from “Cash Based GST Reporting” to “Accruals Based GST Reporting”.

19.1.6. As a consequence of this change in reporting entities related to me needed to recognise the relevant GST liability as being due and payable to the Commissioner on the 25th Day after the closure of the Accounting Period.

19.2. **CK Consulting**

19.2.1. From April 2009 I also obtained advice from a joint venture consulting firm, Crescendo/Kopp consulting, **(“CK Consulting”)** represented by Mathias Kopp.

19.2.2. Crescendo has expertise in Fast Moving Consumable Goods and has previously acted as a Consultant to the Respondent.

19.2.3. Kopp comes from a merchant banking background with Deutche Bank in addition to his consulting background and has conducted extensive research into OBS in the writing of the Business Methodology (annexure 8.1 of the Business Plan)

19.2.4. At all times I have been properly advised by persons with appropriate experience in developing the Business Methodology and Business Plan of OBS

19.2.5. On the 20th January 2012 OVANZ sold the exclusive Consulting Rights for the territory of Australia & New Zealand to Daleford Downs Pty Ltd .

19.2.6. The Respondent did not pay the relevant GST Credit to Daleford Downs Pty Ltd

19.3. **Hambros and Cahill Lawyers**

19.3.1. In the second week of October 2011 AGFT 4 sold its Litigation Management Services Rights to HC Legals Pty Ltd as Trustee of the HC Legal (Services) Unit Trust.**(“the First Legal Services Rights Sale Agreement”)**

19.3.2. **The Choses in action to be managed included the Choses in action against the Trustees, and the Respondent.**

19.3.3. On or about the 31st December 2011 Hambros advised that there had been a mistake in the ABN on the First Rights Sale Agreement and requested AGFT 4 to execute a new agreement with HC Legal Pty Ltd **("HCL") .("the Second Rights Sale Agreement")**

19.3.4. There is no legal entity known as HC Legals Pty Ltd.

19.3.5. The Trustee of the HC Legal (Services) Unit Trust is HC Legal (Services) Pty Ltd **("HCLS")**

19.3.6. On the 23rd December 2011 HCLS was placed in Liquidation by the Sole Directors Peter Hambros **("Hambros")** and Francis Cahill **("Cahill")**

19.3.7. Hambros and Cahill misled me in the execution of the Second Rights Sale Agreement; I did not know that HCL and HCLS were different Legal entities until sometime in 2013.

19.3.8. Between the 11th December 2011 and the 6th April 2012 the Company and Sanctuary in their capacities as Trustees of AGFT 4 paid a total of $400,000 to be held in Trust on account of works to be undertaken by HCL and its Directors.**("the Part A Trust Moneys")**

19.3.9. No work was undertaken by HCL at any time on behalf of AGFT 4 and its related entities on a chargeable basis because;

19.3.9.1. Hambros and Cahill advised me that their Bank Accounts had been frozen and garnished by the Respondent and that the money paid into Trust was in the hands of the Respondent, and

19.3.9.2. They would forego their fees on minimal essential works, until issues between HCL and the Respondent had been resolved.

19.3.10. On the 23rd February 2014 the Respondent paid a GST Credit to the account of HCL.

19.3.11. At all relevant times during the periods leading to the execution of the First and Second Legal Services Rights Sale Agreements I and entities related to me were advised by;

19.3.11.1. Deloitte Private SA in respect to accounting advice, and

19.3.11.2. Peter Hambros and Francis Cahill in respect to Legal Advice.

19.3.12. Between the 31st January 2012 and the 7th November 2012 Hambros and Cahill advised me that they could not properly act in respect to the Management Rights Purchase Agreement due to the actions of the Respondents in;

19.3.12.1. Freezing all accounts of HCL and accounts related to the Directors of HCL, and

19.3.12.2. Garnishing all accounts related to HCL

19.3.13. On the 22nd February 2012 Hambros and Cahill executed alleged non-recourse loan agreements between themselves and HCL and withdrew approximately $4,900,000 from the accounts of HCL and HCLS between 13th December 2011 and 13rth March 2012.

19.3.14. As a consequence of the advice received from Deloitte between January 2012 and February 2012 in respect to the legal obligation to convert from Cash Based Reporting to Accruals Based Reporting, I instructed Hambros and Cahill to prepare;

19.3.14.1. a supplementary Deed to pay an initial payment to AGFT 4 in the amount of the GST liability in the hands of AGFT 4

being $4,500,000 which was to be funded by the GST Credit when it was received by HCL.

19.3.14.2. a Performance Security to be registered over HCL to compel the compliance of HCL and its Directors with the terms of the Second Rights Sale Agreement as amended.

19.3.15. I instructed Hambros and Cahill to prepare Rights Sale Agreements and Performance Securities in respect to the following Rights Sales all of which were to incorporate the obligation on the purchaser to pay an initial payment of 10% to the Vendor and the execution of a Performance Security;

19.3.15.1. Exclusive Supplier of Vehicles and Forklifts to Edwards Motor Company by the Company, and

19.3.15.2. Exclusive Supplier of Management and Consulting Services to Daleford Downs Pty Ltd as Trustee of the Kopp Family Trust by the Company, and

19.3.15.3. Exclusive Supplier of Technology and Point of Sale Systems to PCS Global Pty Ltd by the Company, and

19.3.15.4. Exclusive Supplier of Franchising Services to CLP Masters Pty Ltd trading as Growit.net.au by the Company, and

19.3.15.5. Exclusive supplier of Plant and Equipment to ABT 2 by the Trustee of the Holy Grail Property Trust No 4 and the Company for the Territories of;

19.3.15.5.1. Vietnam **("The Vietnam Rights Sale"),** and

19.3.15.5.2. UK & Ireland **("The UK/Ireland Rights Sale"),** and

19.3.15.5.3. Hungary **("The Hungary Rights Sale"),** and

19.3.15.5.4. Nevada **("The Nevada Rights Sale"),** and

19.3.15.5.5. California **("The California Rights Sale").**

19.3.16. Between February 2012 and July 2012 Hambros and Cahill did not act as instructed and instead supplied me with the templates of the Rights Sale Agreements which they offered to review before execution, and

19.3.16.1. It was always the intention of the entities related to me that the related party vendor of rights would receive from the purchaser of rights an amount of 10% of the Purchase Price upon receipt of the relevant GST Credit payable by the Respondent in respect to the activity statement lodged by each rights purchaser of the rights set out at para 19.3.15, and

19.3.16.2. That the obligation to pay those moneys to the related party vendor being AGFT, AGFT 4, HGPT 4 and/or OVANZ was to be set out in a supplementary deed or alternatively in the final exclusive rights purchase deed to be prepared by Hambros and Cahill, and

19.3.16.3. That the performance of the Rights Purchasers was to be secured by a Performance Security to compel performance of the purchaser under the Rights Purchase Agreement, and

19.3.16.4. That upon receipt of the payment of 10% initial payment from the purchasers the moneys received would be applied to meet the Net GST Liability of the related party vendor to the Respondents in respect to the Rights Sales.

