA: Yes, your Honour.

25 HIS HONOUR: Yes, very well. All right. Well, I'll grant that leave, and I'll make the usual order for written submissions.

MR DONA: If your Honour pleases.

30 HIS HONOUR: And the matter will be listed for hearing in the May sittings, with an estimate of one day.

MR DONA: Thank you, your Honour.

35 HIS HONOUR: Yes, thank you, gentlemen. Call the next matter please.

40 **No. VID 1223 of 2007**

**WARREN CRUSE**

45 **and**

**MULTIPLEX LIMITED (ACN 008 687 063) and OTHERS**

MR BARKER: May it please your Honour, I appear for the appellant.

HIS HONOUR: Yes, Mr Barker.

5 MR MADDISON: If it please the court, I appear on behalf of the respondents, your Honour.

HIS HONOUR: Mr Maddison, thank you. Yes, well, there's nothing that emerges from the status report that needs comment.

10 MR BARKER: No, your Honour.

HIS HONOUR: Are there any other – there's another case – is there a Full Court decision pending on this issue?

15 MR BARKER: Not pending, your Honour. There was a Full Court decision I think in – last year. Given last year some time.

HIS HONOUR: I see. All right. That's been delivered has it?

20 MR BARKER: Yes.

HIS HONOUR: It was on the same – in the same general area I think.

25 MR BARKER: Yes, that's correct, your Honour.

HIS HONOUR: Yes, all right. Well, in that event, I'll just make the usual order and they may as well be – I see there's no difficulty with dates, so it will be listed for hearing in the May sittings.

30 MR BARKER: If your Honour pleases.

HIS HONOUR: Yes, thank you both.

35 MR MADDISON: Thank you, your Honour.

40 **No. VID 992 of 2007**  
**No. VID 1152 of 2007**  
**No. VID 1153 of 2007**

45 **DAVID ROBERT SIMINTON**

**and**

## AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY

5 HIS HONOUR: Yes, Mr Sharp.

MR D. SHARP: If your Honour pleases, I appear on behalf of the appellant who is the same person, of course, in each of the three matters.

10 HIS HONOUR: Yes.

MR SHARP: My learned instructor has just handed to your Honour's associate a status report. We - - -

15 HIS HONOUR: I'll just take the appearances for the respondent.

MS M. VANNITEMBY: If your Honour pleases, for Australian Prudential Regulation Authority.

20 HIS HONOUR: I'm sorry, Ms?

MS VANNITEMBY: Vannitemby.

HIS HONOUR: Thank you.

25 MR D. ABLETT: If your Honour pleases, I appear for the District Registry of Victoria.

HIS HONOUR: Yes. Yes, Mr Sharp.

30 MR SHARP: Sorry, your Honour. Your Honour will see that the status report is not one which has been agreed between the parties. The basic provisions are, we are in agreement on the basic aspects, but we raise several matters which we believe would be appropriate for consideration at this stage. I apologise for the handwriting, your Honour, on the third page.

35 HIS HONOUR: That's all right. Now, what about the constitutional issues? Have you given a notice under the Judiciary Act?

40 MR SHARP: Yes, we have, your Honour. It went out yesterday. But has been finalised yesterday.

HIS HONOUR: Was one given at first instance?

45 MR SHARP: Yes.

HIS HONOUR: There was?

MR SHARP: Yes, there's been a succession of them, your Honour.

HIS HONOUR: Good. All right, thank you. Well, there doesn't seem to me to be anything in the status report that requires comment.

5

MS VANNITEMBY: Your Honour - - -

HIS HONOUR: Yes, do.

10 MS VANNITEMBY: - - - the issues raised are rejected by the respondent. We don't see the relevance of putting the issue of the notice of motion. That's a matter between the receiver that was appointed by the court and Mr Siminton, and they don't – they're not relevant to the appeal at hand.

15 HIS HONOUR: Well, do I need – I don't know what that's about. Do I need to know about that?

MR SHARP: I can tell you, your Honour, in a few words.

20 HIS HONOUR: Yes.

MR SHARP: Part of the order of his Honour, Tracey J, Tracey Js order included the appointment of a receiver, and the receiver has been performing his task. As a consequence of that he has issued a notice of motion which is returnable tomorrow.  
25 Now, the notice of motion may raise a problem, it may not, because it may turn on the question of the right against self-incrimination. So it may be that there may be further - - -

30 HIS HONOUR: Well, that can be dealt – who is – before the duty judge tomorrow will it?

MR SHARP: Yes. Presumably so, yes, your Honour.

35 MS VANNITEMBY: I think it's before Tracey J. He may be the – that's my understanding.

HIS HONOUR: Well, that can be sorted out tomorrow. It's not a - - -

40 MR SHARP: Yes, I'm not suggesting it necessarily it wouldn't - - -

HIS HONOUR: No, it's not a problem.

45 MR SHARP: I put it before the court so it can be informed, your Honour. The second aspect is, we note that Gray J has - - -

HIS HONOUR: Yes, well, I see that. Well, that's sensible to raise that.

MR SHARP: There is one other aspect, your Honour. One of the three appeals relates to the order and the interpretation of the order. The relevant order was the order of Gray J and that would be another aspect of the relevance to Gray J, your Honour. He would be called upon to determine the meaning of his own order.

5

HIS HONOUR: Yes, I see.

MS VANNITEMBY: Your Honour, the decision that, on my understanding, is that – is of the 10<sup>th</sup> of December. That's not a decision that's being appealed. It – I don't consider that Mr Sharp has established the relevance of that issue. He – Mr Siminton has not given any evidence before Gray J himself. So any issues about his credit is not viable. So we would submit that that issue is not relevant either.

10

HIS HONOUR: Yes, thank you. Very well, well, I'll make the usual order for written submissions, and the matter will be heard in the May sittings.

15

MR SHARP: If your Honour pleases.

HIS HONOUR: Yes, thank you. Excuse me. Yes, call the next matter please.

