

1.3.3. The Respondent had been paid the whole amount of the claim plus costs on the 22nd September 2004 and proceeded to obtain the sequestration order against me in circumstances where the personnel of the Respondent had advised me that the Sequestration Order would not be pursued, and

1.3.4. The GST errors appearing on the RBA of AGFT were corrected by the Respondent and his personnel on the 6th and 7th October 2008 in accordance with the instructions given by the Respondent to the Applicant on the 1st September 2008, and

1.3.5. The Respondent and his personnel cancelled corrections of the relevant GST Mistakes in circumstances for the sole and improper purpose of;

1.3.5.1. Avoiding embarrassment in the face of inquiry from the Commonwealth Ombudsman , and

1.3.5.2. Misleading the Honourable Master Norman in hearing of an application to set aside the First Default on the basis that;

1.3.5.2.1. That I had no standing to make the application as Trustee of AGFT, and

1.3.5.2.2. That only the Trustee in Bankruptcy could bring the application in the absence of an application by the Respondent, and

1.3.5.2.3. The GST corrections entered on the RBA of AGFT had been an error of the ATO staff, and

1.3.5.2.4. The Cancellation of the Amending Activity Statements was undertaken for an improper purpose which was an abuse of process.

1.3.5.3. Submissions made by the Respondent to the Master Norman were an abuse of process and a breach of the Model Litigant Obligations of the Respondent and His Personnel

1.4. **Issue No 2**

1.4.1. The decision of the Respondent dated 18th February 2009 to cancel the Amending Activity Statements entered on the RBA of AGFT on the 6th and 7th October 2008 is the subject of an order under section 39B of the Judiciary Act for a prerogative writ of;

1.4.1.1. Certiorari setting aside that Decision, and

1.4.1.2. Mandamus is issued to the Respondents to

1.4.1.2.1. Reinstate the corrections on the RBA of AGFT, and

1.4.1.2.2. Make application to the District Court of South Australia to set aside the Default Judgment given in DCCIV-2003-1666

1.5. **Issue No 3**

1.5.1. That an order should be made that the Bankruptcy Notice that was the subject of the Creditors Petition in ADG 69 of was defective,

1.5.2. That a writ of Mandamus is issued to the Respondents to take steps to set aside the sequestration order dated 24th September 2004

1.6. **Issue No 4**

1.6.1. The National Australia Bank ("**NAB**") breached its first and second contracts of finance as a sole consequence of the flaws in security documentation arising from the conduct of Greg May, Louisa McClurgh and Minter Ellison (see "**Annexure 1**"), and

1.6.2. That Greg May, Ray Mansuetto and Minter Ellison were acting for the Trustee in Bankruptcy to my Estate Peter Ivan Macks ("**Macks**") in the Liquidation of Bernsteen ("**Bernsteen**") at the time of the making of the sequestration order, and

1.6.3. That Macks was hopelessly conflicted and ought not have accepted appointment and;

1.6.3.1. Did not pursue a negligence claim against Greg May and Minter Ellison as consequence of acting for him in Bernsteen, and

1.6.3.2. Did not investigating the Conduct of NAB as Macks accepts appointments from NAB, and

1.6.3.3. Was the subject of in excess of \$19,000,000 in costs orders made against him in the Supreme Court of Queensland in Favour of Foster's Brewing Group which entity was jointly and severally liable to pay moneys (as the Parent) under a Deed of Settlement dated 26th July 2000 executed with a wholly owned subsidiary

1.6.3.4. Suborned me into execution of a Deed of Settlement on the 10th March 2009 that was not executed on a Bona Fide Basis and that is the subject of orders made by Tracey J in VID304 & VID 425 of 2014 on the 21st November 2014 ¹ that are the subject of applications for leave to appeal, and

1.6.3.5. Was aware of the GST Corrections to the RBA at the time of the execution of the aforementioned Deed of Settlement (see “**Annexure 2**”)

1.7. **Issue No 5**

1.7.1. That my Bankruptcy ought to be annulled on the grounds set out within these submissions, and

1.7.2. The Vexatious Litigant Judgments made against me ought to be set aside.

1.8. **Issue No 6**

1.8.1. The actions and the conduct of the Respondent should be reviewed in respect to Operation Winebar, and

1.8.2. That writs of Certiorari are issued setting aside the at least 300 taxation and other decisions of the Respondents that I am aware of and that have been made in the course of Operation Winebar ², and

1.9. **Issue No 7**

1.9.1. Whether the applicant is capable of pursuing the complex claims set out in the originating process and the originating statement of claim, and

1.9.2. Whether the court should consider making a referral to the Pro Bono Scheme, and

1.10. **Issue No 8**

1.10.1. Whether a finding should be made that the failure of the Respondents to provide full material disclosure, within the Affidavits of Vincent Tavolaro dated 12th November 2014

¹ The reasons of Tracey J are the subject of applications for leave to file and serve Notices of Appeal in VID 730 of 2014 and VID 732 of 2014

² Pages 58 – 78 of my Fourth Affidavit

and 11th December 2014, of the affidavit material filed by the Applicant in VICSC-2013-02968 is inconsistent with the Model Litigant Obligations of the Respondents, and

1.10.2. Whether the Respondents have abused process for an improper purpose and an order should be made that Legal Privilege should be penetrated for the purposes of discovery.

2. **Preamble**

- 2.1. I have been involved in multiple aspects of the wine industry from the age of 16 when I commenced working on the bottling line of Ryecroft wines in McLaren Vale in 1973.
- 2.2. I am now 58 years of age and have been committed to the Wine Industry in all of its aspects for now 41 years.
- 2.3. Between then and now I have been responsible for the development of at least 21 wine brands and building of around 3,000 acres of vineyards while working in the traditional channel to market and sell wines made by me or my related entities.
- 2.4. When I launched my own brand in 1981 there were 294 wineries in the territory of Australia & New Zealand, today there are over 3,000 which proliferation of supply has created a downwards pressure on prices to the producer.
- 2.5. During the last 40 years the available shelf space and pattern of purchasing of wholesale wine has changed with the consolidation of ownership of the retail channel to market now resting mainly in the hands of the multiples, including Coles and Woolworths.
- 2.6. Concurrently, those Multiples are seeking to increase the percentage of their "**Own Brands**" sold in those channels to enhance margins thus further restricting the available shelf space available to traditional suppliers.
- 2.7. By way of example Woolworths Liquor is Australia's largest liquor business in a market with annual revenues of \$21,000,000,000 with Woolworth's share of the Market being 35% (AUD\$7,500,000,00 of all retail sales of liquor in Australia (wine, beer, spirits and other) or 45% of all wine sold; of which 35% of sales are own Woolworth's own brands.
- 2.8. As a consequence of the proliferation of brands, increase in supply of Own Brands and the change in control of the Channel to market the downward pressure on retail prices flows back to the

producer consequently there is limited profitability across all sectors of the wine industry (which often generally translates to a loss)

2.9. The industry is one that seeks owners of wine related business to invest “patient capital”.

2.10. Between 2008 and today’s date my sole aim has been to develop “**the Know-How**” and “**Intellectual Property**” ((together the “**IP**”) of OenoViva Business Systems (“**OBS**”).

2.11. OBS is the IP behind my vision of a new complete retail channel to market for the distribution of wine through a franchise system that has evolved from my 41 years’ experience in the Australian and global wine industry.

2.12. Prior to the 7th February 2014, ACN 133 861 579 Pty Ltd (in Liquidation) (Controller Appointed) was known as OenoViva (Australia & New Zealand) Pty Ltd (“**the Company**”)³.

2.13. From the date of its incorporation, the company has also been involved with me in the development of OBS and at various times has acted as a trustee of;

2.13.1. AGFT

2.13.2. AGFT 3

2.13.3. AGFT 4

2.13.4. The OenoViva (Australia & New Zealand) Trust (“**OVANZ**”)

2.13.5. The OenoViva (Australia & New Zealand) Plant & Equipment Trust (“**OVPET** ”)

2.13.6. The OenoViva (Australia & New Zealand) Plant & Equipment Trust No 2. (“**OVPET 2**”)

2.14. On the 22nd January 2014, a liquidator was appointed to the company⁴ pursuant to an application made in the Federal Court of Australia; South Australia Registry and given action No SAD 368 of 2013 that was commenced by the Plaintiff (in this action and the applicant in SAD 368 of 2014.)

³ Exhibit 1 tendered to court on the 4th April 2014 filed in VICSC-2013-02968 being an ASIC search of the Company evidencing its name and the appointment of both a liquidator and me as a controller of property.

⁴ Exhibit 16 of my affidavit dated 9th April 2014 filed in VICSC-2013-02968 being a copy of the Order appointing a liquidator in SAD 368 of 2014.

2.15. Subsequently on the 23rd January 2014 I was appointed to the company⁵ (**also “The Chargee”**) as the Managing Controller pursuant to;

2.15.1. Service of a Notice of Crystallisation of Charge dated 23rd January 2014 by the Chargor on the Chargee

2.15.2. Execution of a Deed of Appointment of Controller by me and the Chargee.

2.15.3. Service of a Form 504 annexing the aforementioned documents on ASIC

2.16. I complain of Misconduct in respect to the Plaintiff over the last 10 years amounting to Conscious Maladministration that is not just driven by the Plaintiff’s actions related to OenoViva Business Systems which business has been developing for 7 years but is also driven by the desire to “cover up” and avoid “embarrassment” in respect to the Plaintiff’s conduct **related to my Bankruptcy in 2004, in respect to a debt that did not in fact exist**, when a judgment was given in default in DCCIV-20013-1666 and the subsequent refusal of the Plaintiff to consent to orders setting aside the Default Judgment.⁶

2.17. That desire to avoid embarrassment has resulted in a circumstance where I allege the Plaintiff has misused and continues to misuse his statutory powers to create debts, manipulate the Australian Business Register and effectively create a situation where I respectfully submit the principles of “Improper Purpose”, “Abuse of Process” and “Double Jeopardy” ought to be found by this learned court to apply.

2.18. The Plaintiff has caused me (in all of my capacities) loss and damage of significant proportions including those amount claimed as choses being property that was previously property of the entities that I am controller of.