19.3.17. From the date of receipt of the GST credit by the Purchaser of the relevant rights from the Respondent the moneys paid by the Respondent to the account of HCL took on the characteristic of Trust Moneys, as a consequence of the obligation to pay AGFT 4 the same amount as AGFT 4 held an obligation to pay GST on the second Rights Sale to the Respondent.

19.3.18. From February 2012 it became apparent the Respondent was rejecting the various rights sales in the hands of the Purchaser.

19.3.19. The Money paid by the Respondent to HCL in respect to the GST Credit of $4,500,000 was Trust Money belonging to AGFT 4 pursuant to the obligation to pay that amount to the Respondent set out in the RBA of AGFT 4 **("the Part B Trust Moneys")**

19.3.20. The actions of Hambros and Cahill in failing to pay the Part B Trust Moneys have caused bias and prejudice against me in all of my capacities in the minds of the respondents that has driven the conduct and decisions of the respondents since at least January 2012.

19.3.21. On the 7th November 2012 HCL repudiated the Second Rights Sale Agreement which repudiation was accepted by me on the 8th November 2012 following receipt of independent Legal Advice

19.3.22. In Submissions made in VID 515 of 2012 the Respondent apparently admits that there was no impropriety in respect to the Rights Sale and took action in any event to revise the relevant Activity Statement and pursue recoupment of the GST Credit paid to HCL rather than from AGFT 4 in whose hands the liability existed.

19.3.23. Subsequently in MLG 1631 of 2014 the Honourable Justice Burchardt made findings in his reasons delivered on the 19th January 2015 that the Second Rights Sale was a Sham.

19.3.24. Hambros and Cahill misled me as to;

19.3.24.1. Their own conduct, and

19.3.24.2. The actions of the Respondent and his personnel, and

19.3.24.3. Their dealings with Part A Trust Moneys being a sum of $310,000 paid to accounts under the control of Hambros and Cahill between the 11th December 2011 and the 14th

February 2012 by the Company and Sanctuary in their capacities as Trustees of AGFT 4, **("the Part A Trust Moneys")**

19.3.24.4. Their Dealings with the Part B Trust Moneys in the amount of $4,500,000 paid to the account of HCL as GST credit on the 23rd February 2012 **("the Part B Trust Moneys")**

19.4. **The Legal Services Commissioner ("the LSC")**

19.4.1. Following the repudiation of the Second Rights Sale Agreement by HCL the sole Director of the Company and Sanctuary lodged a complaint dated 19th November 2012 with the LSC regarding the dealings with the Part A Trust Moneys and invoices issued on the 7th November 2012 but dated the 26th January and 1st February 2012 **("the First Complaint").**

19.4.2. On the 31st March 2014 the Delegate of the LSC made a Decision in favour of HCL and against the First Complaint which decision is the subject for Judicial Review pursuant to Order 56 of the Victorian Supreme Court Rules given action VICSC-2014-02728.

19.4.3. On the 19th May 2014 I lodged a second complaint with the LSC in respect to the conduct of Hambros and Cahill in respect to their dealings with the Part A and Part B Trust Moneys and breaches of the Professional Conduct and Practice Rules 2005 (Vic) **("the Second Complaint")**

19.5. **ABT 2**

19.5.1. Between July 2010 and today's date I have been working with Gerald Asbroek of Wineries by Design in the development and innovation of OenoViva Business Systems; the Development, Costing and Delivery of Urban Wineries and a unique/ innovative point of sale system known as Oenotecas.

19.5.2. On the 27th September 2011, Sanctuary as Trustee of HGPT 4 sold the preferred supplier rights for Winery Design and Plant & Equipment Supply for the territory of Australia & New Zealand pursuant to a Heads of Agreement executed on that day to a related entity of Wineries by Design being AES as Trustee of ABT 2. **("the ANZ Rights Sale")**

19.5.3. Subsequently, on the 4th May 2012 a Vendor Finance Agreement, Rights Purchase Deed and Performance Security for the territory of Australia & New Zealand were executed by HGPT 4 and ABT 2

19.5.4. The first sets of OenoTecas were installed at 79-81 Fitzroy Street St Kilda pursuant to a Plant and Equipment Lease executed between Holy Grail Hospitality (St Kilda) Pty Ltd and OVPET.

19.5.5. On the 31st March 2012 OVANZ by way of binding Heads of Agreement sold to ABT 2 the exclusive supplier rights for the Territories of;

19.5.5.1. Vietnam **("The Vietnam Rights Sale")**

19.5.5.2. UK & Ireland **("The UK/Ireland Rights Sale")**

19.5.5.3. Hungary **("The Hungary Rights Sale")**

19.5.5.4. Nevada **("The Nevada Rights Sale")**

19.5.5.5. California **("The California Rights Sale")**

19.5.6. Subsequently also on the 4th May 2014 OVANZ and ABT 2 executed the Rights Purchase Agreements, Vendor Finance Agreement and Performance Security in respect to;

19.5.6.1. The Vietnam Rights Sale

19.5.6.2. The UK/Ireland Rights Sale

19.5.6.3. The Hungary Rights Sale

19.5.6.4. The Nevada Rights Sale

19.5.6.5. The California Rights Sale

19.6. **OVPET**

19.6.1. OVPET was settled by way of Deed of Settlement dated 30th March 2012 as a Hybrid Unit Trust for the purposes of placing an order for 300 sets of the Generation 1 sets of Oenotecas being the patented Point of Sale System relating to OBS.

19.6.2. The Company was the Trustee of OVPET at settlement of the Trust Deed.

19.6.3. On the 15th March 2013 I was appointed as a Trustee of OVPET.

19.6.4. On the 8th May 2012 the Commissioner delivered to the Company a Notice of Completion of Audit following a 45 minute audit undertaken by the personnel of the Commissioner on the 4th May 2014 being the date that a Notice of Audit was provided to the Company.

19.6.5. Between the 30th March 2012 the conduct and actions of the Commissioner of Taxation have caused loss and damage to the Company in its prior capacity as Trustee of OVPET by frustrating the manufacture of 300 sets of OenoTecas that the Company intended to sell and or lease to Urban Winery Licensees and Distributor Licensees in the Territory of Australia and New Zealand and Internationally.

19.6.6. **Particulars**

19.6.6.1. The conduct and decisions of the Respondents in respect to OVPET as described at paragraphs 19.16.1 to 19.6.7 were driven by the bias and prejudice flowing from Operation Winebar that is/was and are/were conduct and decisions that

are reviewable under s5 & s6 of the ADJR, the Common Law and the provisions of s39B of the Judiciary Act

19.6.6.2. Repeats paras 4.5.2 to 4.5.6

19.7. **OVPET 2**

19.7.1. OVPET 2 was settled by way of Deed of Settlement dated 26th November 2012 as a Hybrid Unit Trust for the purposes of placing an order for 50 sets of the Generation 1 sets of Oenotecas following discussions with the Audit Team.