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**No. VID 1048 of 2007**

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**ROSA DORA IMPORTS PTY LIMITED and ANOTHER**

**and**

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**PZ CUSSONS (INTERNATIONAL) LIMITED and ANOTHER**

HIS HONOUR: Yes, Mr Heerey.

35

MR E. HEEREY: If it please your Honour, I appear for the respondents.

HIS HONOUR: This is the Morning Fresh matter.

40

MR HEEREY: That's right. Yes, I understand that the appellant's will not be appearing today.

HIS HONOUR: Do we know why they're not going to be here today?

45

MR HEEREY: They didn't give me their reason for that. But I spoke to their solicitors yesterday, so I think I can propose a course that's at least uncontroversial between the parties.

HIS HONOUR: Yes.

MR HEEREY: It's probably worth explaining at the outset that the parties have reached an in principle agreement as to the terms of settlement.

5

HIS HONOUR: Yes.

MR HEEREY: And we expect to be able to inform the court that the matter has settled before you come to list the matter within the May sitting. But we ask that you proceed for the time being as though we would need to have the matter listed.

10

HIS HONOUR: So, I'm sorry, you would like it listed, or not listed?

MR HEEREY: We would like you to proceed for the time being as though it does need to be listed pending a finalisation of the settlement.

15

HIS HONOUR: I see, and so Mr Koutzoumis isn't – in a sense there's a reason for them not to be here. I mean, this matter is going to settle. That's the essence of it.

MR HEEREY: That would explain it I think, your Honour.

20

HIS HONOUR: Yes, very well. All right, well, I won't get upset about that. Well, I'll certainly make the usual order for written submissions and order that the matter be fixed for trial in May, but if you'd be good enough to let the appeals registrar know the moment – or his solicitors – the moment settlement is definitely on, that would be appreciated.

25

MR HEEREY: We will do that.

HIS HONOUR: Yes, thank you, Mr Heerey.

30

MR HEEREY: Thank you, your Honour.

HIS HONOUR: Everyone has a view about Morning Fresh I've no doubt.

35

MR HEEREY: We certainly do, your Honour.

HIS HONOUR: Yes, thank you, Mr Heerey. Yes, call the next matter please.

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**No. VID 1168 of 2007**

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**SYED MUSTAPHA HUSSAIN**

**and**

**MINISTER FOR FOREIGN AFFAIRS AND TRADE and ANOTHER**

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MR L. MAHER: If your Honour pleases, for the appellant.

HIS HONOUR: Yes, Mr Maher, yes.

10 MR A. BERGER: May it please the court, I appear for the respondent.

HIS HONOUR: Yes, Mr Berger. Now, what's the position? This is discovery, isn't it, in the - - -

15 MR MAHER: No, that's another case, your Honour.

HIS HONOUR: Well, tell me about this one.

20 MR MAHER: This is an appeal from a decision of the Security Appeals Division of the AAT affirming two decisions. One of the decisions of the Minister for Foreign Affairs to cancel Mr Hussain's passport, and the other affirming an adverse security assessment of the Director-General in respect of an application for a passport. Both those decision were reviewed in the AAT under the special regime that's set out.

25 HIS HONOUR: Is there still a Security Appeals Tribunal?

MR MAHER: No, it's a division of the A - - -

HIS HONOUR: There used to be. I remember it.

30

MR MAHER: You're quite right, your Honour.

HIS HONOUR: And it all goes to the AAT, a special division now, does it?

35 MR MAHER: And there are special provisions in the AAT Act which govern the way in which the proceeding is conducted and disposed of.

HIS HONOUR: Yes, I see.

40 MR MAHER: There is another case that's - - -

HIS HONOUR: I'm confusing the two obviously.

45 MR MAHER: - - - involves one of my learned friend's clients and a discovery point that's due to be heard on the 24<sup>th</sup> by the Full Court, in which I and my leader, Mr Bornstein, are also involved. So there is a connection between the two cases, but it's adventitious.

HIS HONOUR: So this is an appeal from a passport?

MR MAHER: Well, it's an appeal from the AATs decision affirming two passport related decisions.

5

HIS HONOUR: Yes, I see.

MR MAHER: And it specifically brought on questions of law in accordance with the provisions which give the Full Court jurisdiction to hear such appeals. And my learned friend has very kindly completed the status report. The - - -

10

HIS HONOUR: I think I've been reading the wrong - - -

MR MAHER: Well, in that case, I'm sorry, your Honour.

15

HIS HONOUR: It's gone out of the list. Yes, I see.

MR MAHER: Yes, the other case was in today's list until - - -

20

HIS HONOUR: And it's come out of the list.

MR MAHER: - - - I had a brief. And late yesterday, I gather, it came out of the list.

HIS HONOUR: Yes.

25

MR MAHER: So your Honour is right to have that in your Honour's mind.

HIS HONOUR: That's very tactful of you. Now I understand, yes. Now, I've got the right one.

30

MR MAHER: Well, would your Honour like me to retrace any steps - - -

HIS HONOUR: Yes, just – yes, if you wouldn't mind, because I was briefing myself on the discovery one, not on this one. So just if you wouldn't mind just giving a brief summary.

35

MR MAHER: Well, I'm sorry your Honour. I should've - - -

HIS HONOUR: No, that's all right.

40

MR MAHER: - - - made mention of that other one at the beginning. There is a sense in which - - -

HIS HONOUR: And I haven't briefed myself on this one. So a five minute, two minute summary would be helpful.

45

MR MAHER: Right, okay. The decision which is sought to be impugned by our clients – I'm being led by Mr Bornstein – is the decision of the Security Appeals Division of the AAT which affirmed two decisions that were adverse to our client, Mr Hussain. Both passport related. And both because of adverse security  
5 assessment which the Director-General of Security had issued. In the case of the Minister for Foreign Affairs who had cancelled the passport, there are specific provisions that dealt with that decision making exercise. And in relation to the Director-General's separate, but related, adverse security assessment decision, which was also passport related, that is anchored in the provisions of ASIOs constituent  
10 legislation.