3. **The Evidence adduced thus far**

In support of my contentions in respect to the aforementioned issues I rely upon the following materials;

3.1. The Affidavit of Vincent Tavolaro dated 12th November 2014 filed in this proceeding, and

3.2. The Affidavit of Vincent Tavolaro dated 11th December 2014 filed in this proceeding, and

⁵ Exhibit 17 of my affidavit dated 9th April 2014 being a copy of the Deed of Appointment of Controller

⁶ Volume 4 of my Sixth Affidavit filed in VICSC-2013-02968

- 3.3. My Affidavit dated 24th October 2014 (“My First Affidavit”) was filed in this proceeding in support of orders for substituted service and is not relevant to this hearing as the Respondent elected to accept service on behalf of the 2nd to 14th Respondents, and
 - 3.4. My Affidavit dated 27th August 2014 (“My Second Affidavit”) of 243 pages; also filed in VICSC-2014-03380, and
 - 3.5. My Affidavit dated 30th September 2014 (“My Third Affidavit”) of 131 pages; also filed in VICSC-2014-03380, and
 - 3.6. My Affidavit dated 6th October 2014 (“My Fifth Affidavit”) of 527 pages; also filed in VICSC-2014-02968, and
 - 3.7. My Affidavit dated 22nd October 2014 (“My Fourth Affidavit”) of 198 Pages also filed in VICSC-2014-03380 annexing a copy of my Fourteenth affidavit in VICSC-2014-02968, and
 - 3.8. My Affidavit dated 25th November 2014 (“My Sixth Affidavit”) filed in this proceeding, and
 - 3.9. My Affidavit dated 27th January 2015 (“My Seventh Affidavit”) filed in this proceeding, and
4. **Standing**
- 4.1. Significantly, there is a material change to my standing post Discharge from Bankruptcy on the 17th April 2009 which has been initially set out in paragraph 1 of the Statement of Claim dated 29th September 2014 and is sought to be expanded on as described in paragraph 1 of my proposed amended Statement of Claim ⁷ which includes my position as;
 - 4.1.1. Controller appointed to different entities, and
 - 4.1.2. Personally, in respect to any rights of action against the Respondents arising after the making of the sequestration order on 24th September 2004 as after acquired property, and
 - 4.1.3. Trustee of Trusts, and
 - 4.1.4. Beneficiary of Trusts
5. **“Operation Winebar”; a Relentless Campaign by the Respondents**

⁷ exhibit AMG 1 of my Seventh affidavit filed in these proceedings

- 5.1. I invite the Honourable Court to conclude as a part of these submissions and the evidence to be adduced in the substantive hearings that the last 12 years of dealing with representatives of the Commissioner of Taxation have carried all of the hallmarks of conscious maladministration and malfeasance in public office.
- 5.2. In particular, during the period since September 2011, that conduct and relevant taxations decisions has been characterized by what I assert is oppressive and unconscionable conduct (and in some instances illegal) flowing from A Task Force established within the ATO and referred to as "Operation Winebar"
- 5.2.1. On the 11th May 2012 I invited the Respondent and his personnel to attend a whole of ATO briefing in respect to OenoViva Business Systems ("OBS") to be held at the site of the First Distributor Licensee, "OenoViva Dining and Wine Room" operated by Holy Grail Hospitality (St Kilda) Pty Ltd at 79 – 81 Fitzroy Street, St Kilda, Victoria.⁸
- 5.2.2. The invitation was issued following a 45 minute audit on the 4th of May 2012 of a Business Activity Statement lodgment with the Respondent by the Tax Agent for the Trustee of the OenoViva (Australia & New Zealand) Plant & Equipment Trust.
- 5.2.3. The issues arising from FOI applicable to the relevant Notice of Completion of Audit dated 8th May 2012⁹ are summarised in a letter to the seventh respondent dated 20th October 2012 (see "**Annexure 3**")
- 5.2.4. That briefing was originally agreed with the Respondents to be held on the 21st May 2012 however was subsequently refused by the Respondents for reasons that were then not known to me.
- 5.2.5. In response to a request under the FOI Act for documents related to that refusal to attend information was released to me dated the 8th January 2013 revealing the existence of Operation Winebar which relevantly set out minutes of a meeting attended by some of the Respondents on the 18th May 2012¹⁰

⁸ Materials produced in VID 557 of 2014 that is the subject of an application for leave to adduce in this proceeding

⁹ Pages 166 – 240 of my Sixth Affidavit

¹⁰ Exhibit AMG 2 of my seventh affidavit pages 90-95

ATTENDEES: Chris Barlow Senior Assistant Commissioner, RISE
 NAMES/SECTION Marina Dofevski Assistant Commissioner, Serious Evasion
 Aislinn Walwyn Assistant Commissioner, ATP
 Mark Darmody Access Advisor, ATP
 Matthew Doolan Director, Serious Evasion
 Debbie Signal Team Leader, Serious Evasion
 Greg Vitulano Technical Leader, IAG Technical Projects
 Joanne O'Connell Senior Director, ATP
 Jack Keshishian Acting Senior Director, ATP Strategy Risk & Intelligence
 Michael Neville Audit Leader, Serious Evasion
 Ryan Helton Auditor, Serious Evasion
 Craig Schell A/g Director, Strategic Debt
 Gary Chall SNC

5.2.6. APOLOGIES: Alyx Sudall Case Officer, Strategic Debt
 NAMES/SECTION

| | | | |
|---|--------------|--|------------|
| 3 | 9:20 to 9:45 | Recent Communications with Andrew Garrett – request for interview <ul style="list-style-type: none"> Debbie advised of Garretts request for interview and the process and reasoning undertaken prior to declining the interview General discussion was held around whether we should be attending an interview with Garrett Concerns were that we aren't interested in a marketing exercise, that the interview is a deflection from the main activity, that treatment strategy needs to | Deb Signal |
|---|--------------|--|------------|

| | | | |
|--------|--|---|--|
| 5.2.7. | | <ul style="list-style-type: none"> match the hallmarks of fraud we have observed. It was agreed that declining the interview was the correct strategy | |
|--------|--|---|--|

5.2.9. Following an application for compensation made by me on the 21st October 2012 the Fourteenth Respondent provided a decision dated 1st August 2013 that is a subject of these proceedings and application for Certiorari.

5.2.10. Relevantly that Compensation Decision revealed that;

20. The ATO's interest in this matter is not to do with the 'urban winery concept' itself but the tax arrangements proposed by you to fund its development. This is an important distinction

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¹¹ Page 180- 181 of my Seventh Affidavit

21. In broad terms, under the arrangements proposed by you to fund the development of the urban winery concept, you seek to sell future rights to perform services of various kinds (eg including hospitality and legal services) relating to the urban winery concept to a purchaser, using a vendor financing agreement. Repayments under the vendor financing agreement are deferred and are contingent on the occurrence of a number of events including realisation of a particular level of profit. In the meantime, the vendor in each transaction generally reports the sale on its activity statement on a cash or non-cash basis and the purchaser generally reports the purchase on its activity statement on a non-cash basis. Consequently, the purchaser claims an immediate input tax credit but the vendor does not remit GST until the conditions of the vendor financing agreement are met.
22. The ATO has considered these arrangements and has concluded that the arrangement (as distinct from the urban winery concept itself) is a sham, either in its entirety or to the extent that the arrangement purports to enable the purchaser to claim the input tax credit before payment of the GST amount. The ATO considers that the value of the rights is inflated, no creditable acquisition is acquired, no consideration has been paid and liability to pay may never crystallise.
- 5.2.11.
- 5.2.12. It appears from this communication that all of the conduct and decisions of the Respondents have been predicated on the basis that the relevant documentation relating to each sale was identical to that prepared by HC Legal Pty Ltd in respect to a Legal Rights Sale.¹²
- 5.2.13. On the 19th January 2015 the Honourable Burchardt J delivered his reasons in MLG 1631 of 2014; *Andrew Garrett v Francis Cahill*¹³ which relevantly makes findings at paragraph 53
53. *“The conduct of Mr Cahill and Mr Hambros, as indicated by these papers, would certainly give rise to concerns. The GST input credit is certainly consistent with an elaborate sham. The payment of the \$2 million by way of loans would bear careful investigation.”*
- 5.2.14. Since February 2012 I instructed Hambros and Cahill to prepare a supplementary Deed and a Performance security for all rights sales or licenses that obliged the Purchaser to pay an initial payment of 10% to the Vendor so that the Vendor could in turn meet its own GST liabilities Net of any Credits or claims.
- 5.2.15. No further sales were documented without the obligation for the Purchaser to pay at least an initial 10% of the Purchase Price to the Vendor subject to a charge being registered over the entity; which I believe addressed the relevant concerns of the Respondents.
- 5.2.16. In some circumstances the relevant purchasers failed to execute the Supplementary Deed and the Performance Security solely as a consequence of the actions of the Respondents.

¹² (2013) FCA0045; Judgment of Murphy J in VID 515 of 2014 delivered 5th February 2013

¹³ *Garrett v Cahill* (2015) FCCA 26

5.2.17. On the 18th December 2014 a further release of documents under FOI ¹⁴ was provided to me which relevantly set out;

Operation Winebar has been an ITX compliance project focussing on GST refund schemes of the kind contemplated in TA 2012/15. Specifically Operation Winebar related to a significant attack on the GST system whereby numerous entities have either attempted to claim or succeeded in receiving large GST refunds on the purported acquisition of rights under vendor financing arrangements.

5.2.18.

5.2.19. The name of the author of Project Closure report has been redacted from the FOI release however I submit that it is likely that the Eighth Respondent as the Audit Team Leader is likely to have been the author

5.2.20. From the aforementioned details and from the evidence adduced as well as that withheld from the affidavit of the respondent's dated 11th December 2014 I seek the learned court to conclude that OBS and the taxation affairs of entities related to me have been tarred with the same brush as a consequence of the actions of Cahill and Hambros.

6. **Inquiry into Taxation Disputes**

6.1. On the 26th January 2015 I provided my submissions to the Parliamentary Inquiry into Taxation Disputes a copy of which is set out in my seventh affidavit ¹⁵

6.2. Those submissions annex the documents referred to at paragraphs 4.2.5 – 4.2.19

6.3. Following recent submissions to the Inquiry Ms. Nassim Khadem wrote an article published in the Sydney Morning Herald related to similar conduct to that complained of by me. ¹⁶

6.4. Issues relating to the lack of accountability of the Respondents under the Tax Payers Charter in the absence of an order such as that sought by me have also been highlighted in the Sydney Morning Herald ¹⁷

7. **Loss and Damage**

7.1. Amongst the various losses and damage flowing from the Commissioner's conduct over the last 12 years that are the subject of the various decisions referred to is the withdrawal of Genesis Global Trading Co Ltd from Heads of Agreement executed on the 30th April 2013 to acquire 41

¹⁴ Pages 96 – 114 of my seventh affidavit

¹⁵ Exhibit AMG 2 of my seventh affidavit at Pages 83 - 115

¹⁶ Exhibit AMG 5 of my seventh affidavit at Pages 130 - 132

¹⁷ Exhibits AMG 6 of my seventh affidavit at Pages 133 - 138

Master Regional Licenses (“MRL”) and Australian Domiciled Master Regional Licensees (“AMRL”) in respect to OBS.¹⁸

- 7.2. A brochure on the details related to those AMRLs and MRLs is set out in my seventh affidavit¹⁹
- 7.3. I submit that it is my demonstrable view supported in evidence so far adduced in 9 Affidavits filed in this proceeding, as well as the 14 Affidavit filed by me in the related proceeding VICSC-2013-02968 that the alleged Income Tax Liability that is the subject of the Default Judgment does not exist (legally) which question is the subject of this application under section 39B of the Judiciary Act 2014
- 7.4. Should this Honourable Court determine that the Notice of Assessment are proper and not the subject of the Conscious Maladministration that I allege then the alleged Income Tax Debt may be set off against moneys claimed to be owed by the Commissioner of Taxation in respect to loss and damage of at least the amount of the balance sheet of the Trustee of the Andrew Garrett Family Trust (“AGFT”) of **\$46,133,481.00** as at 31st March 2004 plus outstanding moneys that have been received by the Plaintiff from entities related to me and not yet been credited to the account of AGFT or any entity related to me.
- 7.5. The minimum amount of Loss and Damage referred to at para 7.4 that was previously held by the Trustee of AGFT has been distributed to me “**in specie**” on the 30th November 2013 and is not accounted for in the completion of Audit dated 6th December 2013 that led to the Plaintiff issuing Notice of Assessment dated 13th December 2014..