19.7.2. The purpose of placing an order for the Generation 1 OenoTecas by OVPET 2 was to facilitate the sale of OenoTecas to the Trustee of the Fairweather Trust which entity had purchased the Master Sub Regional License for the territory of Queensland and also intended to export OenoTecas overseas to entities related to it in Vietnam, Korea and Thailand

19.7.3. The Company was the Trustee of OVPET 2 at settlement of the OVPET 2 Trust Deed.

19.7.4. I have never been a Trustee of OVPET 2.

19.7.5. Between the 30th March 2012 the conduct and actions of the Commissioner of Taxation have caused loss and damage to the Company in its prior capacity as Trustee of OVPET 2 by frustrating the manufacture of 50 sets of OenoTecas that the Company intended to sell and/or lease to the Fairweather Trust, Urban Winery Licensees and Distributor Licensees in the Territory of Australia and New Zealand and Internationally.

19.7.6. On the 7th July 2013 the Deputy Commissioner of Taxation commenced VICSC-2013-02968 against me;

19.7.6.1. In my agreed capacity as Trustee of AGFT which capacity was also my capacity at the time of the Contradicting submissions

made by the Deputy Commissioner of Taxation in DCCIV-2003-1666 before the Honourable Master Norman.

19.7.6.2. In my alleged capacity as Trustee of OVPET 2 which is the subject of a hearing listed before the Honourable Zammit ASJ in the Supreme Court of Victoria.

19.7.7. On the 21st December 2012 the personnel of the Commissioner requested information in respect to OVPET 2 and issued a Notice under section 8AAZLGA of the TAA.

19.8. **Particulars**

19.8.1. The conduct and decisions of the Respondents in respect to OVPET 2 as described at paragraphs 19.7.1 – 19.7.7 were driven by the bias and prejudice flowing from Operation Winebar that is/was and are/were conduct and decisions that are reviewable under s5 & s6 of the ADJR, the Common Law and the provisions of s39B of the Judiciary Act

19.8.2. *Repeats paras 4.5.2 to 4.5.6*

19.9. **Sanctuary**

19.9.1. Between February 2011 and the 14th August 2011 I became involved in trying to assist Solargen Pty Ltd **("Solargen")** in a restructure.

19.9.2. Between February 2011 and June 2011 Solargen and the business of Solargen was controlled by the Denning Family with the support of external finance from Beatrice Pty Ltd controlled by Noel McDermott

19.9.3. Solargen could no longer import and pay for Solar Panels required by it to honour contractual commitments to install

Solar Panels to its customers without further support from Private Finance and was insolvent.

19.9.4. On the basis of the establishment of Green Energy Distributors Australia Pty Ltd and Solargen Australia Pty Ltd and the transfer of the Solargen Business to Solargen Australia Pty Ltd Sanctuary borrowed money from Daleford Downs Pty Ltd in order to import and pay for Solar panels required by the Solargen Business.

19.9.5. A dispute arose between the parties to the restructure and a settlement agreement was executed by the parties dated 14th August 2014.

19.9.6. As a consequence of the settlement agreement solar panels were returned to the Supplier and Sanctuary was credited with the amount of the returns.

19.9.7. The Credit of the Solar Panels returned by Sanctuary entitled Sanctuary to a GST Credit as it had already paid for relevant GST when the Panels were imported into Australia.

19.9.8. On the 10th September 2012 the Commissioner and his personnel advised Sanctuary of an audit as a function of Operation Winebar and retained the relevant GST Credit due on the return of the Solar Panels to the supplier in circumstances where there was no notice issued under section 8ZAAZLGA of the TAA within the Statutory Period.

19.9.9. The Commissioner retained the GST Credit in circumstances where the findings of the Federal Court in Mutiflex applied for the sole and improper purpose of rendering Sanctuary impecunious.

19.9.10. On the 26th April 2013 the Commissioner delivered a completion of Audit that the Commissioner knew could not be correct and issued a penalty for the sole and improper purpose of creating a debt in the hands of Sanctuary so that the Commissioner could pursue a strategy of placing Sanctuary into liquidation.

19.10. **Particulars**

19.10.1. The conduct and decisions of the Respondents in respect to OVPET 2 as described at paragraphs 19.9.1 – 19.9.10 were driven by the bias and prejudice flowing from Operation Winebar that is/was and are/were conduct and decisions that are reviewable under s5 & s6 of the ADJR, the Common Law and the provisions of s39B of the Judiciary Act

19.10.2. *Repeats paras 4.5.2 to 4.5.6*

19.11. The pattern of conduct and decisions of the Commissioner and his Personnel were repeated in respect to the administration of the Tax affairs by the Commissioner and his personnel in respect to;

19.11.1. OVANZ

19.11.2. AGFT

19.11.3. AGFT 2

19.11.4. The Springwood Park Unit Trust

19.11.5. The Sunburst Property Trust

19.11.6. The Andrew Garrett Family Superannuation Fund

19.11.7. AGFT 3

19.11.8. AGFT 4

19.11.9. The Taxation Affairs of entities that I have been appointed as Managing Controller to as described at paragraph 1

19.11.10. My own taxation affairs

19.12. **Particulars**

19.12.1. The conduct and decisions of the Respondents as described at paragraphs 19.11 were driven by the bias and prejudice flowing from Operation Winebar that is/was and are/were conduct and decisions that are reviewable under s5 & s6 of the ADJR, the Common Law and the provisions of s39B of the Judiciary Act

19.12.2. *Repeats paras 4.5.2 to 4.5.6*

19.13. **Applications for Compensation**

19.13.1. On the 20th October 2012 in all of my then capacities I made my first application for Compensation.

19.13.2. Subsequently the 14th Respondent wrote to me and confirmed receipt of my application for compensation and advised that she would be assessing my application.

19.13.3. On the 1st August 2013 the 14th Respondent advised me that my application for compensation was rejected on behalf of the respondent.

19.13.4. Subsequently following the provision of FOI on the 11th and 14th July 2014 I made a third application for compensation on the 7th August 2014 to the 14th Respondent which was copied to the Commonwealth Ombudsman.

19.13.5. In the 22nd August 2014 the 14th Respondent wrote to me and apologised for the delay in responding to me in respect to my third application for compensation.

19.13.6. Subsequently, on the 27th August 2014 I wrote to the 14th Respondent in respect to my Third Application for compensation annexing a copy of Volume 5 of the Book of Exhibits of my sixth affidavit filed in VICSC-2013-02968 dated 14th July 2014 and asking for a response in respect to my application for compensation.