And the critical point, so far as the appeal, really relates to how the provisions in the AAT Act govern the disposition of the merits review of both those primary national security/passport related decisions. And there is a section 65B question which my  
15 learned friend has kindly reminded me about this morning. 78B, I'm sorry. What the appeal focuses on is the way – it's – in short, we are attacking the specific provisions in the – if your Honour looks at page two of the amended notice of appeal in question, 2.2 and 2.3, there's a reference to sections 36, 39A and 39B of the AAT Act. The effect – the hearing below was conducted both, in part, in open and then in-  
20 camera, and the in-camera – if I can loosely call it that - part of the proceeding, the applicant and his advisors were excluded.

At the beginning of the proceeding below two things occurred. First of all, it was indicated to the Tribunal that Mr Hussain's position was that he didn't accept  
25 formally the validity of the procedure which the Tribunal was bound to follow. And then, more specifically, a series of questions were formulated and reduced to writing and provided to the presiding member of the division in which, in short, Mr Hussain formally sought, what would normally be called, again, in shorthand or vernacular terms, a full specification of the case against him.

30

HIS HONOUR: Yes.

MR MAHER: And the presiding member, his Honour, on behalf of the Tribunal, made some responses to – informative and helpful responses – to those inquiries  
35 which had been made on behalf of Mr Hussain. But otherwise the hearing proceeded in the way in which the statute stipulates. So the attack on the, as it were, on the Tribunal's decision, in a nutshell, is an attack on the validity of the provisions in the AAT Act which provide for this - - -

40 HIS HONOUR: So is this a chapter three, or what's the fundamental attack?

MR MAHER: Well, it's - - -

HIS HONOUR: Couldn't be chapter three because it's not judicial power.  
45

MR MAHER: It's not judicial power, but the circumstances in which the – well, the Tribunal is not exercising judicial power quite clearly.

HIS HONOUR: No.

MR MAHER: But the case which the applicant below foreshadows - and it wasn't spelled out in any detailed way - was that, in the particular context in which these national security and decision making powers are being exercised, there was no power to investing the AAT with the merits review jurisdiction to prevent, in the way in which the Act does - and which starts with a certificate from the Attorney, and then there are other provisions that spell out, in quite significant detail, how the hearing is to be conducted - that the Parliament had stepped beyond its authority in preventing an applicant who was seeking to challenge the merits of these two adverse, though related, decisions from, as it were, doing so with one hand tied behind his back. I'm lapsing into the vernacular there, your Honour.

HIS HONOUR: Yes, I understand.

MR MAHER: I should say this, that the circumstances were - and my learned friend can correct me here if I've left anything out - that one of the difficulties which the applicant experienced was that he had some material, and there were some open documents that were put before the Tribunal in accordance with the provisions that were laid down. And there was some information, additional information provided, I think, on the Thursday or the Friday before the hearing, which took place on a Monday and Tuesday following. And that additional information actually condescended to some specificity about what it was that had led to the adverse assessments and, in particular, just to give your Honour a sort of flavour of this, it was said that there were apprehensions about Mr Hussain's likely conduct that were related to matters that had to do with the conflict in Iraq.

So that the underlying adverse assessment of Mr Hussain was based upon material and conclusions that were drawn from that material which led the Director-General, in the first place, to form an adverse view about Mr Hussain that he, within the - - -

HIS HONOUR: So basically there are two points. There's a constitutional point and presumably then a question of instruction of the - - -

MR MAHER: Yes, your Honour.

HIS HONOUR: - - - AATs own - of the legislation covering these sort of cases.

MR MAHER: The AAT, yes.

HIS HONOUR: All right. I follow. Thank you.

MR MAHER: Your Honour, I think I've detected an infelicity in the amended notice of appeal. I realised this just before I got to my feet because I haven't told my friend this. But just for the sake of completeness, in the grounds in line three, line three is ungrammatical in this sense. There's a passage in the second half which reads:

*And by access the entirety of ...*

I think, but I haven't looked at this since the document was composed some weeks ago, that what it should read is:

5

*And by denying access to the entirety of.*

It's an infelicity that can be cured, but I just need to double check with my leader about that.

10

HIS HONOUR: Well, I'll give you leave to amend within seven days.

MR MAHER: I'm indebted to your Honour.

15

HIS HONOUR: If you - - -

MR MAHER: We both agree the case should take a day, no more. Half day probably, yes.

20

HIS HONOUR: Yes, very well. And you'll need, of course, the notice under the Judiciary Act.

MR MAHER: Yes, well, I'm happy to – if your Honour makes a direction about that. My learned friend, I think, is going to suggest that. And the other thing is my learned friend is suggesting that, having regard particularly to the section - - -

25

HIS HONOUR: Well, this may be a matter that the Commonwealth would be interested in having the Solicitor-General make submissions.

30

MR MAHER: Yes, well, that wouldn't surprise me at all, your Honour. My learned friend has also suggested in that regard that there be greater time allowed in advance for the provision of the submissions, and I think my learned friend's suggestion is a sound one in that respect.

35

HIS HONOUR: All right.

MR MADDISON: We would suggest, your Honour, that the submissions, instead of five days before the hearing, be done 28 days. I think my learned friend had suggested 14, but - - -

40

HIS HONOUR: Do you have a problem with 28, Mr Maher?

MR MAHER: Well, 14 is a minimum. If push comes to shove, 21. 28 is a - - -

45

HIS HONOUR: It is. It's too far. 20, 20 - - -

MR MAHER: It's a long way out, your Honour.

HIS HONOUR: Yes, it is. 21 days.

MR MADDISON: May it please, your Honour.

5 HIS HONOUR: And then how many for yours in response after that?

MR MADDISON: If ours could be done say 14 days after that. So 14 days before.

10 MR MAHER: After and before. I'm - - -

MR MADDISON: 14 days after the appellant's have been filed, so that would be 14 days before the hearing.