8. **The Freedom of Information Act (“FOI”) Applications**

- 8.1. The Respondents rely on Judgments made prior to the commencement of this proceeding and indeed even prior to the inception of OBS in support of allegations of a pattern of conduct by me that they allege is consistent with that of a Vexatious Litigant.
- 8.2. Those Judgment all arise prior to my discharge from Bankruptcy apart from Judgments made in the AAT whereby I have sought to exercise my rights under Part IVC of the Taxation Administration Act 1953 (Cth) .
- 8.3. In order to be adjudged Vexatious this Honourable Court needs to consider the merits of my application which Merits can only be ventilated in an environment of **full disclosure** of the relevant facts by the Respondents.

¹⁸ Page 115 of my seventh affidavit

¹⁹ Exhibit AMG 3 of my seventh affidavit at Pages 116 - 128

- 8.4. The disclosure and adducing of the relevant facts may only occur in an environment where orders for discovery, answering of Interrogatories and examination of witnesses have been completed.
- 8.5. I submit that as an initial threshold issue this court must decide, on the balance of probability, whether the application made by me is **wholly without Merit** in order to deal with the applications of the Respondents dated 12th November and 11th December 2014 in a Summary way.
- 8.6. On the evidence thus far adduced and also that withheld by the Respondents I submit that, on the balance of probability, **there is Merit** to my application and in respect to the materials that will be adduced in this proceeding surrounding the over 300 Taxation and other decisions made by the Respondents.
- 8.7. From May of 2012 until today's date I have applied for release of information under the provisions of the FOI Act.
- 8.8. It is the information disclosed to me during the course of those applications that has led to this application and is significant material change to circumstances prior to those dates which I submit may have resulted in the Judgments relied upon by the Respondents not being made.
- 8.9. I received a letter from the Office of the Australian Information Commissioner ("the OAIC") on the 16th December 2014 annexing a copy of a letter from the Respondent dated 15th December 2014 seeking an order to be made under section 89K of the FOI Act.²⁰
- 8.10. Some but not all of the FOI details released to me over the last two Years pursuant to applications made by me have been exhibited in my Sixth Affidavit ²¹
- 8.11. The evidence adduced in the aforementioned FOI reveals a high level of redacting and unwillingness to provide disclosure.²²

6. Evidence of Failure to Fully Disclose Materials

- 6.1. The Respondents and Solicitors for the Respondents are highly seasoned litigants with the limitless resources of the Commonwealth available to them.
- 6.2. The Model Litigant obligations incumbent upon the Crown are to assist the court to arrive at a Just outcome (see submissions below)

²⁰ Exhibit AMG 7 of my seventh affidavit at Pages 116 - 128

²¹ Exhibit AMG 1 of my sixth affidavit at Pages 5 - 1461

²² Example pages 1002 -1172 of my Sixth Affidavit

- 6.3. In order for this to occur it is incumbent upon the crown to ensure all of the evidence is available to the court in the exercise of its discretion.
- 6.4. The Affidavit material filed by Mr. Tavolaro dated 11th December 2014 is deficient in a number of regards as is highlighted by the materials set out in my Third Affidavit²³
- 6.5. Mr. Tavolaro has sworn that the evidence adduced therein exhibit True and Correct Copies of Affidavits sworn by me in VICSC-2013-02968 (*sometimes annexing exhibits and sometimes not*) dated;
- 6.5.1. 28th January 2014 (“First Affidavit of Defendant”) including exhibits; comprising 599 pages as VDT 21 / My copy shows 599 pages and
- 6.5.2. 3rd February 2014 (“Second Affidavit of Defendant”) including exhibit; comprising 11 pages as VDT 23 / My copy shows 11 pages, and
- 6.5.3. 17th March 2014 (“Third Affidavit of Defendant”) WITHOUT exhibits comprising 3 pages as VDT 25 / My copy shows 106 pages inclusive of exhibits, and
- 6.5.4. 21st May 2014 (“Fifth Affidavit of Defendant”) WITHOUT exhibits comprising 7 pages as VDT 28 / My copy shows 392 pages plus Exhibit AMG 2 in 6 volumes comprising exhibit AMG 1 of 2,230 pages (*My affidavit sworn in VID 198 of 2014 evidencing a copy of my First Affidavit sworn in HCA M42 of 2014*) and Exhibit AMG 3 of 196 pages (*My Second affidavit sworn in HCA M42 of 2014*); Total 2,618 pages, and
- 6.5.5. 14th July 2014 (“Sixth Affidavit of Defendant”) WITHOUT exhibits comprising 19 pages as VDT 38 / My copy shows 20 pages, plus 7 Volumes of exhibits,
- 6.5.5.1 Volume 1 comprising 354 pages, and
- 6.5.5.2 Volume 2 comprising 313 pages, and
- 6.5.5.3 Volume 3 comprising 321 pages, and
- 6.5.5.4 Volume 4 comprising 397 pages, and
- 6.5.5.5 Volume 5 comprising 677 pages, and

²³ Paragraph 14 pages 3-4 of My Third Affidavit

6.5.5.6 Volume 6 comprising 220 pages, and

6.5.5.7 Volume 7 comprising 256 pages.

6.5.6. 1st August 2014 (“Seventh Affidavit of Defendant”) WITHOUT exhibits comprising 19 pages as VDT 38 / My copy shows 194 pages, and

6.5.7. 5th August 2014 (“Eighth Affidavit of Defendant”) including exhibits comprising 19 pages as VDT 37/ My copy shows 79 pages and

6.5.8. 5th August 2014 (“Ninth Affidavit of Defendant”) including exhibits comprising 19 pages as VDT 38 / My copy shows 20 pages, and

6.5.9. 8th August 2014 (“Tenth Affidavit of Defendant”) including exhibit; comprising 159 pages as VDT 39/ My copy shows 188 pages, and

6.5.10. 21st August 2014 (“Eleventh Affidavit of Defendant”) including exhibits; comprising 13 pages as VDT 42/ My copy shows 13 pages, and

6.5.11. 8th September 2014 (“Twelfth Affidavit of Defendant”) WITHOUT exhibits; comprising 3 pages as VDT 44/ My copy shows 282 pages, and

6.5.12. 6th October 2014 (“Thirteenth Affidavit of Defendant”) including exhibits; comprising 527 pages as VDT 56/ My copy shows 527 pages

6.5.13. 18th October 2014 (“Fourteenth Affidavit of Defendant”) including exhibits; comprising 0 pages as it is NOT SHOWN/ My copy shows 85 pages²⁴

6.6. I invite this learned Court to conclude that the conduct of the Respondents in only providing part of the evidentiary materials to the court can only be for the collateral purpose of misleading His Honour by leaving out relevant information.

6.7. By way of example I have sworn into evidence Volume 5 of my affidavit dated 14th July 2014 filed in VICSC-2013-02968 ²⁵ as being critical to my submissions relating to the improper cancellation of GST Corrections on the 18th February 2009.

6.8. At first Blush it appears that the Crown has deliberately withheld evidence which I submit must be for an improper purpose of misleading the court as follows;

6.8.1. My Third affidavit dated 17th March 2014 filed in VICSC-2013-02968 is missing 103 Pages, and

6.8.2. My Fifth affidavit dated 21st May 2014 filed in VICSC-2013-02968 is missing 2,611 Pages, and

²⁴ Pages 26 – 111 of my Fourth Affidavit

²⁵ Exhibit AMG 10 of my Seventh Affidavit pages 211 - 643

6.8.3. My Sixth affidavit dated 14th July 2014 filed in VICSC-2013-02968 is missing 2,293 Pages, and

6.8.4. My Seventh affidavit dated 1st August 2014 filed in VICSC-2013-02968 is missing 175 Pages, and

6.8.5. My Eighth affidavit dated 5th August 2014 filed in VICSC-2013-02968 is missing 60 Pages, and

6.8.6. My Tenth affidavit dated 8th August 2014 filed in VICSC-2013-02968 is missing 29 Pages, and

6.8.7. My Twelfth affidavit dated 8th September 2014 filed in VICSC-2013-02968 is missing 279 Pages.

6.8.8. My Fourteenth affidavit dated 18th October 2014 filed in VICSC-2013-02968 is missing in its entirety of 85 pages and directly relates to the affidavits sworn by the Twelfth Respondent in VICSC-2013-0296

6.9. A sum of 5,928 pages is missing from the affidavits sworn by me in VICSC-2013-02968 that ought to be before this Honourable Court for reference in a the circumstance where the respondents have complied with the relevant Model Litigant Obligations.

6.10. There is increasing articulation of the duty owed by lawyers to facilitate the just, quick, efficient and inexpensive resolution of proceedings.

6.11. In many respects, these articulations reflect judicial criticism of practitioner conduct causing unreasonable expense or delay. For example, in *White Industries (Qld) Pty Ltd v Flower & Hart*, Goldberg J of the Federal Court made the following comments:

The time has passed when obstructionist and delaying tactics on the part of parties to proceedings in the court can be countenanced by the court ... It is not proper ... to adopt a positive or assertive obstructionist or delaying strategy which is not in the interests of justice and inhibits the court from achieving an expeditious and timely resolution of a dispute. Court resources are finite and so are the resources of most litigants and the court should not countenance a deliberate strategy of obstruction and delay. If a party instructs its legal advisers to adopt

such a strategy the legal adviser should inform the party that it is not proper to do so and if the party insists, then the legal adviser should withdraw from acting for that party.

9. **The Civil Procedures Act 2010 (Vic) (“the CPA”)**

9.1. The Respondent and the Solicitors for the Respondent have respectively executed an Overarching Certificate and a Proper Basis Certificate in VICSC-2013-02968²⁶

9.2. On the basis of the evidence set out in my Fourteenth affidavit filed in those proceedings and other materials adduced in this proceeding I seek orders that the Respondents have failed to comply with the CPA.

10. **The Civil Disputes Resolution Act 2010 (Vic) (“the CDRA”)**

10.1. On the 2nd February 2015, my Genuine Steps Statement was filed in these proceedings outside of the time specified under s6(1) of the CDRA.

10.2. I seek an order extending time for compliance by me of the aforementioned section of the CDRA.

10.3. The Genuine Steps Statement has been served by me on the solicitors for the Respondents.

11. **Communications with the Solicitors for the Respondent**

11.1. At every step in my dealings with the Respondents and despite repeated requests to address the issues becoming apparent from the Details released under the Provisions of the FOI Act I have been stonewalled and/or alternatively misled by the Respondents apparent intransigence in failing to either agree to set aside the Default Judgment or make an application of the Respondent’s own motion to set aside the First Default Judgment,

11.2. I have sworn into evidence a bundle of correspondence between me and the Solicitors for the Respondents²⁷ and in particular refer to my emails dated 16th July 2014²⁸ following the provision of the FOI related to the Four Year Rule ²⁹

11.3. When directly asked regarding the alleged Perjury Issues on the 10th August 2014 I have been created by stony silence.³⁰

²⁶ Pages 358 & 359 of My Fifth Affidavit

²⁷ My Fifth Affidavit

²⁸ Pages 435-438 of My Fifth Affidavit

²⁹ Exhibit AMG 31 of my Fourth affidavit at pages 158 - 198

³⁰ Pages 415 to 417 of my Fifth Affidavit

11.4. I invite this Honourable to find that the failure of the Respondents and Solicitor for the Respondents to resolve this matter prior to the 29th September 2014, in compliance with the intention of the Legislature under the CDRA is solely responsible for the ongoing litigation in this proceeding and in VICSC-2013-02968.

12. The Alleged Income tax Liability

12.1. The Alleged Debt that is the subject of the Default Judgment made in this proceeding is an assessment for Income Tax Liability against me that is a function of a Notice of Completion of Audit dated 6th December 2013 ³¹

12.2. The amount of the resultant Income Tax Liabilities arising from the Completion of Audit was entered on my Running Balance Account on the 5th December 2013.