19.13.7. I have not heard from the 14th Respondent in respect to my Third Application for compensation.

19.14. **Particulars**

19.14.1. The conduct and decisions of the 14th Respondent as described at paragraphs 19.13.1 – 19.3.7 was driven by the bias and prejudice flowing from Operation Winebar that is/was and are/were conduct and decisions that are reviewable under s5 & s6 of the ADJR, the Common Law and the provisions of s39B of the Judiciary Act

19.14.2. *Repeats paras 4.5.2 to 4.5.6*

19.14.3. *The failure to make a compensation decision on my third application for compensation is a breach of the Legal Services Directions and the provisions of the CDDA Scheme*

Date: 26th January 2015

……

Signed by Andrew Morton Garrett

The Applicant

This pleading was prepared by The Applicant.

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 15/02/2015 5:36:48 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Outline of Submissions
File Number:	VID600/2014
File Title:	Andrew Morton Garrett v The Commissioner of Taxation & Ors
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

SEAL OF THE FEDERAL COURT OF AUSTRALIA

Dated: 16/02/2015 9:35:36 AM AEDT Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Federal Court of Australia No. VID 600 Of 21

District Registry: Victoria

Division: Common Law

ANDREW MORTON GARRETT

Applicant

THE COMMISSIONER OF TAXATION and ORS

The Respondent

OUTLINE OF SUBMISSIONS OF ANDREW GARRETT
For Hearing 18th February 2015

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1. Summary

1.1. The Purpose of this hearing is to hear the Interlocutory Application of the Applicant dated 10th February 2015 **("the Application")** which seeks (amongst other things) to adduce fresh evidence that was not previously available for the hearing dated 4th February 2015 and Summary Judgment in respect to order 8 of the Final Orders sought of the Originating Process.

1.2. I have previously made applications for Compensation to the Respondent under the provisions of the CDRA scheme and the Legal Services Directions 2005,

1.3. Order 5 of the Application seeks such other orders as this Honourable Court deems fit which I now advise includes this Application for an order

1.3.1. to pursue alternative dispute resolution under the provisions of s53A of *the Federal Court of Australia Act* 1976 (Cth) **("the FCA")** and r28.1 of the Federal Court Rules, and

1.3.2. That the Respondents comply with s7 of the Civil Disputes Resolution Act 2011 (Cth) **("the CDRA")**

2. Materials relied upon for these submissions

2.1. My Affidavit dated 22nd October 2014 **("My Fourth Affidavit")** of 198 pages; also filed in VICSC-2014-02968, and

2.2. My Affidavit dated 6th October 2014 **("My Fifth Affidavit")** of 527 pages; also filed in VICSC-2014-02968, and

2.3. My Affidavit dated 25th November 2014 **("My Sixth Affidavit")** filed in this proceeding, and

2.4. My Affidavit dated 27th January 2015 **("My Seventh Affidavit")** filed in this proceeding, and

2.5. Affidavit of the Applicant dated 9th February 2015 plus exhibits **("my Eighth Affidavit")**

3. s53A of the Federal Court of Australia Act 1976 (Cth)

3.1. Pursuant to s53A(1) of the FCA this Honourable Court may make an order referring a part or the whole of a proceeding to mediation subject to the Rules of the Court **("the Rules").**

3.2. r28.1 of the Rules set out;

> *"Parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. If appropriate, the Court will help implement those options."*

2.3 r28.1 of the Rules set out

> ***28.02 Orders that may be sought***
>
> *(1) A party may apply to the Court for an order that:*
>
> *(a) the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process; and*
>
> *(b) the proceeding be adjourned or stayed; and*
>
> *(c) the arbitrator, mediator, or person appointed to conduct an ADR process report to the Court on progress in the arbitration, mediation or ADR process.*

2.4 By these submissions and orally in court on the 18th February 2015 **I make this application** that the Court makes an order under r28.1 and r28.02 of the Rules that;

2.4.1 In accordance with r28.02 (1)(a) all aspects of this proceeding are referred to an arbitrator, mediator, or some suitable person for resolution except the summary judgment sought under Order 8 of the Originating Process as set out in the interlocutory application dated 10th February 2015, and

2.4.2 In accordance with r28.02 (1)(b) the proceeding is adjourned or stayed

4. *Civil Disputes Resolution Act* 2011 (Cth) and Alternative Dispute Resolution ("ADR") steps taken by the Applicant

4.1. On the 4th February 2015 this Honourable court heard an application in this proceeding brought by the Respondents for orders unders37AO of the FCA in circumstances where the Respondents have not complied with s7 of the CDRA, and

4.2. The Applicant has sought an extension of time for compliance with s6(1) of the CDRA to file the Applicant's Genuine Steps Statement[1] which has been filed and served on the Respondents, and

4.3. On the 21st October 2012, I made application for compensation[2] to the Respondent in which regard the Fourteenth Respondent made a Decision dated 1st August 2013 [3] which is one of the subjects of this proceeding, and

4.4. A second application for compensation was made by me on the 11th June 2014 again by email and also decided by the Fourteenth Respondent on the 16th June 2014 [4]

4.5. Also on the 16th June 2014 I applied again for Test Case Funding to the Respondent in respect to a matter in the Public Interest for determination of the Treatment of Bills of Exchange by the Commissioner of Taxation[5]

4.6. I have a number of applications for Test Case funding from the Respondent and his Personnel over an extended period of time in order to avoid appearing before any court as an unrepresented party without success.

4.7. Similarly since 6th December 2006 I have been seeking the Respondent to consent to orders to set aside the Default Judgment made in DCCIV-2003-1666 which attempts are referred to in my communique dated 23rd June 2014 to the Third and Fourteenth Respondents [6]

4.8. Relevantly that communique is evidence in support of my allegations of trespass on my Bankrupt Estate by Peter Ivan Macks **("Macks")** which is the subject of VID 304 of 2014; *Garrett v Macks* and annexes possible calculations of consequential loss and some details of judgement against Macks as evidence of the Misconduct that the Respondents have actively propagated.[7]

4.9. I have at all relevant times endeavoured to be transparent with respect to my allegations in respect to consequential loss flowing from the actions of Macks, the Respondent and his peronnel

[1] Paragraph 10 of page 18 of my outline of submissions dated 4th February 2015 filed in this proceeding
[2] Exhibit AMG 10 of my Seventh affidavit at pages 439 - 440
[3] Exhibit AMG 8 of my Seventh affidavit at pages 175 - 203
[4] Paragraph 7 of Page 581 of my Seventh Affidavit
[5] Pages 574 – 576 of my Seventh Affidavit
[6] Pages 583 – 585 of my Seventh Affidavit
[7] Pages 586 – 592 of my Seventh Affidavit

with the Respondent and his personnel as set out in the chain of correspondence within my Second Affidavit [8]

4.10. On the 27th June 2014 I set out my dissatisfaction to the Respondent and his personnel with the alleged failures of the Fourteenth Respondent in respect to the First and Second Applications for Compensation. [9]

4.11. Following the provision of the FOI related to the Four Year Rule[10] I made a further Third Application for Compensation dated 7th August 2014 [11]

4.12. I received correspondence from the Fourteenth Respondent apologising for the delay in communication relating to my Third Application for Compensation [12]

4.13. Despite all of efforts to try and resolve this dispute without proceeding to court this action has been forced upon me as a consequence of the Respondent, his Legal Representatives and his personnel

4.14. As recently as the 22nd January 2015 I wrote to the solicitor for the Respondent inviting the Respondents to make an offer to resolve this dispute without further expense and consumption of court resources. **("Annexure 1")**

4.15. Following the swearing of my Second Affidavit I received an email on the 27th January 2015 I from the solicitor for respondents advising that the Respondent did not wish to make an offer to settle this dispute. **("Annexure 2")**

4.16. At all relevant times over a period of 11 years I have taken what I believed to be the appropriate steps to finalise this dispute in order to avoid litigation, which efforts have fallen on the Deaf Ears of the Respondents.