15 HIS HONOUR: That gives your opponent only seven days. I suppose that's - do you have a problem with that? Everyone knows what the issues are anyway though.

MR MAHER: Yes, I'm not – that's manageable, your Honour.

20 MR MADDISON: The issue, your Honour, was to give to State and Commonwealth Attorney-Generals, and those advising them, sufficient time to decide whether they want to intervene.

25 HIS HONOUR: Yes, all right. Well, now the 78B notices should be delivered reasonably soon.

MR MAHER: Yes, your Honour.

HIS HONOUR: Within 28 days?

30 MR MAHER: Yes, your Honour.

HIS HONOUR: The - - -

35 MR MAHER: Sooner if your Honour – 21 - - -

40 HIS HONOUR: Well, 14 then. 21 will be fine. But the sooner – that should be done reasonably quickly. So all of – they be served by 22 February, and submissions on behalf of the appellant, 21 days before the date notified for hearing of the appeal. And submissions by the respondents, 14 days before the date notified for hearing of the appeal. And the usual 10 page limitation.

MR MADDISON: Just to be clear, your Honour, the service of the 78B notice would be by the appellant.

45 HIS HONOUR: I'm not sure who the Act requires – I think - - -

MR MADDISON: It does – well, it can be either, your Honour. It does suggest the appellant. Sometimes the respondent does, but - - -

5 HIS HONOUR: I think it's generally – yes, I'm - - -

MR MADDISON: - - - we're not sure exactly how they're putting their attacks. So it would be more appropriate in - - -

10 HIS HONOUR: It would be better if they do, because it's not entirely clear, I have to say, at this point, how the attack is put. It's not a chapter three point, it's a - - -

MR MAHER: Your Honour, I assume from my earlier discussions with my learned friend - - -

15 HIS HONOUR: I think best if you do it, Mr Maher.

MR MAHER: - - - that it was best for us to articulate - - -

20 HIS HONOUR: I think it is, yes.

MR MAHER: And we're quite happy to, if necessary, to confer with my learned friend, but I think the responsibility should rest on us.

25 HIS HONOUR: I think it's best if you do it, and I'll so order. As far as the court's concerned, I think the only thing is we're not allowed to proceed unless it has been done.

MR MAHER: That's so, and the Act requires it.

30 HIS HONOUR: That's what the Act says. All right. Well, thank you both and the matter will be heard in the May sittings.

MR MAHER: If your Honour pleases.

35 MR MADDISON: May it please the court.

HIS HONOUR: Call the next matter please.

40

**No. VID 52 of 2008**

45 **ARTHUR DENT**

**and**

**AUSTRALIAN ELECTORAL COMMISSION and ANOTHER**

HIS HONOUR: Mr Dent, you appear for yourself in this matter I think.

5

MR DENT: That's right.

MR P. BARKER: And, your Honour, I appear for the respondents.

10 HIS HONOUR: Yes, Mr Barker. Mr Dent, as you would have gathered the only purpose of this call over is to sort out anything that needs sorting out before the appeal is actually listed for hearing.

MR DENT: Unfortunately there are a number of matters that need to be sorted out.

15

HIS HONOUR: All right. Well, let's go through them.

MR DENT: There hasn't been an actual directions hearing in the original proceedings because they were dismissed at what was intended to be the first directions hearing.

20

HIS HONOUR: Yes.

MR DENT: And, as a result, a number of things haven't been done which really ought to be done before. I don't imagine you would want to do them at the call over.

25

HIS HONOUR: No.

MR DENT: But I'd suggest that you might want to either authorise the registrar to – I believe there is some provision in the rules of the Federal Court that the registrar can act pretty much like a judge.

30

HIS HONOUR: Well, let's just see what the - - -

MR DENT: Or alternatively set a date for a directions hearing.

35

HIS HONOUR: What – if you could just sort of outline – are you aware of these difficulties, Mr - - -

MR BARKER: No, not really, your Honour.

40

HIS HONOUR: We should be able to sort them out I think. I don't know.

MR DENT: Well, the first one, of course, Mr Barker is aware of because he created it yesterday by writing a letter which he handed to me.

45

HIS HONOUR: This is the leave to appeal point, is it?

MR DENT: Yes, I believe that should be handed to you.

HIS HONOUR: Well, now the – Mr Barker, you’re going to contend, are you, that there should be – there’s no leave and leave is required.

5

MR BARKER: Yes, your Honour.

HIS HONOUR: I thought that might arise. This point is currently before a Full Court, isn’t it? It’s unresolved?

10

MR DENT: Well, I was told that there’s a case, re Lark – I’ve a copy of it along on the CD, and it makes it quite clear that the point is completely ridiculous, that there is no question that - - -

15

HIS HONOUR: You don’t need leave when it’s a strike out.

MR DENT: No, well, if it’s a strike out for abuse of process, vexatious, frivolous, etcetera, then you do, quite unequivocally, but the entire reasoning in the judgment is that that is an interlocutory protection of the court’s process.

20

HIS HONOUR: Yes.

MR DENT: Whereas the decision that was made by Gordon J was a summary final judgment.

25

HIS HONOUR: Yes.

MR DENT: And there’s simply nothing in this point, and I think it should be dismissed now.

30

HIS HONOUR: This issue, as I understand it, and I’ll check this out, I take the distinction that Mr Dent draws between a strike out for abuse of process and a strike out on summary dismissal. My understanding is that this issue still is before a Full Court, in which it would be wrong, it seems to me, to deny Mr Dent the capacity to pursue this matter. I mean, it may be the Full Court will say that leave is not required.

35

MR BARKER: Yes, your Honour. Well, perhaps – we have written to Mr Dent outlining this issue, and we invited him to withdraw his notice of appeal and file an application for leave to appeal, failing which we had put on a notice of motion seeking dismissal - - -

40

HIS HONOUR: You have done that, have you?