12.3. Subsequently, Notices of Assessment were allegedly issued dated 13th December 2013 ³² (**“the Assessments”**) that I had not yet received a copy of at the time of the swearing of my first affidavit filed in these proceedings dated 27th August 2014.³³

12.4. Following multiple FOI releases provided to me over a period of time since the first release on the 18th September 2012 I have been able to adduce sufficient evidence to conclude that the relevant personnel named in an application under section 39B of the Judiciary Act have acted in bias and conscious maladministration alleging that I have sought to defraud the Commonwealth and yet at the same time recognize the business model as described in the Completion of Audit dated 6th December 2013.

12.5. On the basis of the FOI releases in my possession (which is voluminous) I assert and verily believe that the Notices of Assessment that are the subject of the Default Judgment all fail “the Futuris Test”³⁴ in respect to conclusive evidence of debt in circumstances of allegations of conscious maladministration.

6.11.1. In Futuris the Honourable Justices of the High Court of Australia summarised the findings of the Full Court of the Federal Court of Australia;

³¹ Pages 67 -169 of exhibit AMG 4 of my Second Affidavit

³² Pages 311 – 352 of the Court being exhibits AS-1 to AS-14 of the affidavit of Alyx Sudall shown as exhibit VDT 10

³³ Pages 39 – 281 of my Second Affidavit 2014 see paragraph 14 of that affidavit

³⁴ *Commissioner of Taxation v Futuris Corporation Limited* (2008) HCA 32

- 1 *The Full Court of the Federal Court of Australia (Heerey, Stone and Edmonds JJ) declared that the amended assessment of income tax for the year ended 30 June 1998 which was served upon the respondent ("Futuris") by notice dated 12 November 2004 (identified in litigation as "the Second Amended Assessment") is not a valid assessment for the purposes of the Income Tax Assessment Act 1936 (Cth) ("the Act"). Their Honours also ordered that the Second Amended Assessment be quashed.*
- 2 *The Act provides in s 6(1) that an "assessment" relevantly means "the ascertainment of ... the amount of taxable income ... and of the tax payable on that taxable income". The term "assessment" thus identifies what Kitto J said was:

"the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case".*
- 3 *The Second Amended Assessment fixed the taxable income of Futuris at \$188,988,223 and the tax payable at \$68,035,760.28.*
- 4 *The Full Court allowed the appeal by Futuris against the dismissal by the primary judge (Finn J) of its application for the relief now granted by the Full Court. The Full Court based its orders upon the holding that the Second Amended Assessment "was not a bona fide exercise of the power to assess" by the appellant ("the Commissioner").*
- 5 *The jurisdiction of the Federal Court invoked by Futuris was that conferred by s 39B of the Judiciary Act 1903 (Cth) ("the Judiciary Act"). Section 39B relevantly replicates the terms in which jurisdiction is conferred upon this Court by s 75(v) of the Constitution in respect of any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The central issue presented by reliance upon s 39B for an order quashing the Second Amended Assessment thus was not merely whether there had been an error of fact or law by the Commissioner, but whether there had been error in the exercise by the Commissioner of powers conferred by the Act which amounted to jurisdictional error .*
- 6 *In Parisienne Basket Shoes Pty Ltd v Whyte*³⁵ *Dixon J referred to the maintenance of "the clear distinction ... between want of jurisdiction and the manner of its exercise". His Honour in this context also used the phrase "excess of jurisdiction" and, with respect to*

³⁵ (1938) 59 CLR 369 at 389; [1938] HCA 7. See, further, *Craig v South Australia* (1995) 184 CLR 163 at 176 180; [1995] HCA 58.

relief under s 75(v) of the Constitution, the same idea had been conveyed as early as 1914 in *The Tramways Case [No 1]*, by such expressions as "usurp jurisdiction", "wrongful assumption of jurisdiction" and "proceeding without or in excess of jurisdiction". Thereafter, in his submissions in *R v Kirby and Ors; Ex parte The Transport Workers' Union of Australia*³⁶, Dr Coppel QC is reported as using the term "jurisdictional error".

The holding by the Full Court

- 11 *What is conveyed by the holding by the Full Court that the Second Amended Assessment did not represent an exercise by the Commissioner of the power to assess which was bona fide? That phrase is used in several senses in public law. With cognate expressions, it also appears in formulations of the tort of misfeasance in public office. This Court has accepted that in that context it is sufficient that the public officer concerned acted knowingly in excess of his or her power. The House of Lords has since indicated that in English law recklessness may be a sufficient state of mind to found the tort. The affinity between tort law and public law has been remarked upon in this Court; that affinity reflects the precept that in a legal system such as that maintained by the Constitution executive or administrative power is not to be exercised for ulterior or improper purposes*

- 12 *However, Aickin J observed in The Queen v Toohey; Ex parte Northern Land Council*³⁷ that sometimes it was impossible to be certain of the meaning intended to be conveyed by the expressions "good faith" and "bad faith". His Honour went on to discern three distinct grounds upon which an exercise of an administrative power might be attacked. One was the existence of a corrupt purpose, with which Aickin J identified the doing of an act for personal gain including a gain for the associates of the person doing the act. Absence of good faith also was used to indicate the presence of an improper purpose outside the scope of the power but without any endeavour to obtain personal gain.

- 13 *Finally, Aickin J indicated that in a narrow and technical sense a power might be said to have been exercised improperly where the act done was beyond the power conferred irrespective of the motive or intention of the party exercising the power. In this third sense "good faith" means merely exercising an administrative power "for legitimate reasons" and its absence suggests no degree of moral obliquity. However, it is apparent from the terms in which the Full Court expressed its reasons that the failure attributed to the Commissioner to exercise bona fide the power of assessment was not designed to identify "good faith" in any such softer sense.*

³⁶ (1954) 91 CLR 159 at 168; [1954] HCA 19.

³⁷ (1981) 151 CLR 170 at 232; [1981] HCA 74.

14 *The Full Court said in the penultimate paragraph of its reasons that the Commissioner had applied provisions of the Act "to facts which he knew to be untrue" and it was that circumstance which brought the case "squarely" within the description of a failure to exercise bona fide the power of assessment.*

12.6. The Commissioner issued the notices of assessment dated 13th December 2013 against me in circumstances where the Commissioner knew he could not legally make issue those assessments.

13. **Improper Purpose of Cancellation of GST Corrections.**

13.1. That conduct reflects his conduct on the 18th February 2009 when he cancelled amended activity statements properly processed on the 6th & 7th October 2008 at a time when he knew he could NOT LEGALLY reverse those GST Corrections to the Running Balance Account of the Andrew Garrett Family Trust ^{38,39}

~~2. No. We are not legally allowed to amend the BASs, reinstating the 1A amounts.~~

his trustee. With or without the GST rules surrounding amendments, without the written advice including legislation and precedent cases, the ATO will not be able to defend its position. If the GST rules do not allow our office to amend the BAS back to their original state (and it doesn't), then we would need to rely on the written advice to at least cancel the amendments. This would achieve the same result but would have more effective legal support. =

13.2 This claim seeks to;

13.2.1 On the basis of the findings in *Futuris* ⁴⁰(the *Futuris Test*) and *Richard Walter*⁴¹ as to the appropriate application of the law impugn Notices of Assessment issued by the Commissioner of Taxation on the 13th December 2014 against me for Penalties and Income Tax Assessment that are the subject of the Judgment of the Honourable Mukhtar AsJ made on the 30th September 2014 that this hearing is a hearing of the relevant Notice of Appeal of, and

13.2.2 Agitate claims of Conscious Maladministration, and

³⁸ Page 159 of my Fourth Affidavit

³⁹ Page 176 of my Fourth Affidavit

⁴⁰ *Commissioner of Taxation v Futuris Corporation Limited* (2008) HCA 32

⁴¹ *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; (1995) 127 ALR 21; (1995) 94 ATC 4067; (1995) 29 ATR 644; (1995) 69 ALJR 223; (1995) 183 CLR 168 (18 April 1995)

13.2.3 Agitate claims of Swearing of False Affidavit Material by the Respondents, and

13.2.4 Agitate claims of manipulations of the Australian Business Register for an improper purpose,

13.2.4.1 Amongst other claims

13.2.4.2 Of particular relevance in that proceeding is the application of the Hickman Principle⁴²

14. VICSC-2013-02968; Evidence failed to be adduced re the Trustee of the Andrew Garrett Family Trust (“AGFT”) and Amended Notice of Appeal

14.1. Both the Court and I have relied upon the Model Litigant Obligations of the Plaintiff and the Plaintiff’s Solicitors in directing our attention to the relevant issues as would no doubt be the case in this hearing.

14.2. The Crown prepared the Court books in VICSC-2014-03380 and advised that its says contains the materials relevant to both the Stay and the Hearing of the Appeal however that Book is silent as to;

14.2.1. My Affidavit dated 30th September 2014, and

14.2.2. My Affidavit dated the 22nd October 2014 filed together with the application for Stay

14.3. Due to my own inexperience in the management of litigation as an unrepresented party I failed to adduce all of the available evidence in respect to the hearings of the 4th and 6th August 2014 in VICSC-2013-02968⁴³ which led to the reasons of His Honour dated 7th August finding a Debt in favor of the Commissioner,

14.4. A review of my computer on the 8th August 2014 following my consideration of the judgment of the Honourable Mukhtar AsJ delivered on the 6th August 2014 revealed further evidence that ought to have been placed before the Honourable Judge by me and/or in the alternative by the Plaintiff as a Model Litigant representing the Crown.

⁴² *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53

⁴³ Exhibit AMG 27 of My Fourth affidavit filed in these proceedings pages 4-12

14.5. Relevantly that evidence⁴⁴ is the subject of an application to adduce New Evidence, pursuant to the Supreme Court Rules, in the Appeal listed for the 26th May 2015⁴⁵ however it is also relevant to my continued assertions made of Conscious Maladministration which relevantly reveals;

14.5.1. **The Income Tax Account Running Balance Account (“RBA”)**; The Income Tax Liability for the Year ending 30 June 2011 that the alleged PAYG Installment Liability was calculated on was cancelled by the Plaintiff on the 12th June 2013; 5 days after issuing the writ in VICSC-02968-2013, and

14.5.2. Consequently the relevant alleged Installment Liability is zero, and not \$62,960.17 as alleged on the Legal Action Account RBA relied on by Ms. Sudall in her 5 affidavits,

14.5.3. **The Legal Action Account Running Balance Account (“RBA”)**; The alleged installment liability was entered on the Legal Action Account RBA on the date of issuing the writ in SCI -2013-02968 as an abuse of process for the improper purpose of obtaining the judgment debt now obtained so that the Plaintiff could again issue a Bankruptcy Notice in respect to a debt that DOES NOT EXIST,

14.5.4. The alleged Installment Liability for the period ending 31st March 2013 and 31st December 2012 inserted on the Legal Action Account by the Plaintiff on the 7th June 2014 was subsequently reversed by the Plaintiff on the 4th October 2014 so that there was no Primary Tax Debt appearing on the Legal Action Account RBA that is the subject of the Judgment Debt and

14.5.5. As there was no Primary Tax Debt acknowledged by the Plaintiff then there could be no General Interest Charge applicable to a debt that DID NOT and DOES NOT EXIST

14.5.6. **The Insolvency Account Running Balance Account (“RBA”)**; It is the obligation of the Plaintiff to ensure that he is satisfied with the maintenance of the various Running Balance Accounts by his personnel and the Tax Payer. A review of this RBA on the 14th October 2014 reveals that even after the cancellation of relevant GST Corrections to the RBA of AGFT that the Plaintiff also agreed that the Default Judgment given on the 11th February 2004 in DCCIV-1666-2003 was not correct and consequently the Bankruptcy Notice that was the subject of the Creditors Petition brought in ADG 69 of 2014 was fatally flawed, and

⁴⁴ Exhibit AMG 5 of my Fourteenth Affidavit dated 18th October 2014 filed in VICSC-2013-02968 as exhibit AMG 29 of my Fourth Affidavit

⁴⁵ Exhibit AMG 28 of My Fourth affidavit pages 13 - 24

14.5.7. That advice obtained from the Legal Services Branch in 2008 and 2009 revealed that the Plaintiff COULD NOT LEGALLY reverse the relevant GST Corrections due to the 4 year rule that came into force on the 28th September 2008.