5. Application by the Respondents for Summary Dismissal of the Originating application in this proceeding

5.1. Instead of resolving the Dispute by Alternate Dispute Resolution Paths as a consequence of my repeated invitations the Respondents sought leave to amend the application made on the 11th December 2014 under s37AO of the FCA which was granted on the 4th February 2015 to, in effect, seek orders to summarily dismiss this proceeding.

[8] Pages 562 – 573 of my Seventh Affidavit
[9] Pages 577 – 580 of my Seventh Affidavit
[10] Pages 466 – 515 of my Seventh Affidavit being exhibit AMG 6 of my affidavit dated 6th February 2015 filed in each of VID 730, VID 731 and VID 732 of 2014 in support of my applications for a stay. adjournment of those proceedings.
[11] Exhibit AMG 9 of my Seventh affidavit at pages 204 - 210
[12]

5.2. That application was granted in circumstances where I had already made submissions on the merits of my application in two parts which I respectfully submit reveal an arguable case.

5.3. I submit that the Authorities in respect to *"Applications for Summary Judgment"* in respect to Dismissal are clear; that the Court should only exercise its discretion in circumstances where the case subject of the application is hopeless and there is no discernible arguable case. That discretion should be exercised with caution.

5.4. On the basis of my submissions in Two Parts made on the 4th February 2015 I invite the Court to conclude that there is *"an arguable case to be tried*" and that the Originating Application is far from *"Hopeless"* which in turn has resulted in the application for Summary Judgment in respect to Order 8 of the Originating Application.

5.5. Equally, the Authorities guides the exercise of discretion by this Honourable Court as to Summary Judgment in favour of the Applicant, in support of the Application seeking summary judgment for Order 8 of the originating process and may be exercised in circumstances where the Defence of the Respondents is hopeless.

5.6. I submit to this Honourable Court a summary of the relevant Authorities from Halsbury's Law of Australia **("Annexure 3")**

5.7. The First Part of my submissions for the Hearing of the 4th September 2015 in this proceeding refers to the Authority of this Court in the exercise of its Bankruptcy Jurisdiction to go behind the Default Judgment to assess the Bona Fide nature of the Debt as expressed by the High Court in *Wren v Mahony.*

6. Submissions on Probono Referral

6.1. s23 & s28 of the FCA along with r1.32 of the Rules allows for this Honourable Court to exercise its discretion in the interests of Justice.

> ***1.32 Court may make any order it considers appropriate in the interests of justice***
>
> *The Court may make any order that the Court considers appropriate in the interests of justice.*
>
> *Note See sections 23 and 28 of the Act.*

6.2. r4.12 of the Rules

> ***4.12 Referral for legal assistance***

(1)The Court may refer a party to a lawyer for legal assistance by issuing a referral certificate, in accordance with Form 9.

(2) When making a referral under subrule (1), the Court may take the following matters into account:

(a) the means of the party;
(b) the capacity of the party to otherwise obtain legal assistance;
(c) the nature and complexity of the proceeding;
(d) any other matters the Court considers appropriate.

(3) The referral certificate may state the kind of legal assistance for which the party has been referred.

6.3. There are a number of purposes for these submissions which include my submissions in support of the exercise of the Court's discretion in favour of a referral to the Probono Scheme under r4.12(1).

6.4. In order to be comfortable that the Court should exercise discretion in favour of the Referral sought this Honourable Court should consider the aspects of this proceeding as set out in r41.12 (2)

6.4.1.Regarding r4.12(2)(a); In respect to my means I provide evidence of my limited means by way of a copy of a current Commonwealth Health Care card issued in my favour **("annexure 4")**

6.4.2.Regarding r4.12(2)(b); other avenues of Legal Assistance

6.4.2.1. I have made application to Victorian Legal Aid and been advised that as this matter is in the Civil Jurisdiction I am not eligible for Legal Aid.

6.4.2.2. I have made application for Test Case funding to the Commonwealth Attorney General without success

6.4.2.3. I have made multiple applications for Test Case Funding to the Respondent without success

6.4.3.Regarding r4.12(2)(b); The Nature and complexity of the proceedings

6.4.3.1. have been referred to in my submissions in Two Parts dated 4th February 2015, and
6.4.3.2. set out in evidence adduced thus far in Eight Affidavits,
6.4.3.3. the statement of claim filed with the originating process and

6.4.3.4. the proposed amended statement of claim and my submissions to the Parliamentary inquiry n Taxation Disputes [13]

6.4.4.Regarding r4.12(2)(b); Other Matters that the Court Deems appropriate including;

6.4.4.1. The expanded s37AO pursuant to leave granted on the 4th February 2015, and

6.4.4.2. The duplication of the s37AO application made in VID 739 of 2014 made in circumstances where the orders sought may only be made once and may be considered as an abuse of process for an improper purpose, and

6.4.4.3. The relevant strengths of the Parties in circumstances where the resources of the Commonwealth are limitless as evidence by the team brought to bear thus far representing the Respondents,[14]

6.4.4.4. Details adduced regarding "Operation Winebar" and

6.4.4.4.1. the correspondence with the Respondents and the Solicitor for the Respondents over an extended period[15]

6.4.4.4.2. the FOI releases provided and evidence of the Respondents seeking orders to restrict my rights under the FOI Act.[16]

6.4.4.4.3. Issues relating to the ATO Culture[17]

6.4.4.4.4. Failure to pursue Alternate Dispute Resolution

6.5. R4.12(3) sets out that the Court may make the referral for *"a kind of Legal Assistance"* which in this circumstance I seek referral for the purposes of Alternate Dispute Resolution through mediation and an order under s53A of the FCA and r28.02 of the Rules in the hope of settling the proceedings and saving of Court Resources, expense to the Public Purse and expenses to the Respondents.