45

MR BARKER: No, we haven’t. We were going to allow him seven days to file an application. It may be that we can make a new motion that we file returnable before the Full Court - - -

HIS HONOUR: Well, isn't that the best thing, and then – I mean, the matter is before the Full Court, but the other Full Court will have determined the matter.

MR BARKER: That's right. We may not need to move the court.

5

MR DENT: Could I suggest that that letter that was sent outlining this should be before your Honour.

HIS HONOUR: Yes, certainly.

10

MR DENT: It seems to me - - -

HIS HONOUR: I'll just take a moment to read it, Mr Dent. I won't be a moment. I see. Yes, well, I've read your letter, Mr Barker. So what – your point is this. You say that re Lark covers it, Mr Dent says it doesn't. And you say he needs leave, and you're prepared to waive time limits and so forth, and Mr Dent says he doesn't.

15

MR BARKER: Yes.

20

HIS HONOUR: And the reality is that – I mean, it was a final decision which precluded him from putting the case that he wants to put. I must say, subject to hearing Mr Dent, I'm a bit inclined to fix the matter for hearing before a Full Court.

MR BARKER: Yes, and we can - - -

25

HIS HONOUR: And this issue will then be decided. If the Full Court thinks there's nothing in it, well, it will so rule. And if it sees the whole of the material and thinks that Mr Dent has a point that he should have been allowed to put, well, it can so rule. It's a very pragmatic way of getting the matters resolved.

30

MR BARKER: Yes, your Honour.

HIS HONOUR: And getting the thing on for hearing.

35

MR DENT: So it would be the typical leave refused, appeal refused, or leave granted, appeal granted sort of thing.

HIS HONOUR: Well, that's – yes, that's right. It all happens at once.

40

MR DENT: It's the same – we wouldn't waste time on arguing the issue.

HIS HONOUR: It wouldn't – it would all happen at once. I mean, I can't - - -

45

MR DENT: My only remaining objection to it being raised at all is that it is simply an effort to justify their bill of costs for raising every point they can conceive of, but I gather that's standard practice.

HIS HONOUR: Well, I'm not going to comment on that. You know, look - - -

MR DENT: Yes, no, as long as we're getting on with it rather than taking - - -

5 HIS HONOUR: I think we'll just get on with it.

MR BARKER: Yes, your Honour, we would be happy to do that.

10 HIS HONOUR: Fix it for hearing and fix all the matters before a Full Court in May and then get into the merits or, as you would say, the lack of merits of the case.

MR DENT: The other matters raised in the election – in the letter, sorry, are I think the substance of the issue. Can I speak seated?

15 HIS HONOUR: Yes, yes, certainly.

MR DENT: That it's complaining that the orders sought, in particular paragraphs one, two, nine, 10 and 11, cannot be granted by a court on appeal because they weren't in the original claim. And I would like that clarified now. My  
20 understanding is that the summary judgment was based on a submission that the election was over and therefore there was no relief.

HIS HONOUR: That's as I read it.

25 MR DENT: Yes, and therefore there was no relief. So the claims are being - - -

HIS HONOUR: But I didn't go beyond that to see whether – what your case was on that point. I mean, it may be that you would say that it wasn't just for this election, it was for - - -

30 MR DENT: Well, essentially, the original affidavit and original statement of claim was to get the interlocutory orders to get me enrolled and to make sure they couldn't prevent me being a candidate. And so it was drafted very hastily. Then, in the course of Ryan J reading out his decision on that, the Electoral Commission did  
35 reject my nomination as a Senate candidate and, as a result, I got an oral ex parte hearing before Jessup J. Now, the first difficulty is that it's been referred to as an ex tempore judgment, but it currently doesn't exist at all. I've only just obtained the transcript of Jessup. We ordered it quite a while back but they couldn't find it. And  
40 apparently it's been held back so that his judgment could be redacted from it. So he hasn't published a written judgment, and there is no transcript of his oral judgment.

And I believe that that's something that ought to be included in the Appeal Book. And I don't know how to extract a judgment from a judgment. I presume that you  
- - -

45 HIS HONOUR: So it was an oral – it was delivered on the – it was an ex-tempore judgment.

MR DENT: It was ex-tempore judgment which you would expect to show up in the transcript if it – normally it's redacted from the transcript if they are going to deliver a different written judgment.

5 HIS HONOUR: What we normally do is to – if it's - - -

MR DENT: Release the transcript.

10 HIS HONOUR: No, not normally. Just take the transcript and create a more formal judgment within the – of course, departing only minimally from the unsplitting the infinitives and generally tidying it up. But that's what normally happens. When was this delivered? Have you got the date?

15 MR DENT: This is on 1 November.

MR BARKER: 1 November, your Honour.

HIS HONOUR: Is it – I mean, you were there?

20 MR BARKER: Yes, I was.

HIS HONOUR: His Honour delivered it. Delivered brief reasons - - -

25 MR BARKER: Yes, that's correct.

HIS HONOUR: - - - which were presumably transcribed.

MR BARKER: Yes.

30 MR DENT: He had, in fact, spent the afternoon preparing them. It wasn't really ex tempore. He had been briefed by Ryan J from lunch time - - -

HIS HONOUR: Well, we all do that.

35 MR DENT: - - - until 4.00 pm.

40 HIS HONOUR: We all do that to try and get it out quickly. Yes, I see. Do you agree with Mr Dent's view that this should – that ex tempore, or whatever it was, should be in the appeal papers?

MR BARKER: We haven't got objection to it forming part of the appeal papers. It is - - -

45 HIS HONOUR: Yes. Well, the appeals registrar can see what can be done about that.

MR DENT: Now, I'm assuming also that point (b) on paragraph six on page two is essentially part of the case that will be argued on the appeal. That's suggesting that  
- - -

5 HIS HONOUR: I assume so. Mr Barker, of course, you will – I'll make the order for written submissions so that Mr Dent has advance notice of what you want to say about this. But are you able to enlighten us now what (b) actually – the substance of (b).