14.6. Of relevance I have again exhibited the materials referred to in para 9.5 in this proceeding⁴⁶

14.7. ***That evidence reveals that for the second time in my life the Plaintiff has the benefit of a judgment debt in respect to a debt that does not and did not exist at the time of the Judgment.***

14.8. Pursuant to the Plaintiff's Model Litigant Obligations, the Plaintiff ought to have;

14.8.1. Called the relevant witnesses under his Model Litigant Obligations for Cross Examination on the Affidavit Material in evidence before this court but failed to do so.

14.8.2. Directed the Court's attention to all of the available evidence on the court files in respect to issues of conscious maladministration

14.8.3. Agitated all of the relevant issues both for and against the case of the Crown in order to ensure that the Court delivers complete justice without interference in the administration of Justice

14.8.4. I have reviewed a number of Authorities in respect to improper purpose and an abuse of process and attempted to analyse those concepts against Plaintiff's Model Litigant Obligations incumbent on representatives of the Crown and whether the Court should make orders for discovery based on penetration of Legal Privilege as set out in the following paragraphs.

15. Various Taxation and other Decisions made by the Plaintiff subject to VID 600 of 2014

15.1. In the paragraphs above I have asserted malfeasance in public office and conscious maladministration against the plaintiff which conduct is reflected in at least 285 Taxation Decisions that I am aware of.⁴⁷

15.2. That type of conduct has been referred to in a number of authorities including *Futuris* and *Richard Walter*⁴⁸ and I rely on those authorities.

⁴⁷ Pages 58 – 78 of My Fourth Affidavit

⁴⁸ *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; (1995) 127 ALR 21; (1995) 94 ATC 4067; (1995) 29 ATR 644; (1995) 69 ALJR 223; (1995) 183 CLR 168 (18 April 1995)

15.3. No doubt there are decisions and actions of the Plaintiff that will be the subject of discovery in VID 600 of 2014

16. Conduct of the Trustee in Bankruptcy and application for Stay in VID 730,VID 731 & VID 732 of 2014

16.1. My Fifth Affidavit sworn in VICSC-02968 is a copy of an affidavit sworn by me in VID 304 and VID 425 of 2014 and seeks to address the conduct of my Trustee in Bankruptcy and the Trustee of the Bankruptcy of my ex-wife.

16.2. The aforementioned affidavit seeks to address the issues of findings of abuse of process and improper purpose found by the Learned Chief Justice Kourakis CJ in *Viscariello v Macks* in his reasons dated 16th August 2012 SASC 165 of 2012

16.3. On the basis of His Honours Reasons the learned Judge ordered breach of Legal Privilege against Macks and Minter Ellison who were his lawyers in that proceeding.

16.4. Following a delay of 20 months deliberations by the Honourable Chief Justice delivered further reasons on the 9th December 2014 finding that Macks had;

16.4.1. Breached His Duties as an Officer of the Court, and

16.4.2. Abused Process for an Improper Purpose, and

16.4.3. Falsified Documents for the sole and improper purpose of misleading the Court, and

16.4.4. Be removed as Liquidator of Bernsteen. and

16.4.5. Amongst other findings

16.5. At all relevant times the personnel of the Respondent have been a party to the improper Conduct of the Trustee.⁴⁹

16.6. Amongst the FOI materials released to me is correspondence between my Trustee and employees of the Respondent⁵⁰ that relevantly reveals that at all times in the administration of my bankrupt estate the Respondents have been aware that I have asserted that there was no debt owed by me to the Respondent or any other person.

⁴⁹ Pages 247 – 294 of my Sixth Affidavit

⁵⁰ Pages 241-332 of my Sixth Affidavit

16.7. Relevantly this is confirmed in my statement as to affairs dated 16th November 2004 annexed to a letter to the representatives of the Respondent on the 16th November 2004 from the assistant to my Trustee.⁵¹

16.8. The Conduct of the Trustee has been the subject of number proceedings and perhaps most relevantly in SAD 5 of 2006 where His Honour found that the Affidavit of Macks dated 10th June 2008 would not be admitted into evidence.⁵²

17. **Vacation of Judgments to which either Macks or Duncan are parties**

GOING BEHIND THE JUDGEMENT DEBT

17.1. In my submission on the basis of the conduct of the Respondents and on the premise that the debt subject of the sequestration orders against my ex-wife and I did not exist then it is apparent that both of the Trustees in Bankruptcy were improperly appointed.

17.2. I also submit that any submissions and affidavits made by those Trustees and Counsel were for the improper Purpose of unjust enrichment in respect to the profit sharing arrangements found by Kourakis CJ to exist in the insolvency industry.

17.3. On the basis of the annulment of my Bankruptcy that I have applied for in VID 304 of 2014 then there will be an absence of a contradictor in the relevant proceedings.

17.4. It is an obligation of the Two Trustees in Bankruptcy to go behind the Judgment Debt that is the subject of their appointment as found in *Wren v Mahony* [1972] HCA 5; (1972) 126 CLR 212 (1 February 1972) especially in circumstances where the Judgment Debt is a Default Judgment.

17.5. The matter was explained thus by Sir W. M. James L.J. in *Ex parte Kibble ; In re Onslow* (1875) 10 Ch App 373, at pp 376-377 :

"It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all ; it is therefore

⁵¹ Pages 269 – 293 of my Six Affidavit

⁵² Pages 57 – 61 of the Affidavit of VDT dated 12 November 2014

necessary that the consideration of the judgment should be liable to investigation."

- 17.6. This rule is applied most readily where judgment has gone by default : *Petrie v. Redmond* (1942) 13 ABC 44 . It can, no doubt, be applied in other circumstances but it has been repeatedly said that, when a judgment has been given in open court against a person who is represented, it is only in exceptional cases that the Court of Bankruptcy should exercise its discretionary power. See for instance *In re Flatau ; Ex parte Scotch Whisky Distillers Ltd.* (1888) 22 QBD 83 and *In re Howell* (1915) 84 LJKB 1399 . In the former case Lord Esher M.R. said (1888) 22 QBD, at p 85 :

"It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition."

- 17.7. Fry L.J. said (1888) 22 QBD, at p 86 :

"The second ground is, that there is a 'sufficient cause' within sub-s. 3 why a receiving order should not be made. It is suggested that some of the issues which were tried before Mathew J., were wrongly decided, and that the registrar was bound to try them over again. In my opinion there was no such obligation. It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a court." (at p23)

- 17.8. The exercise of the power to go behind a judgment to see whether it is founded on a real debt has been considered twice by this Court : *Corney v. Brien* (1951) 84 CLR 343 and *Ross-Ireland v. Tour Finance Ltd.* (1965) 39 ALJR 49 . In the former case the judgment under consideration was a judgment of the Supreme Court of New South Wales obtained in default of appearance. In a majority judgment, it is said (1) :

"Section 56 (2) (a) of the Bankruptcy Act 1924-1950 (Cth) provides that the court at the hearing shall require proof of the debt of the petitioning creditor. Under this provision the Court of Bankruptcy has undoubted jurisdiction to go behind a judgment obtained by default or compromise or where fraud or collusion is alleged and inquire whether the judgment is founded on a real debt."

17.9. In that case it was decided that it was clear that there was no consideration for a judgment debt. Fullagar J., in a separate concurring judgment, stated the rule and considered the various English authorities relating to it. The starting point of his Honour's judgment was that "a judgment at law for a sum of money creates an obligation of its own force".

17.10. His Honour went on to point out that it had been well settled for many years "that in a court having jurisdiction in bankruptcy a judgment has no such conclusive effect" (2). Later his Honour quoted (3) Lord Esher M.R. in *In re Fraser; Ex parte Central Bank of London* (4), referring to *Ex parte Lennox*; *In re Lennox* (5), as follows :

"The decision is based upon the highest ground - viz., that in making a receiving order, the court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt prima facie evidence of a debt ; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor."

17.11. His Honour added that "... an enquiry into what lies behind a judgment may be undertaken either on the petition for sequestration or when, after sequestration, a judgment creditor comes in to prove a debt : see, e.g. *Ex parte Revell* ; *In re Tollemache* (6)." In *In re Fraser ; Ex parte Central Bank of London* (7) the "debtor" had entered an appearance to a specially endorsed writ but did not appear and judgment was given against him. He applied to have the judgment set aside but his application was dismissed. He appealed to the Court of Appeal but his appeal was dismissed. His Honour said

(8) : *"It was nevertheless held by the Court of Appeal that a creditor's petition for sequestration was rightly dismissed because, on a reopening of*

the matter, it appeared that the 'debtor' was not in law indebted and the judgment was not soundly based in law."

17.12. His Honour's comment was "This case perhaps goes as far as any". His Honour's conclusion was that :

"... wherever the judgment in question is a judgment by default, it appears that the court will always 'go behind' the judgment if there is what it regards as a bona-fide allegation that no real debt 'lay behind' the judgment." (1) (at p235)

18. Setting aside Deeds of Settlement not obtained Bona Fide

18.1. On the 10th March 2009 I was suborned into executing a Deed of Settlement with the Two Trustees in Bankruptcy as a direct result of the actions of the employees of the Respondent in frustration of setting aside of the Default Judgment.

18.2. In *Katter v Melhem* (No 2) [2014] FCA 1176 the learned Court found that a Deed of Settlement that was not obtained Bona Fide should be set aside as the Deed operated as a Penalty.