6.5.1.I appeared before the Honourable Justice Beach on the 11th February 2015 in VID 730, VID 731 and VID 732 of 2015 being and Interlocutory hearing for a stay of each of the proceedings pending a decision of this learned court in respect to my application for summary judgment in respect to Order 8 of the final orders sought in this proceeding,

[13] Exhibit AMG 1 of my Seventh Affidavit at pages 6-81 and Exhibit AMG 2 of my Seventh Affidavit at pages 82-115
[14] Exhibit AMG 1 of my Fifth Affidavit at pages 524-527 evidencing at least 60 ATO personnel involved in my Tax Affairs and that of entities related to me
[15] Exhibit AMG 1 of my Fifth Affidavit at pages and the Affidavit of Vincent Tavolaro dated 11th December 2014
[16] Exhibit AMG 1 of my Sixth Affidavit at pages 4-1364
[17] Exhibits AMG 2-AMG 6 pf my Sixth Affidavit at pages 1365-1462; Exhibit AMG 5 of my Seventh Affidavit at pages

6.5.2. The hearing on that day was also to make directions in respect to the application for leave.

6.5.3. His Honour made comment that the finalisation of that order *"could take years"* and it would not be in the interests of finalisation of the proceedings to await the Judgment of this Honourable Court in respect to that order.

6.5.4. His Honour's commentary resonated with me, I have no desire to be in this court for years and have already set out my application for Alternate Dispute Resolution above at paragraphs 3 & 4.

7. Expanded s37AO application made by the Respondents

7.1. Amongst the amendments to the application dated 11th December 2014 sought by the Respondents on the 4th February 2015 was an application to expand the effect of the application to protect all persons and, in effect, an application for summary dismissal which I submit was made on that day for an ulterior purpose and was a "surprise attack" that was properly considered by the Respondents as being the best way to catch me unprepared as a hall mark of experienced and professional Litigants.

7.2. I submit and invite this learned Court to agree that the Respondent and his solicitor , in compliance with the relevant "Model Litigant Obligations" **("MLOs")**, should have sought to apply the principles of procedural fairness and made a further application to amend the application dated 11th December 2015 in this proceeding which could have been made at any time by the respondents in the preceding 55 days.

7.3. Indeed I believe I recall that the Respondents advised this learned Court orally that a further application had been made in VID 739 of 2015 unders37AO of the FCA for orders in the identical form[18].

7.4. The Orders sought in the two applications filed in VID 600 of 2014 and VID 739 of 2014 can only be made once consequently I respectfully submit that the application made in VID 739 of 2014 on the 7th January 2014 was made for an ulterior purpose and was an abuse of process designed to frustrate the orderly hearing of VID 739 of 2014 that was previously set down for hearing on the 6th February 2015 before the Honourable Davies J.

7.5. As a consequence of that application by the Respondents the Hearing date was moved forward to the 30th January 2015 and was heard by the Honourable Davies J.

[18] Exhibit AMG 7 of My Eighth Affidavit

7.6. The Honourable Justice declined to make the orders sought by the Respondents in VID 739 of 2015 and Dismissed the Application of the Respondents on the basis of my oral submissions that the application made in VID 739 of 2014 dated 7th January 2015 was an abuse of Process and was brought for an improper collateral purpose.

7.7. Her Honour made orders that I file and serve relevant affidavit materials in that proceeding by the 6th March 2015 **("Annexure 4")** for a directions hearing on the 15th March 2015.

7.8. I submit that the s37AO application made on the 11th December 2014 in VID 600 of 2014 is an application made for an improper Ulterior Purpose and is an Abuse of Process as was the application made on the 7th January 2015 in VID 739 of 2015.

7.9. I confirm that during the hearing of the 30th January 2015 in VID 739 of 2015 I sought Liberty to apply in respect to a foreshadowed application for Summary Judgment to strike out the s37AO application brought by the Respondents and the 39 B orders sought by me in that proceeding which relates to decisions of the Respondent and his personnel made on the 26th November 2014 being a date after the acceptance of filing of these proceedings.

7.10. The Honourable Davies J advised that there was no restraint on making the relevant application and consequently orders for Liberty to Apply were not needed.

No Appeal of VID 187 of 2014 VID 197 of 2014, VID 198 of 2014 and HCA M42 of 2014

7.11. The Respondents have relied heavily in their submissions on the 4th February 2015 in support of the 37AO order on the reasons of the Honourable Davies J given on the 5th June 2014 in VID 187 of 2014 and VID 198 of 2014. Her Honour summarily dismissed Application VID 197 of 2014, I did NOT Appeal those reasons.

7.12. Upon proper consideration of Her Honours Reasons in all of the proceedings I did NOT apply for Review of Her Honour's Orders as I felt the Judgments and Reasons were sound.

7.13. I invite this Honourable Court to Conclude that as a Party I made a conscious decision to NOT Appeal those reasons which behaviour is NOT consistent with the threshold test under s37AO of the FCA that I have persistently commenced proceedings to harass or annoy without reasonable prospects of success.

7.14. In order to meet the 37AO Threshold Test I would have had to file Notices of Appeal or applications for Leave to Appeal in those 3 proceedings in circumstances where I had NO reasonable Prospects of Success.

7.15. No Appeals and no steps were taken to Appeal in any of VID 187, VID 197 and VID 198 of 2014.

7.16. Relevantly HCA M42 of 2014 relates to issues arising from the conduct of my former lawyers Hambros and Cahill as an Incorporated Legal Practice and that company's Directors Peter Hambros and Francis Cahill.

7.17. I sought to bring issues relating to the administration of justice in respect to unrepresented parties to the attention of the High Court of Australia as I perceived them and the need for an interpretation of a matter arising out of the Constitution that *"the Right of Access to Justice"* inferred by Common Law under the Constitution ought be properly interpreted as *"the Right of Represented Access to Justice*"

7.18. The Honourable Justice Crennan dismissed leave to file and serve those proceedings consequently no proceeding was ever commenced in the High Court of Australia that required the attention of the Respondents.

7.19. I did NOT Appeal the Reasons of the Honourable Justice Crennan consequently I submit it cannot be concluded by this Honourable Court that I have persistently pursued the High Court Application for Leave with the intention to Harass or Annoy the Respondents in this proceeding OR any other person.

7.20. Relevantly I have already referred to the findings made in my favour in (2015) FCCA 54 in Part 1 of my submissions for the hearing dated 4th February 2015[19] in which the Honourable Burchardt J came to the conclusions that I agreed with that;

> *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."*

7.21. I disagreed with His Honours Orders but only part of His Honours reasons consequently I have lodged a Notice of Appeal [20]in this Honourable Court given VID 49 of 2014; *Garrett v Cahill* As a have developed the view that His Honours findings did not go far enough against Hambros and Cahill

7.22. On the 8th September 2014 I lodged for filing a further application for Mandamus [21]in respect to the Chief executive of Austrade seeking that the relevant Grant Determination be made a copy of which application and evidence of lodgement was provided to the proposed respondent under

[19] Exhibit AMG 5 of my Eighth Affidavit at pages 607 - 724
[20] Exhibit AMG 6 of my Eighth Affidavit at pages 625 - 647
[21] Exhibit AMG 1 of my Eighth Affidavit at pages 5 - 16

cover of an email from me offering to withdraw the application on the basis that the CEO of Austrade made the Grant Determination.