10 MR BARKER: Yes, your Honour, I'll do it by reference to the notice of appeal. Essentially Mr Dent - - -

HIS HONOUR: I think I know what you're going to say. That the court's powers are – I see. Well, maybe – look, don't let me guess. You tell me what the point is.  
15

MR BARKER: Yes. Mr Dent, as part of his relief, seeks a declaration that the writ, purportedly returned on 21 December 2007, was null and void, and also a declaration that the election of Senators representative of the people of the State of Victoria, pursuant to the writs for an election issued on 17 October, has wholly failed. Now,  
20 as I understand it, your Honour, that's – leave of that nature can only be granted by the Court of Disputed Returns.

HIS HONOUR: Which is primarily the High Court, or which can - - -

25 MR BARKER: That's correct, your Honour, and - - -

HIS HONOUR: Yes, I see.

MR BARKER: - - - there is provision for the High Court to transfer matters to the  
30 Federal Court of course. But, as I understand it, no application has been made to the Court of Disputed Returns.

MR DENT: Well, on that - - -

35 HIS HONOUR: I mean, it's a point of - - -

MR DENT: To me, it's something that will be a major feature of the appeal before the Full Court.

40 HIS HONOUR: Yes. Well - - -

MR DENT: But the reason I'm raising it now is that the letter appears to have been created on the basis that some application will be made on the 12<sup>th</sup>, or shortly after the 12<sup>th</sup> of February and I'm assuming, from what's just been said, that there now  
45 won't be, that it's going before the Full Court and we don't need to hear this sort of application beforehand.

HIS HONOUR: I understand. Mr Barker, isn't the best way to resolve – I mean, we can have endless – well, not endless. We can have some sort of preliminary hearing. I just get the impression the best thing is - - -

5 MR BARKER: Certainly, your Honour, yes.

HIS HONOUR: - - - to make sure that Mr Dent has – puts his case in writing in good time for you to have a look at it, and then you respond to it in good time for him to understand exactly what you say and why, and put the whole thing before a  
10 Full Court in May.

MR BARKER: Yes.

HIS HONOUR: And then we'll just get on with it. That's what I propose. Are you  
15 content with that?

MR BARKER: We'd be very content with that, your Honour.

HIS HONOUR: Look, it's going to save you time, and costs, and everything else.  
20

MR BARKER: Yes.

HIS HONOUR: If you just get the whole thing together in one day and argue it.

25 MR BARKER: We were just really highlighting these issues to Mr Dent - - -

HIS HONOUR: No, I understand. I'm not being critical of you.

MR BARKER: - - - to protect our position in terms of costs.  
30

HIS HONOUR: That's fine. That's not a problem. And some would not agree with what I've done, but I think it's probably the most sensible course in the circumstances. So I'll order that the matter be listed for hearing in May on a date to be notified. Are there any dates inconvenient to either of you?  
35

MR BARKER: No, your Honour.

MR DENT: Not in May, but there's a longer document that I faxed to the appeals registrar which I understand has been passed on to you. That was notes for preparing the - - -  
40

HIS HONOUR: I haven't read it.

MR DENT: Well, in that case I better get another copy ready for you. I've got a copy to hand the respondents as well. I was told by the registrar that it had been handed to you. So do you have one there.  
45

HIS HONOUR: Excuse me, Mr Dent, I do my staff an injustice. In fact, they have – it's on the desk in front of me. I just didn't – I haven't read it. Would you like me to - - -

5 MR DENT: Right. Well, it was originally intended as a draft for them to give me feedback, but when I was told that it had been passed on to you I decided not to write another draft.

10 HIS HONOUR: Well, that's all right. Have you got any problem with me reading it?

MR DENT: No, I presume I ought to hand one to the respondents now too.

15 HIS HONOUR: Yes. I mean, I don't – I won't read it if you don't want me to, but I - - -

MR DENT: No, I just want to explain that it was originally intended as a draft, and I haven't got a later draft.

20 HIS HONOUR: Yes, I see. That's not a problem.

MR DENT: But just to explain, it was - - -

25 HIS HONOUR: There are some dates here that you're not available. I think you're available for relevantly the whole of May. So that's fine.

30 MR DENT: But most of it is about suggesting that separating the matter into the different aspects of it could both shorten it and enable it to be expedited earlier than May.

HIS HONOUR: Well, I think that's right.

35 MR DENT: The problem is that the issue – can I give you the gist before you read it fully, or do you want to read it fully first?

HIS HONOUR: Yes, sure.

40 MR DENT: The central thing that I believe needs to be resolved today, or some procedure for resolving it worked out, is that there's two matters that aren't at all urgent and that will take some time prepare. One is the damages and exemplary damages. That will, in fact, involve a wide range of issues, and I'm certainly not prepared to argue it now. And I've got six years statute of limitations to cover the damages, but they started – the ones that I'm seeking started about three years ago. The second matter that isn't at all urgent is the silent enrolment. It's enrolment with  
45 the address not published. It is that the Act provides that if you have applied for silent – for that, they can't publish your address until the courts are finished dealing with it. So it doesn't really matter how long you take about it.

And the complicated issue, which I just don't know how to deal with is that the fact there is simultaneous AAT proceedings intertwined with the Federal Court proceedings. And this letter also notes the AECs position is that the AAT has made final orders and it's finished there. I believe I should write a letter to the AAT to  
5 either confirm that they're right about that, or, as I suspect, they're wrong, because I have gone in and inspected the registry files and I can show you a copy of an extract from it that makes it quite clear it was, in fact, a stay order hearing which went on to give final orders in relation to one matter which was enrolling me.

10 HIS HONOUR: The matter before this court, Mr Barker, is simply – well, is, fundamentally anyway, an application – well, sorry, is an appeal, but an apprehended application for leave to appeal, if it's necessary, from a decision summarily dismissing Mr Dent's matter.

15 MR BARKER: Yes, your Honour.

HIS HONOUR: And that's the only matter which I'm seized and which is before this callover.