19. Model Litigant Obligations and other Relevant Authority

| Authority | Principle | Judge | Cite |
|---|---|-------------------------------|-----------|
| Duties of Model Litigants | | | |
| <i>Melbourne Steamship Co Ltd v Moorehead</i> (1912) 15 CLR 333 | Early HC authority stating that Crown parties have to observe a standard of fair play. | Griffith CJ | 342 |
| <i>Hughes Aircraft Systems International v Airservices Australia</i> (1997) 146 ALR 1 [Federal Court] | The 'model litigant' standard exists 'to protect the reasonable expectations of those dealing with public bodies', that public bodies use their authority for the public good, and that they act as exemplars for good litigation. | Finn J | 40-42 |
| <i>Scott v Handley</i> (1999) 58 ALD 373 [Federal Court] | The standards of model litigants carry positive duties to conscientiously comply with procedures and seek just outcomes, and negative duties to not pursue technicalities or unfairly impair the other party's capacity to defend itself. | Spender, Finn and Weinberg JJ | [43]-[45] |

| Obligation to give evidence | | | |
|--|---|---|------------------------|
| <i>Australian Securities and Investments Commission (ASIC) v Hellicar</i> (2012) 247 CLR 347 | This case is an authority that will likely be used to argue that a model litigant does not have extra responsibilities to call witnesses or other evidence. The key passage: Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. That procedural rules apply to model litigants uniformly with other litigants. | French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ | [240] |
| <i>R v Rigney</i> [2005] SASC 264 | When acting as a prosecutor or similar party a model litigant has a duty to call witnesses for reasons of justice and not tactical reasons. This is so even if the witness would give evidence contrary to their case. Even if the defendant can access the witness, the prosecutor's failure to call them can adversely affect their evidence and the defendant's case. | Vanstone J, Bleby and Anderson JJ agreeing | [14], [16], [20] |
| <i>Police v Kyriacou</i> [2009] SASC 66 | The prosecution has a duty to call all relevant witnesses. If they determine not to call a witness they should make available any statement made by the witness to the defence and take steps to make the witness available to the defence. It is open to the defence to ask the judge to inquire as to why the prosecution did not call the witness. | Sulan J, Gray and Kourakis JJ | [62]- [63] |

5. The recent High Court case of *ASIC v Hellicar*⁵³ sets authority that a model litigant has a duty to pursue procedural fairness with evidence such as calling witnesses, but not beyond the standards of ordinary litigants, unless otherwise required by regulations. In particular at [240] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ:

⁵³ *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 286 ALR 501

[240] “ASIC also did not dispute that it had a duty to act as a “model litigant” pursuant to the Legal Services Directions made under s 55ZF of the Judiciary Act 1903 (Cth). But App B of the directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that noncompliance cannot be raised in any proceeding except by or on behalf of the Commonwealth. The Commonwealth has the same rights as any other litigant. It has the same powers to enforce those rights. That is so whether the Commonwealth is suing or being sued. And it is so even where, as here, no other person could have brought the proceedings. Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. The Solicitor-General of the Commonwealth correctly submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants -- they apply uniformly.”

6. *Scott v Handley* (1999) 58 ALD 373 at [43]-[45] per Spender, Finn and Weinberg JJ:

[0-43] “The second respondent is, as we have noted, an officer of the Commonwealth. As such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect -- and where there has been a lapse therefrom, to exact -- from the Commonwealth and from its officers and agencies. The spirit of this “model litigant” responsibility, now long enshrined in a policy document of the Commonwealth, is perhaps best captured in the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342:”

“I am sometimes inclined to think that in some parts -- not all -- of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as

elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.”

[0-44] *“Insistence upon that standard is a recurrent theme in judicial decisions in this country in relation to the conduct of litigation by all three tiers of government: see eg Yong Jun Qin v Minister for Immigration and Multicultural Affairs (1997) 75 FCR 155 at 166 ; 144 ALR 695; Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 at 196-7 ; 146 ALR 1; SCI Operations Pty Ltd v Commonwealth (1996) 69 FCR 346 at 368 ; 139 ALR 595; Director of Public Prosecutions (Cth) v Saxon (1992) 28 NSWLR 263 at 267; Kenny v South Australia (1987) 46 SASR 268 at 273; Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537 at 558-9; P & C Cantarella Pty Ltd v Egg Marketing Board (NSW) [1973] 2 NSWLR 366 at 383-4 see also R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd [1988] AC 858 at 876-7.”*

[0-45] *“ As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligation of*

“Conscientious compliance with the procedures designed to minimize cost and delay”:

Kenny's case, above, at 273; and of assisting

“the court to arrive at the proper and just result”:

7. *P & C Cantarella Pty Ltd v Egg Marketing Board, above, at 383. And they have spoken negatively, of not taking purely technical points of practice and procedure: Yong's case, above, at FCR 166; of not unfairly impairing the other party's capacity to defend itself: Saxon's case, above, at 268; and of not taking advantage of its own default: SCI Operations Pty Ltd, above, at FCR 368.”*

8. *R v Rigney (2005) SASC 264 at [14], [16], [20] per Vanstone J, Bleby and Anderson JJ agreeing:*

[14] Mrs Shaw QC, who appeared for the appellant upon the appeal, submitted that notwithstanding these matters Ms. Wright should have been called to give evidence by the prosecution; even if only presented for cross-examination. It was submitted that despite the fact that Ms. Wright was made available to the defence to be called, and was called by defence counsel, a miscarriage of justice resulted. That was said to be because the value of the evidence was potentially depreciated on account of Ms. Wright being a defence and not a prosecution witness. In that context reliance was placed upon R v Shaw (1991) 57 A Crim R 425 at 450. It was also because of the course of cross-examination of Ms. Wright by the same prosecutor and further because of submissions made about Ms. Wright's evidence by that prosecutor in the final address.

[16] There is no doubt about the obligation of prosecuting counsel to act objectively and with propriety in carrying out that important role. The principles which apply have been clearly stated and need no repetition: Whitehorn v R (1983) 152 CLR 657; R v Apostilides (1984) 154 CLR 563; Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279, 294 per Fullagar J.

An important aspect of that role relates to the decisions as to which witnesses to call as part of the prosecution case. Such decisions are to be made having regard to the overriding considerations of justice rather than for tactical reasons: Apostilides at 576.

The fact that a witness gives an account of an event which is contrary to that provided by other witnesses in whom the prosecution has confidence and whom it plans to call will not generally, of itself, justify the failure to call that witness or, at least to present that witness for cross-examination: R v Kneebone (1999) 47 NSWLR 450 at 460-461; R v Shaw at 429.

At least in the case of a material witness, a decision not to present that witness should not be taken without the benefit of interview of that witness by the prosecuting authority: Kneebone; R v O'Brien (1996) 66 SASR 396.

It is noteworthy that in the cases of Kneebone and Shaw the witness under consideration was said to be an eye witness to the crime. The significance of a

witness in a case will obviously be an important factor in the decision as to whether to call that witness.

[20] *The decision not to call Ms. Wright as a prosecution witness coupled with defence counsel's decision to call her meant that the prosecutor was put in the position of cross-examining about an event -- the interview -- in which she herself had taken part. I agree that that this situation is not a particularly desirable one and that there can be dangers arising from it. However, it will be a situation which comes to pass from time to time, particularly if prosecutors are responsive to criticism for failing to interview witnesses prior to discarding them, as was levelled in the cases of Kneebone and Shaw. I note that had Ms. Wright given a statement to the investigating officer after his interview with the prosecutors, and assuming that statement contained the same assertions made to the prosecutors, then the situation would have been very much neutralised.*

9. *Police v Kyriacou* (2009) SASC 66 at [62]-[63] per Sulan J, Gray and Kourakis JJ agreeing:

[62] *There is substance in the submissions of counsel for the appellant, although I do not accept that all the matters to which he refers are required to be established before the principle in Jones v Dunkel is applied. The matters to which counsel refers are relevant to the Court's consideration whether to give a Jones v Dunkel direction. I observe the direction is simply a direction as to the process of reasoning open to a jury in arriving at its ultimate decision. I consider that the principle in Jones v Dunkel has limited application to criminal trials, and should rarely be given in respect of the prosecution's failure to call witnesses. Insofar as its application in cases in which it is argued that the prosecution has failed to call a material witness, there are a number of factors to which a court should have regard before applying the principle.*

[63] *First, the prosecution has a duty to call material witnesses. The prosecutor has a discretion as to what evidence will be adduced by the prosecution. The prosecutor, nevertheless, is under a duty to call all relevant witnesses or, if he has determined not to call a material witness, then that witness's statement, if available, should be provided to the defence. Secondly, if no statement is available, then the identity of a potentially material witness should be provided to the defence and steps should be taken by the prosecution to make that witness available to the defence. Thirdly, it is open to defence counsel to ask the judge to*

make an inquiry of the prosecutor as to why the witness is not be called.³⁶ If an explanation acceptable to the court is given, then it is not appropriate for a Jones v Dunkel direction to be given in respect of the failure of the prosecution to call that witness. In deciding whether an explanation is acceptable, the court will have regard to the prosecutor's discretion not to call a witness who the prosecutor considers is not honest or not reliable. A judge may direct the jury that the failure of a witness to have been called is a factor to which they are entitled to have regard when considering whether they are satisfied beyond reasonable doubt that the prosecution has proved its case.³⁷

10. *Payne v Parker* (1976) 1 NSWLR 191 contains a more lengthy statement of the requirement to call witnesses. At 200-202 per Glass JA.

11. The following are additional authorities for stating the obligations of statutory bodies in serving the court, ensuring procedural fairness and acting as model litigants.

11.1. The *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) states in s 7:

7—Role of Crown Solicitor

(1) For the avoidance of doubt, where this Act specifies that a power or function is to be exercised by the Crown Solicitor, the Crown Solicitor exercises an independent discretion in relation to that power or function and does not act on the instructions of any other person or body.

(2) In proceedings under this Act the Crown Solicitor acts as a model litigant for, and on behalf of, the State.

12. *Legal Bulletin No. 2* paper by Crown Solicitor Greg Parker is relevant to the AGS acting as a model litigant

Common Law authorities

13. These case extracts along with those previously provided are the commonly cited common law authorities.

14. One of the earliest and most frequently cited authorities comes from Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342:

"It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and & \a fortiori not in criminal proceedings. I am sometimes inclined to think that in some parts -- not all -- of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

15. *GP v R* (2010) 27 VR 632 at [64] per Bongiorno JA:

[64] ...The function of a Crown prosecutor is to act as a minister of justice. It is not the function of a Crown prosecutor merely to act as might some counsel in an ordinary inter partes proceeding, taking every point regardless of its merit. It is the function of a Crown prosecutor, by appropriate argument, to assist the court not to fall into appealable error.

16. *Qantas Airways Ltd v Transport Workers' Union of Australia* (2011) FCA 470 at [192] per Moore J:

[192] As an aside I should observe that this submission was illustrative of the general tenor of a number of the submissions of the Ombudsman. The submissions were, in my opinion, a little too partisan at times for a statutory officeholder. By partisan I mean infused by a measure of zeal rather than detachment. I would have thought that the Ombudsman should aspire to be a model litigant rather than a partisan one. While aspects of the model litigant obligations are found in App B to the Schedule to the Legal Directions 2005 (Cth) issued by the Commonwealth Attorney-General under s 55ZF of the Judiciary Act 1903 (Cth) they are broader and more fundamental.

17. Crown litigants include trading and statutory corporations. *Logue v Shoalhaven Shire Council* (1979) 1 NSWLR 537 at 558-559 per Mahoney JA:

"And, in this regard, it is proper to have in mind that the council is a corporation constituted by statute, and discharging public functions. It has acquired the property by a procedure which was invalid, and it may retain it only if it is to have the unfettered benefit of protection designed primarily for the protection of third parties. It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see Melbourne Steamship Co. Ltd. v. Moorehead, per Griffith C.J. What might be accepted

from others would not be seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see P. & C. Cantarella Pty. Ltd. v. Egg Marketing Board (N.S.W.). In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind; there being no competing interests, the council should be seen as holding the land subject to the appropriate rights in equity.”

18. *P & C Cantarella Pty Ltd v Egg Marketing Board for the state of New South Wales* (1973) 2 NSWLR 366 at 393 per Mahoney J:

The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

19. *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695 at 704-705 per Beaumont, Burchett and Goldberg JJ:

*Before dealing with the question raised, we are bound to say that we share Hill J's reaction that an injustice was involved as a result of the taking of this point by the Crown. That is the more to be regretted when the point is taken by a party which is expected to act, and to be seen to act, as a model litigant. It is worth recalling the observations of Griffith CJ in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 as follows (at 342):*

The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.