7.23. On the 12th September 2014 Paul Wan for Austrade advised that a Grant Determination would be made on the 16th September 2014 on which basis I withdrew the application by my own hand.

7.24. Subsequent to the making of the Grant Determination by the CEO of Austrade VID 584 and VID 585 were commenced by me that relevantly, rely upon a rationale published within the reasons of Davies J dated 5th June 2014 in VID 187 of 2014 and that I relied upon in my submissions in VID 584 and VID 585 of 2014; *Andrew Garrett v Austrade* to the Honourable Jessup J as follows;

41. Her Honour set out in her reasons dated 5th June 2014 in VID 187 of 2014 that it was not an issue as to whether *"the existence of an alternative remedy should not be determinative that the Court Should not exercise its discretion"*[12]

> 24 The fact that the EMDG Act provides rights of merits review provides a discretionary reason why the Court may decline to exercise jurisdiction under the ADJR Act because adequate remedy is provided for by that Act, but the existence of an alternative remedy would not be determinative that the Court should not exercise jurisdiction: *Domaine Finance Pty Ltd v Commissioner of Taxation* (1985) 8 FCR 538 at 543 per Fisher J; *SmithKline Beecham (Australia) Pty Ltd v Chipman* [2002] FCA 674 at [65]-[66], [87]-[88], [105].

7.25. As a consequence of my submissions dated the 27th November 2014,the Honourable Jessup J published his reasons on the 5th February 2015 finding in my favour and VID 584 of 2014 and in favour of the Respondent in VID 585 of 2014 in respect to the Notices of Competency[22]

7.26. Following the publishing of those Reasons I wrote to the Solicitor for the Respondents and advised I would not be appealing the Reasons of His Honour in VID 585 as follows;

andrew.garrett@taggc.com.au

From: andrew.garrett@taggc.com.au
Sent: 10 February 2015 15:33
To: 'Norman Abrams'
Subject: RE: VID 584 & VID 585 of 2014; Affidavit [MA-M.FID94210]
Attachments: Garrett v Chief Executive of Austrade (2015) FCA 39 delivered 5th February 2015.pdf

Importance: High

Hi Norman

Further to the recent findings by His Honour I note that the Notice of Competency under the ADJR was upheld while the application under s39B was dismissed.

[22] Exhibit AMG 2 of my Eighth Affidavit at pages 17 - 31

I confirm that I am minded to seek review of His Honours Reasons in respect to the ADJR application VID 585 of 2014; it appears to me that what his honour was saying was that I would be a person aggrieved but for the lack of submissions on the point.

Unless I have misunderstood His Honour could I ask whether your client would consent to orders reinstating VID 585 of 2014 and acknowledgment of my standing as a person aggrieved both as Trustee and General Beneficiary and the curing of the lack of submissions?

On the other hand I note that the Federal Court Rules set out as follows;

31.12 Joinder of claims for relief

(1) A claim for relief under Division 31.1 that arises out of, relates to or is connected with the same matter as the application under this Division must be made in one application.

Note Division 31.1 provides for applications for review under the AD(JR) Act.

(2) A claim for relief, other than an application under Division 31.1, may be joined in an application under this Division if the claim for relief:

(a) is within the jurisdiction of the Court; and

(b) arises out of, or relates to or is connected with, the same subject matter as the application.

On this basis I seek to proceed to summary judgment on the question of law regarding the Certificate of Solvency and incorporating the ADJR matter within VID 584 of 2014 pursuant the r31.12 which has not yet been addressed by his honour.

This will prevent a duplication of proceedings continuing and confusion over who submitted what in which proceeding.

Could I seek your client's views by return email?

Andrew Garrett
Chief Executive Officer/ Winemaker
The Andrew Garrett Group of Companies (TAGGC)

7.27. I have not received a response from the Solicitor for the Respondents at this Juncture.

No Appeal in VID 585 of 2014

7.28. Following the failure of the solicitor of the respondent to reply I have now filed an Interlocutory Application for Summary Judgment and the adding of the Statement of Claim in VID 285 of 2014 to the statement of claim in VID 584 of 2014 in order to avoid consuming the Court's time with an essentially unnecessary application for leave to appeal the reasons of Jessup J made in VID 585 of 2014.

7.29. I invite the Court to conclude that the aforementioned conduct is not the conduct of a person who seeks to unreasonably harass and annoy persons without prospects of success and consequently the expanded orders under s37AO are not orders that should be made.

8. Submissions in Support of Summary Judgment of Order 8 of the Originating process.

8.1. I have already set out in my statement of claim and my submissions in two parts for the hearing dated 4th February 2015 aspects of the issues related to this application for Summary Judgment.

8.2. There is some duplication of evidence in the various affidavits filed by me as a consequence of annexures to communications between the Respondents, the Respondents Solicitor and I consequently I seek to only rely on limited affidavit materials for the purposes of this application.

8.3. Summaries of the details of my claim in support of the application for summary judgment have been put to the Respondents and the solicitor for the Respondents over an extended period and have been summarised in my email to the Third and Fourteenth Respondents dated 24th June 2014.

8.4. That email dated 24th June 2014 was sent prior to the provision of the FOI materials that are summarised in my affidavits sworn in support of the application for Stay/Adjournment dated the 6th February 2015 which are all identical.

8.5. The Affidavit sworn in VID 731 of 2014; *Andrew Garrett v Make Wine & Ors* is a subject of the application for leave to adduce further materials because I submit it narrows the evidence provided by FOI in a very clear way in respect to this application for Summary Judgment. [23]

8.6. The issues were also summarised in an email to the Solicitor for the Respondents dated 16th July 2014[24]

8.7. I had previously written to the Third Respondent in respect to what I alleged was Morally reprehensible behaviour of the Respondents which was referred to in a letter in reply from the Fourteenth Respondent dated 13th September 2013[25]

<u>The FOI release regarding the Four Year Rule</u>

8.8. At all relevant times the Respondent and his Personnel have asserted that the entering into the RBA of the GST Corrections flowing from amending activity statements was an error as a consequence of the application of the Four year Rule as set out in the letter from the Fourteenth Respondent referred to at paragraph 8.7 and also in a letter dated 22nd November 2013 from the Seventh Respondent to the Applicant[26]

8.9. The Respondent received advice from the Legal Services Brach [27] on a date that I cannot identify from the face of the FOI release that the Respondents all knew was NOT correct that the Taxpayer could not legally apply for the relevant corrections[28] in circumstances where the findings of this learned court in KAP Motors Applied[29]

[23] Exhibit AMG 4 of my Eighth Affidavit at pages 39 -606
[24] Exhibit AMG 1 of my Fifth Affidavit at Pages 435 - 438
[25] Exhibit AMG 1 of my Fifth Affidavit at Pages 108 - 109
[26] Exhibit AMG 10 of my Seventh Affidavit at page 242
[27] Page 467-468 of my eighth affidavit/ also page 158-159 of my fourth Affidavit
[28] Page 467 of my eighth affidavit/ also page 158 of my fourth Affidavit Para 1 of the Decisions and Reasons
[29] Page 469 -470 of my eighth affidavit/ also page 160-161 of my fourth Affidavit

8.10. *In fact I respectfully submit that the issues involved in this application are not complex* on the 20th July 2014 I wrote again to the Solicitor for the Respondents, the Third, the Seventh, the Eighth and the Fourteenth Respondents and the Commonwealth Ombudsman addressing the relevant issues that the Commissioner in fact knew that he could not reverse the GST corrections Legally due to the Four Year Rule[30]

8.11. The Respondent made submissions in an application to set aside the Default Judgment that was heard before the Honourable Master Norman of the District Court of South Australia that the Court could not be certain that I was a properly appointed Trustee of the Andrew Garrett Family Trust **("AGFT")** and therefor lacked the proper standing to bring the Application to set aside the Default Judgment consequently that Honourable Court found that the application was a Nullity.