20 MR BARKER: Yes.

HIS HONOUR: Now, what's going on peripherally to that?

MR BARKER: The AAT handed down their decision, I think, on 23 November.  
25

MR DENT: The day before the election.

MR BARKER: Finally disposing of the matter.

30 HIS HONOUR: Yes.

MR BARKER: The AAT revoked the decision of the second respondent and substituted a new decision essentially granting Mr Dent's application for enrolment as an itinerant elector, but in the name of Albert Langer as opposed to Arthur Dent,  
35 as he - - -

HIS HONOUR: When did it do that?

MR DENT: On the day before on the election. I believe you're correct, 23  
40 November.

MR BARKER: Yes, it comes down to the construction of the Act. To give your Honour some background, the second respondent had refused the application for enrolment as an itinerant elector because it was of the view – he was of the view that  
45 the name Arthur Dent was not the name by which Mr Langer was usually known, and it was a fictitious name. The AAT - - -

HIS HONOUR: You're allowed to change your name, so long as it's for a lawful purpose. So long as it's not for an unlawful purpose. Anyway, look, that's another issue for – it's not the issue before me, although the common law is quite clear about name changing.

5

MR BARKER: Yes. I mean, in the end the - - -

HIS HONOUR: And it's done very, very frequently in a country such as Australia when people anglicise and de-anglicise. Do all sorts of things.

10

MR DENT: And on that note, Gordon J said that there was no factual dispute between – no real factual dispute between the parties. And if they would stop writing to me as Albert Langer and accept that my name is Arthur Dent, I would be inclined to agree with her that there is not factual dispute. If they do intend to continue to dispute it then I don't believe the Full Court should be hearing evidence about it. Gordon J didn't want to hear evidence about it. But I've got even with me now, just in case – and I've got on the CD-Rom here transcripts going back 2005 of a years worth of VCAT hearings of landlord and tenants disputes as MR Dent.

15

20 HIS HONOUR: As Mr Dent.

MR DENT: And I've got in that black bag on the seats there, because I'm assuming you won't want to see it – bound volumes of copies of rent receipts and of staying in caravan parks and rented houses and all this stuff.

25

HIS HONOUR: As Mr Dent.

MR DENT: It really does go back starting in late 2004 and becoming generally known as Arthur Dent in 2005. Now, if they intend to seriously dispute that, I believe they were thoroughly done over at the AAT. There were five witnesses called and six stat decs put in, and the Tribunal found that I was called Arthur Dent, but that the name on my drivers licence obliged her to enrol me under that name.

30

HIS HONOUR: The drivers licence is Mr Dent?

35

MR DENT: No, my drivers licence is in my previous name.

HIS HONOUR: I see.

MR DENT: And on that basis she reads the Electoral Act as requiring her to enrol me under the name on my drivers licence. Now, that's a simple point of law which I believe is already before this court and doesn't need to be appealed from the AAT. But the factual question I believe has been resolved by the AAT, and I would like the respondents to formally admit that they – admit it so that it's not a trial before the Full Court as to what my name is.

40

45

HIS HONOUR: Well, Mr Dent – I better call you Mr Dent. And I’m sure Mr Barker will - - -

5 MR DENT: It’s not just a matter of what you call me in court. Do they dispute that the second respondent was wrong in her view that it was viewed that it was not my usual name. I would like a notice – if necessary, I would issue a notice to admit. But I believe it could be resolved today because they have already got the message.

10 HIS HONOUR: Well, I think we’ll – it seems to me that the situation here is there is an appeal by Mr Dent which the Electoral Commission says it needs leave. There are some other uncertainties about the matter, but the only matter which the court has seized is the appeal or purported appeal. I’m going to set it down for hearing in May on a date to be fixed. I’ll ask Mr Langer to - - -

15 MR DENT: Mr Dent.

HIS HONOUR: I’m sorry, Mr - - -

20 MR DENT: I understand. I get it from my family too.

HIS HONOUR: I do – actually – I’m sorry. It’s like these things. Once you’ve made the mistake you just keep on repeating it.

25 MR DENT: Yes, Deputy President Forgie had a nine year FOI hearing with me. She had difficulty too.

30 HIS HONOUR: I’ll ask Mr – direct that Mr Dent provide a written submission outlining his case. I prefer to say not exceeding 10 pages, because once it gets too long it loses impact.

MR DENT: I understand that - - -

HIS HONOUR: Are you happy with 10 pages, or would you - - -

35 MR DENT: - - - but I really am not a practitioner, and I would try to write the shorter version - - -

HIS HONOUR: Well, how long would - - -

40 MR DENT: - - - and after having written a longer version.

HIS HONOUR: Yes, sure. Would 20 pages be too much of a difficulty?

45 MR DENT: I’ve got no idea.

HIS HONOUR: It’s just that when they get sort of 30, 40 - - -

MR DENT: I understand, but if you could make it leave generally, and I've got your message. I will try to get it down to 10 and I'll really try to get it down to 20.

HIS HONOUR: All right.

5

MR DENT: But if I could just have the leeway.

HIS HONOUR: Not to exceed – I'll tell you what, not to exceed 30 pages, but try for less, all right.

10

MR DENT: Yes.

HIS HONOUR: And the Commonwealth, 10 pages.

15 MR BARKER: Yes, your Honour.

HIS HONOUR: Mr Dent's submissions to be furnished 14 days before the date fixed for hearing, and yours seven days. And all the matters will come on before the Full Court which would be – as I say, we'll give you a listing date within the next – probably in three weeks. You wanted a copy of the transcript. That can be provided to you in due course.

20

MR DENT: Thank you.

25 HIS HONOUR: And it will take - - -

MR DENT: Will that also apply to the Full Court proceedings?

HIS HONOUR: You'll have to ask the Full Court about that.

30

MR DENT: Well, I believe a single judge can give directions relating to .....

HIS HONOUR: Yes, look, let's just deal with the day. The court will send you a copy of it in due course.