I am sometimes inclined to think that in some parts -- not all -- of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

20. See also *Kelson v Forward* (1995) 39 ALD 303 per Finn J at 326-7, and *SCI Operations Pty Ltd v Commonwealth* (1996) 139 ALR 595 at 613.

21. *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 40-41 per Finn J:

There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created. I have no need here, though, to rely upon such a broad notion. That the law entertains expectations of fair dealing of government and of public bodies is manifest in some number of spheres. First and most obviously, there is the general application of the requirements of procedural fairness to "governmental executive decision-making": Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648 at 653 ; 93 ALR 51; see also Annetts v McCann (1990) 170 CLR 596 ; 97 ALR 177 -- though it needs to be acknowledged that these requirements can in limited circumstances extend to the decision-making (characteristically to decisions to expel or to discipline members) of non-governmental bodies and associations: see Aronson and Dyer, Judicial Review of Administrative Action, LBC, Sydney, 1996, pp 493-5.

"Secondly, there is what Griffith CJ referred to in Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333 at 342 as:

"the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary ..."

"This proposition has received significant, recent judicial endorsement in this country most notably in the Full Court of this court in SCI Operations Pty Ltd v Commonwealth (1996) 139 ALR 595 per Beaumont and Enfield JJ; see also Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125. I note in this particularly the observations of Mahoney J in his dissenting judgment (on grounds not presently relevant) in Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537 at 558-9 in applying the proposition to a local

authority - to "a corporation constituted by statute, and discharging public functions":

It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see Melbourne Steamship Co Ltd v Moorehead ..., per Griffith CJ. What might be accepted from others would not be seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see P & C Cantarella Pty Ltd v Egg Marketing Board (NSW) [1973] 2 NSWLR 366 at 383-4. In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind ...

This fair play principle has its most common manifestation in the "model litigant" standards exacted from the Crown in legal proceedings: see, eg Director of Public Prosecutions (Cth) v Saxon (1992) 28 NSWLR 263.

22. *Mahenthirarasa v State Rail Authority of NSW (No 2) (2008) 72 NSWLR 273 at [14]-[15] per Basten JA:*

[14] *It is convenient to say something at this stage about the status of the State Rail Authority. At the time of the appellant's accident, it was a corporation constituted under the Transport Administration Act 1988 and was "for the purposes of any Act, a statutory body representing the Crown": s 4(2). With the creation of a new corporation known as "RailCorp", from 1 January 2004, the constitution of the State Rail Authority was relegated to Sch 8 of the Transport Administration Act, but it remained a statutory body representing the Crown. Its functions by then included facilitating the transfer of its staff, assets, rights and liabilities to new bodies created under the Act: Sch 8, cl 3(1). That was still the position when the Registrar made the decision under review and when proceedings for judicial review were commenced. There is no suggestion that any liability to the appellant has been transferred by the State Rail Authority to any other body.*

[15] *On 1 July 2007 the name of the State Rail Authority was changed to the "State Rail Authority Residual Holding Corporation": State Revenue and Other Legislation Amendment (Budget) Act 2007, Sch 4 [11], inserting new subcl (1A) in Sch 8, cl 1 of the Transport Administration Act. The functions of the State Rail Authority changed with these amendments, but it has not been suggested to the Court that anything turns on these new administrative arrangements.*

Accordingly, the State Rail Authority is and was a statutory body representing the Crown. As such, it is a part of the executive government and should conduct itself, in the conduct of litigation, in the manner expected of the executive government.

23. *Badraie v Commonwealth* (2005) NSWSC 1195 at [94], [114]-[115] per Johnson J:

[94] *Dr Morrison SC points to the model litigant obligations of the Commonwealth as being relevant to the present discretionary decisions. This concept is well known: Scott v Handley (1999) 58 ALD 373; Wodrow v Commonwealth of Australia (2003) 129 FCR 182. Dr Morrison SC points to parts of the model litigant provisions, in particular, the obligation of the Commonwealth and its agencies to act fairly in litigation brought against the Commonwealth by dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation and not taking advantage of a claimant who lacks the resources to litigate a legitimate claim: Wodrow at para 38. The courts have spoken positively of a public body's obligation of conscientious compliance with the procedures designed to minimise cost and delay: Scott v Handley at para 45; Wodrow at para 46.*

[114] *What do the dictates of justice require in the circumstances of this case? I have regard to all of the matters raised on behalf of the Plaintiff and the Commonwealth. I have concluded that officers of DIMIA failed to exercise reasonable diligence with respect to contacting Ms. Jaleeli in the manner advised by Counsel for the Commonwealth. This failure has had a significant impact upon this litigation. I have had regard to the obligations of the Commonwealth as a litigant before this Court, under its own model litigant code and, since 15 August 2005, under the provisions of the Civil Procedure Act 2005, some of these obligations having a direct bearing on the present application. There have been failures to comply on the part of the Commonwealth with respect to a number of orders. The manner in which my orders of 13 October 2005 were approached and the way in which the privilege claim unfolded on 7 November 2005 with the disorderly presentation of documents by the Commonwealth did not assist the Court. However, I do not consider that these matters bear significantly on the present question.*

[115] *Justice is the paramount consideration in determining this application. Save insofar as costs may be awarded against the party seeking leave, such an*

application is not the occasion for punishment of the party making the application: Queensland v JL Holdings Pty Ltd at 155.

24. *Priest v New South Wales* (2007) NSWSC 41 at [33]-[34] per Johnson J:

[33] The Civil Procedure Act 2005 contains a number of provisions which are relevant to the present application. Section 56 of that Act says that the overriding purpose of the Act, and the rules in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56(1). The Court must seek to give effect to that overriding purpose when it exercises any power given to it under the Act or by the rules: s 56(2). A party to civil proceedings is under a duty to assist the Court to further that overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court: s 56(3). A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in s 56(3): s 56(4). A Court may take into account any failure to comply with s 56(3) or s 56(4) in exercising a discretion with respect to costs: s 56(5).

*[34] In a sense, s 56 has the result that every litigant in civil proceedings in this Court is now a model litigant. However, there is ample authority that governmental bodies, including the Commonwealth of Australia or the State of New South Wales, ought be regarded as having model litigant obligations extending in the past, at least, beyond those of private litigants. In this respect, see decisions such as *Scott v Handley* (1999) 58 ALD 373; *Wodrow v Commonwealth of Australia* (2003) 129 FCR 182; *Badraie v Commonwealth of Australia* (2005) 195 FLR 119 at 135 ; [2005] NSWSC 1195 at para 94.*

25. **Improper Purpose & Abuse of Process: “Operation Winebar” & SCI-2013-02968 & SCI 2014-03380 & The Default Judgment DCCIV-2003-1666**

25.1. On the 26th June 2012 the Plaintiff exercised his information gathering powers

25.2. Subsequently on the 8th January 2013 I received an FOI information release from the Plaintiff that revealed the existence of a Strategic Task Force known to the Plaintiff as “Operation Winebar”.⁵⁴

⁵⁴ Exhibit AMG 8 to my Second Affidavit pages 174 - 178

25.3. At a cost of what must be by now some millions the Plaintiff has had an extraordinary number of people involved in investigation of my tax affairs with the end result that the plaintiff has commenced this proceeding against me along with SCI-2014-03380

25.4. I respectfully submit that at all relevant times the conduct of the Plaintiff in this proceeding has been driven by an *"Improper Purpose"*, such that this proceeding is an *"Abuse of Process"*.

25.5. That *"Improper Purpose"*, is linked to a number of significant events (amongst others);

25.6. **Event 1: "The First Judgment Debt"**; A Judgment dated 11th February 2004 was given in Default of Filing a Defence in the District Court of South Australia in DCCIV-166-2003; *Deputy Commissioner of Taxation v Andrew Morton Garrett*; at a time when solicitors were on the court file and who failed to file a defence that the Running Balance Account ("**the RBA**") deficit was not a primary taxation debt and was the result of a sum of entries made to the RBA by my accountant in error in respect to a GST liability that did not in fact exist.

25.6.1. The deficit debt appearing on the RBA that was the subject of the claim made by the Plaintiff did not exist, and

25.6.2. The errors of entry on the RBA were capable of being corrected as GST mistakes, and

25.6.3. The entries capable of being corrected at any time, and

25.6.4. That the subsequent refund due after correction was capable of being paid by the Plaintiff to AGFT at any time until the relevant legislative provisions enacted following the decision of *KAP Motors Pty Ltd v Commissioner of Taxation* 2008⁵⁵ came into force by Royal Assent on the 28th September 2008

25.6.5. Don Dixon for the Plaintiff⁵⁶ observes as follows

The credits that have been posted to the account relate to self amended BAS going back to 2001. This has not only wiped out the liability that he was bankrupted on but also leaves small credit balance. I have no doubt that his requests for an Inso statement of account may be the beginning of a process to have his bankruptcy annulled with possible consequent action against the office.

25.7. **Event 2: The First Bankruptcy Notice**: Issuing of Bankruptcy Notice by the Plaintiff based on the First Default Judgment against me in respect to a debt that did not exist that is referred to the issues of Embarrassment⁵⁷

⁵⁵ *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159

⁵⁶ Page 198 of My Fourth Affidavit

- 25.8. **Event 3; The Creditors Petition.:** The Plaintiff commenced a Creditor's petition against me given action ADG 69 of 2004 in respect to the alleged default of the Bankruptcy Notice dated by the Plaintiff against me in respect to a debt that did not exist.
- 25.9. **Event 4; The First Unaccounted for Payment;** On the 22nd September 2004 the Plaintiff received payment in full from me of the amount of the Default Judgment plus costs totaling \$81,860.55 as set out in the Statement of Claim dated 29th September 2014
- 25.10. **Event 5; The Sequestration Order;** A Sequestration order made against me on the 24th September 2004 by application of the Plaintiff in respect to a Bankruptcy Notice issued in respect to a Debt that did not in fact exist⁵⁸ and in which regard ***the Plaintiff had received Payment***, which materials have been filed into evidence⁵⁹ in respect to the Counterclaim brought in this proceeding;
- 25.10.1. I Assert and verily believe that the notion of "*Embarrassment to the Plaintiff*" highlighted in recent FOI releases dated the 7th and 11th of July 2014⁶⁰ (that were absent from prior FOI releases provided on the 18th September 2012 and 12th October 2012) has been driving the conduct of the Plaintiff between the 22nd September 2004 and today's date.
- 25.10.2. The alleged maladministration by the Plaintiff against my rights at Common Law and the right to be treated fairly has been best demonstrated by the continued refusal of the Plaintiff to consent to orders to set aside the Default Judgment in DCCIV-2003-1666 given on the 11th February 2004.
- 25.10.3. The failure to account of the Plaintiff for a payment of \$81,360.55 received to the account of AGFT by the Plaintiff on the 22nd September 2004
- 25.11. **Event 6; The First Cancellation of GST Corrections** in the amount of \$99,987.00 to the Running Balance Account ("RBA") of the Trustee of the Andrew Garrett Family Trust ("AGFT") on the 18th February 2009;
- 25.11.1. at a time when the Plaintiff was apprised of Legal Advice from his own Legal Services Branch that the Plaintiff could NOT legally make those Corrections ⁶¹ which detail was provided under and FOI application delivered on the 7th and 11th July 2014.

⁵⁷ Pages 158 – 198 of my Fourth Affidavit

⁵⁸ My Sixth Affidavit filed in VICSC-2013-02968 at paragraphs 5 - 12

⁵⁹ Volume 5 of my Sixth Affidavit filed in VICSC-2013-02968 also shown as exhibit AMG 10 of my

⁶⁰ Pages 158 – 198 of my Third Affidavit

⁶¹ Volume 5 of my Sixth Affidavit filed in VICSC-2013-02968.

- 25.11.2. Investigations by the Commonwealth Ombudsman of my complaints being frustrated by the Plaintiff by failing to provide relevant materials.
- 25.12. **Event 7:** The Plaintiff resisting the Application to set aside the default Judgment given in DCCIV-2003-1666 between the 4th December 2006 and March 2009 in circumstances where the Plaintiff was aware the debt did not exist, and
- 25.13. **Event 8: The Second Unaccounted for Payment:** The Failure of the Plaintiff to account for \$112,500 paid to the account of AGFT 3 or any other entity related to me from the SA Registry of the Federal Court of Australia by Bank Cheque on the 3rd April 2009, and
- 25.14. **Event 9: Other Unaccounted for Payments:** The Failure of the Plaintiff to account for \$45,000 paid to the account of AGFT 3 from the Trust Account of Lipman Karas between February 2009 and July 2010, and
- 25.15. **Event 10:** The Establishment of a Strategic Task Force called "*Operation Winebar*" to investigate the Tax Affairs of entities related to me in the development of OenoViva Business Systems, referred to in the Preamble sometime in early 2012 in which regard I seek orders for discovery in the substantive proceeding, and
- 25.16. **Event 11:** Completion of Audit dated 8th May 2012 in respect to OVPET
- 25.17. **Event 12:** Exercise of Information Gathering Powers by the Plaintiff on the 26th June 2014 involving around 120 officers in the field in 5 locations in Victoria and South Australia, including my home at 21 North Road, Brighton.
- 25.18. **Event 13:** Audit of Sanctuary Australasia Pty Ltd on 29th June 2012
- 25.19. **Event 14:** Release of the First Tranche of information under the provisions of the Freedom of Information Act (Cth) in respect to AGFT on the 28th September 2012, and
- 25.20. **Event 15:** First Application for compensation made to the Plaintiff by me on the 20th October 2012
- 25.21. **Event 16: The Second Cancellation of GST Credits** in the amount of \$158,000 due and payable to the account of AGFT 3 on the 16th February 2013
- 25.22. **Event 17:** Letter from Chris Barlow to me dated 21st May 2013⁶²

⁶² Page 220 – 222 of the Court Book

- 25.23. **Event 18:** Service of the Writ in SCI-2013-02968 on the 11th June 2013
- 25.24. **Event 19:** Telephone conference with Chris Barlow on 29th July 2013
- 25.25. **Event 20:** Compensation Decision dated 1st August 2013⁶³
- 25.26. **Event 21:** Second Compensation Letter dated 13th September 2013⁶⁴
- 25.27. **Event 22:** Release of Second Tranche of FOI in respect to AGFT on the 7th and 11th July 2014 nearly 22 months after the release of the First Tranche.
- 25.28. **Event 23:** Service of the Writ in this proceeding on the 14th July 2014 in circumstances where the Plaintiff was aware that the Writ filed in VICSC-2013-02968 was likely to fail
- 25.29. **Event 24: the Second Judgment Debt** ;Given in VICSC-2013-02968 by the Honourable Mukhtar AsJ dated 6th August 2014 which was given in respect to a debt that did not in fact exist.
- 25.30. **Event 25: the Third Judgment Debt:** Given in VICSC-2013-02968 by the Honourable Mukhtar AsJ dated 6th August 2014 which was given in respect to a debt that did not in fact exist.
- 25.31. **Event 26: the Misconduct Complaint:** On the 12th August 2014 I emailed Chris Barlow and the Commonwealth Ombudsman addressing the issues of Misconduct ⁶⁵
- 25.32. **Event 27: The Second Bankruptcy Notice;** The Plaintiff issued a Bankruptcy Notice on me on the 14th October 2014 which was served on me on the 1st November 2014 in respect to the Third Judgment Debt being a Debt again obtained by default in this proceeding that is the subject of this Notice of Appeal; ***It is unsurprising that the Notice was not issued on the Second Judgment Debt by the Plaintiff as the evidence shows that this debt does not exist.***

26. **Blizzard of Materials**

- 26.1. This Honourable Court in VICSC-2013-02968 has referred to a “*Blizzard of Materials*” being filed by the Defendant in this proceeding as set out in the Judgment of the Honourable Mukhtar AJ dated 6th August 2014.

⁶³ Page 224 – 251 of the Court Book

⁶⁴ Page 253 - 254 of the Court Book

⁶⁵ Page 255 - 281 of the Court Book

- 26.2. Those materials have been filed by me in order to plead and evidence my case of counterclaim and sue the Plaintiff for damages in respect to the Plaintiff's conduct during the last 10 years and in which regard the Plaintiff has now obtained two judgments in Default of filing a Defence.
- 26.3. The proper ventilation of those materials will take some time.
- 26.4. The Improper conduct of the Plaintiff is of the kind found in *Viscariello v Macks* 2006⁶⁶ by Kourakis CJ in the Supreme Court of South Australia on the 12th August 2012 and further developed in the authorities set out in these submissions.

27. **DCCIV-2003-1666: Deputy Commissioner of Taxation v Andrew Garrett in his capacity as Trustee of the Andrew Garrett Family Trust**

27.1. Amongst the orders sought in this proceeding is an order that;

27.1.1. the Plaintiff consents to an order to set aside the Default Judgment given on the 11th February 2004 given in DCCIV-2003-1666 AND/OR

27.1.2. in the alternative that the Plaintiff is ordered to bring proceedings to set aside the Default Judgment given in DCCIV-2003-1666 on that day.

27.2. On more than one occasion since 2004 I have requested the Plaintiff to consent to orders to set aside the Default Judgment given in the aforementioned proceeding

27.3. The Plaintiff has refused on the grounds that I am not aware of and have sought a response from the Plaintiff setting out those grounds.

27.4. The Plaintiff has referred to the reasons of the Master Normand given on the 16th January 2010 however I have also pointed out to the Plaintiff that

27.4.1. The learned Master fell into error by failing to refer to my reappointment as Trustee of the Andrew Garrett Family Trust on the 19th January 2006 which evidence is before this learned court; the error of the Master was that he failed to find that I had standing as Trustee of AGFT to set aside a judgment debt made against the Trust Estate, and

27.4.2. The Learned Master was misled by the Plaintiff by cancelling the relevant amending activity statements on the 18th February 2009 in circumstances where the Plaintiff held advice from the ATO Legal Services Branch that it could **NOT Legally** reverse the GST

⁶⁶ Exhibit AMG 35 of my sixth Affidavit filed in VICSC-2013-02968 and referred to at paragraphs 47 - 55

Corrections entered on the RBA of the Trustee of the Andrew Garrett Family Trust⁶⁷ on the 6th & 7th October 2008.

- 27.5. On the 15th July 2014 I read the details pursuant to the provision of Freedom of Informations request made of the Australian Financial Services Authority by me which relevantly revealed that my Bankrupt Estate was finalized by the Trustee on the 17th May 2011.
- 27.6. I was not previously apprised of this detail by AFSA even though I received an FOI release late in 2011 which revealed the issues related to the surplus of the Bankrupt Estate, deposited to in my 6th Affidavit⁶⁸

46. Abuse of Process

- 46.1. Abuse of Process has been defined as;

"[A]buse of process (is) the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages."

- 46.2. The Tort

Abuse of process can also form the basis of a tort claim. In that regard, note these words of Justice Winfree in *DeNardo*:

"Abuse of process is a tort comprised of two elements: (1) an ulterior purpose and (2) a willful act in the use of process not proper in the regular conduct of the proceeding."

"The first element, ulterior purpose, usually consists of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money with use of the process as a threat or a club."

"The second element involves an overt act, but actions taken in the regular course of litigation, such as threatening suit or requesting discovery, are not"

⁶⁷ Volume 5 of my Sixth Affidavit filed in VICSC-2013-02968

⁶⁸ My Sixth Affidavit filed in VICSC-2013-02968 at paragraphs 14-21

a proper basis for an abuse of process claim even if done with an ulterior motive."

46.3. In *Montemayor*, Justice Castillo added:

"Elements of a claim for the tort of abuse of process include (1) an illegal, improper, or perverted use of the process, neither warranted nor authorized by the process, (2) an ulterior motive or purpose in exercising such use, and (3) damage as a result of the illegal act.

"Abuse of process is the malicious misuse or misapplication of process in order to accomplish an ulterior purpose. However, the critical aspect of this tort remains the improper use of the process after it has been issued.

"Abuse of process exists where the original process is used to accomplish an end other than that which the writ was designed to accomplish."

46.4. Principle of Abuse of Process

46.5. The principles which lead to a finding of an abuse of process in the UK were stated in *Johnson v Gore Wood & Co*^[4] by Lord Bingham.

"The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defense in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defense should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter

could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not ... Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

46.6. Distinguished from malicious prosecution

46.7. *A cause of action for abuse of process is similar to the action for **malicious prosecution** in that both actions are based on and involve the improper use of the courts and legal systems. The primary difference between the two legal actions is that malicious prosecution concerns the malicious or wrongful commencement of an action, while, on the other hand, abuse of process concerns the improper use of the legal process after process has already been issued and a suit has commenced. In abuse of process, the legal process is misused for some purpose which is considered improper under the law. Thus technically, the service of process itself—in the form of a summons—could be considered abuse of process under the right circumstances, e.g. fraudulent or malicious manipulation of the process itself,^[5] but in malicious prosecution, the wrongful act is the actual filing of the suit itself for improper and malicious reasons.^[6] As noted above, the three requirements of malice, lack of probable cause in the issuance of the process, and a termination of the prior proceeding favourable to the plaintiff, are essential elements for malicious prosecution. Most jurisdictions do not require any of these three elements in order to make out a prima facie case for abuse of process.*

46.8. Illustration

46.9. *A cause of action for abuse of process may lie in situations where a criminal proceeding is brought against a defendant for improper motives. For*

example, in Lader v. Benkowitz,^[7] a pleading was held to state a good cause of action for abuse of process when it alleged that defendant hotel owner had threatened to have the plaintiff arrested on a warrant issued at the behest of the defendant on a charge of disorderly conduct. The allegedly improper motive was the hotel owner's underlying purpose of compelling plaintiff to pay a bill owed for plaintiff's alleged rental of a room in defendant's hotel. It was claimed that through the unlawful use of the warrant and threat of arrest, the defendant was able to obtain the sum of money allegedly owed by plaintiff. In denying defendant's motion to dismiss, the court admonished that it was sufficient to show that regularly issued process had been used to accomplish an improper purpose in order to set forth a cause of action for abuse of process. The fact that the plaintiff had yielded to defendant's threat to have her arrested under the warrant did not diminish the cause of action, because it was clear that the plaintiff actually had been arrested for the purpose of compelling her to pay the cost of the room.

47. Improper exercise of power

47.1. A court will interfere with an administrative decision or question if it can be shown to amount to an improper exercise of power. There is a large amount of *case law* on the various grounds for such an attack.

47.2. Following is a summary of these grounds;

47.3. Relevant and irrelevant considerations

47.3.1. If it can be shown that a government body has failed to take into account relevant factors or has taken into account factors not relevant to the matter, the court can intervene. In order to decide what is relevant, the reasons given for the decision or action must be assessed against the governing Act. In other words, the Act will often determine the relevant and irrelevant factors.

47.3.2. A relevant consideration is one that the court would say *must* be taken into account. An irrelevant consideration is one that *must not* be taken into account (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 and *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30).

47.4. Illegal or Improper purpose