35

MR DENT: Now, the next matter is separating the issues. I can certainly get it down within the 10 to 20 pages if we eliminate the silent enrolment and the damages from the questions that the Full Court is considering.

40 HIS HONOUR: Well, that – we do, because the strike out – well, I think we can.

MR DENT: And I believe you could get it down to half a day rather than a day, as the respondents are suggesting, if we can separate issues very clearly.

45 HIS HONOUR: I'd like to say that you can separate everything but, of course, one of your points is that you have a case that should not have been struck out.

MR DENT: Yes, well, that one obviously has to be there.

HIS HONOUR: And the question is how far you extend on that issue.

5 MR DENT: Well, my understanding is that you can make a strike out order on a different issue – on part of a proceedings.

HIS HONOUR: Yes, you can.

10 MR DENT: And you can separate a matter to be separate hearings of different aspects of it. And what I'm proposing is that the aspects that deal with the validity of the last Senate election are really quite separable from the question of silent enrolment and from what damages are due, right. Now, whether damages are due or whether electoral officers have some sort of impunity for what damages they cause.  
15 Now, I believe that matters relating to whether a candidate should or should not have been on the ballot paper of an election, should be dealt with speedily. And for that reason you might want to consider whether it's possible to bring that one aspect on even earlier and allocate half a day for it. If I lose on the claim that I was entitled to enrolment under the name Arthur Dent, that would end all the other claims about  
20 declaring an election invalid.

HIS HONOUR: Yes, I follow.

25 MR DENT: If I win on it, then those other claims become a matter of some urgency because the Senators are supposed to take their seats, and it takes several months to organise an election.

30 HIS HONOUR: I think the best thing to do is to fix this for hearing preferably early in May in the ordinary Full Court sittings. As far as the basis upon which you wish to contend that you had a good case that should not have been struck out, that really has to be a matter for you. And if I said that you could put it in pieces, or do bits at a time, the problem would be that, you know, one bit might be good and – I think you've got to put whatever you want to put. It doesn't need to be very long to show that you've got an arguable case, but I think you should do it all to one - - -

35 MR DENT: Okay. Well, on that note I think it can be shown very briefly, and I'd like to do a very unusual thing, is that I was – you will see in my notice of appeal that I was confronted with no notice on an order for summary dismissal. And I would suggest that you could almost summarily strike out the decision striking that out, that  
40 it clearly does require notice.

HIS HONOUR: Well, that's not something – that has to go to the Full Court to do that.

45 MR DENT: Okay. The second matter is that, on the things before the Full Court, that, again, this question of the urgency of the election, you could make an order to have some hearing about something earlier than May. If it's not possible, it's not

possible. But when you do get Jessup Js judgment, he was complaining that I hadn't come to the court quickly enough, when, in fact, I'd stayed in the court from lunch time until 4.00 pm when he heard me, and the rejection of my candidature had been at noon. Now, I don't want to be accused of not having come to the court quickly  
5 enough and it being too late to deal with the fact that an election was held with one of the candidates excluded from the ballot paper.

And I don't think you should take responsibility for it being delayed to that point either. I can't say any more. You understand the point, if it can't be scheduled  
10 earlier, it can't. But it's not my fault that it can't.

HIS HONOUR: I understand. All right. Well, I'll make those orders and the matter will be heard to be - fixed for hearing early in the May sittings.

15 MR DENT: Now, how can I get directions on the appeal book - in particular the section 37 statements. The T documents that were before the AAT have not been filed in these proceedings - - -

20 HIS HONOUR: That is entirely beyond my - to do that you'll need to attend with Mr Barker before the registrar to sort out what should go in and what shouldn't, and you should do that sooner rather than later.

MR DENT: The appointment is set for the 29<sup>th</sup>.

25 HIS HONOUR: Of February.

MR DENT: February. But can you also authorise - like, I understand that the registrar settles the Appeal Book, but there are a number of other matters that are in this document but I interrupted you before you read fully. Can you authorise the  
30 registrar to deal with the other matters that were in that document?

HIS HONOUR: I would assume they are within the capacity of the registrar to deal with. I just don't know what they are. I mean, I did pick up - - -

35 MR DENT: Well, then at this point I think you should read it.

HIS HONOUR: All right. Well, I'll have a quick look. You don't want me to sit on the appeal. That's all right.

40 MR DENT: I just thought I'd better mention it, but it's really up to you.

HIS HONOUR: No, that's okay. I don't think - - -

45 MR DENT: I was rather alarmed when Jessup J introduced himself by saying that he'd been responsible for jailing me 10 years ago. And this was at 4.30 pm, when no other judge was available.

HIS HONOUR: Yes. Well, I thought you did reasonably well before us, but anyway.

MR DENT: You imprisoned me until the rising of the court.

5

HIS HONOUR: Better than what was about to happen to you, Mr Dent. Anyway there we are. I'm not going to – that can be taken as an aside. Yes, well look, I think you'll just have to go through these matters with the registrar. If the matter is beyond the registrar's power, she or he will no doubt refer them into court if they need to be referred to the court. Yes, well, thank you - - -

10

MR DENT: I'm just seeking to avoid having to pay a filing fee for a notice of motion if the registrar is authorised to deal with the matters.

15 HIS HONOUR: I'm sorry, the filing fee?

MR DENT: If I – like, he's quite uninhibited about having notices of motion and bringing on hearings before judges between now and the appeal. I don't want to have to pay a filing fee to get something before a judge if the registrar has been authorised to raise it before a judge without me having to give notice of motion. It's seeking liberty to apply I suppose.

20

HIS HONOUR: I think if you've got any problems, raise it with the registrar and the registrar can be expected to act sensibly in the matter. Yes, very well, Mr Dent.

25

MR BARKER: If your Honour.

HIS HONOUR: I'll get the matter on for hearing in May.

30 MR DENT: Thank you.

HIS HONOUR: Yes, very well. Adjourn the court.

35 **MATTER ADJOURNED at 11.50 am INDEFINITELY**