8.12. And yet, in this proceeding, the Respondent have admitted at paragraph 3 of the Defence filed in this Honourable Court in reply to the Statement of Claim dated 29th September 2014 that I was a Trustee of the AGFT at the relevant time.

> 3. Save that the Respondents admit that the Applicant was the trustee of the Andrew Garrett Family Trust (the **AGFT**) at settlement of that trust and at various other times until 8 June 2013, the Respondents do not admit paragraph 1.3 and say further that AGFT was settled by deed on 31 May 1993 and not 31 May 1991.

8.13. The Admission is the reverse of the submissions made to the learned Master Norman that I invite this learned court to agree were made in effort to mislead that Honourable Court, The Respondents have always been aware that I was reappointed as a Trustee of the AGFT on the 19th January 2006 and that I resigned as Trustee of that Trust on the 30th September 2009 on conclusions of the submissions in DCCIV-2003-1666 on the 12th September 2009.

8.14. For the whole of the relevant period I confirmed my standing as a Trustee of AGFT which Trust was settled under the law of South Australia and *the Trustee Act* 1936 (SA) which sets out at s14(1)(2) as follows

> ***Power of appointing new trustees***
>
> *14. (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead or remains out of the State for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person, or no such person*

[30] Page 467 of my Eighth Affidavit/ also pages 158 of my Fourth Affidavit Para 2 of the Decisions and Reasons

able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the representatives of the last surviving or continuing trustee, may, by writing, appoint a person or persons to be a trustee or trustees in the place of the trustee dead, remaining out of the State, desiring to be discharged, refusing or being unfit or being incapable, as aforesaid.

(1a) The person, or any of the persons, by whom or with whose consent the appointment of a new or additional trustee is required to be made, may appoint himself or, as the case may be, consent to the appointment of himself as a new or additional trustee.

8.15. As the sole Trustee of the Trust the property of the AGFT vested solely in me at that time consequently I was empowered to bring the application

8.16. Mr Goggins for the Respondent sets out in an email to Ms James dated 3rd April 2009 that the Master seemed to be having trouble with the issues surrounding the issue of NOT a Taxable Supply [31]

The ATO collusion with Macks

8.17. A further FOI release dated 25th August 2014 was provided to me in respect to the correspondence between Macks and the personnel of the Respondent between the 25th August 2004 and June 2005[32]

8.18. Relevantly the personnel of the Respondent were provided a copy of my Statement as to affairs by Macks annexed to a letter dated 16th November 2004 from Macks to the attention of Mr John Groom[33]

8.19. At all relevant times between that date and today's date the Commissioner has been aware that I had declared that I had no debts at all as at the date of the making of the sequestration order and that the Judgment Debt was obtained in respect to a Debt that did not in fact exist.

8.20. Between the 27th October 2004 and the 25th November 2004 the personnel of the Respondent colluded with Macks to make submissions in a hearing for review of the sequestration order before Federal Magistrate Lindsay to artificially inflate the claim of Macks as to fees charged by him and Lipman Karas in the two months since his appointment of $195,000.[34]

8.21. The hearing of the review of the sequestration order occurred on the 7th December 2004 in ADG 90 of 2014

[31] Page 471 of my Eighth Affidavit/ also pages 1 of my Fourth Affidavit
[32] Pages 401 – 465 of my Eighth Affidavit
[33] Pages 433 – 457 of my Eighth Affidavit
[34] Page 460 of my Eighth Affidavit

8.22. His Honour Magistrate Lindsay observed in his reasons published on the 24th January 2004 [35]

> 30 *"In relation to the issue of prejudice to the respondent, Mr Groom in the same affidavit annexes a report he received from the trustee of Mr Garrett's estate on 26 November 2004. This was sent in response to a request for same by Mr Groom on 24 November 2004. The response indicates the nature of the work undertaken by the trustee and persons delegated by him to assist in the period to 19 November 2004 and suggests that to that time the trustee has carried out work to the sum of $95,000 and that solicitors engaged by him have carried out unbilled work in progress in the amount of approximately $100,000. These costs, relating as they do to a period of less than 2 calendar months seem at first blush to be excessive, but it is inappropriate for me to express any view about that."*

8.23. I did not seek to apply to review the decision of Magistrate Lindsay until the 25th September 2007.

8.24. The issues related to Not a Taxable Supply and the correction of to the Running Balance Account has only ever been ventilated before the Honourable Master Norman following the commencement of the application to set aside the Default Judgment on the 6th December 2006 by me.

8.25. I have already set out my submissions on the hearing of the 4th February 2015 in respect to the obligations of the Trustees in Bankruptcy of going behind the Default Judgment.

Circumstances of Correction to the Running Balance Account of AGFT and subsequent communications

8.26. I have compiled Volume 5 of my Fifth affidavit dated 14th July 2014 filed in VID 304 of 2014 to comprehensively set out the circumstances in which amending activity statements were first issued by the Commissioner[36]

8.27. Between the 18th and 26th January I entered into correspondence with Michael Jones for the Respondent in respect to ATO Complaint Case # 5898600 that had been made the previous year[37]

8.28. Subsequently Mr Jones wrote to me on the 19th February 2008 setting out that the rights to dispute the liability of the AGFT vested in the Trustee in Bankruptcy which in fact could not be correct.[38]

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[35] *GARRETT v D.C.T.* [2005] FMCA 19
[36] Exhibit AMG 10 of my Seventh Affidavit at pages 211 to 643
[37] Exhibit AMG 10 of my Seventh Affidavit at pages 391 - 392

8.29. I submit that Mr Jones was incorrect and that the only persons authorised to act on behalf of the AGFT was the Public Officer or the Trustee of AGFT which in this case was the Applicant who was both Public Officer and Trustee of AGFT.

8.30. I treated that email as a Taxation Assessment[39], in error, and applied to the Administrative Appeals Tribunal in Perth who correctly made findings that the AAT did not have jurisdiction in AAT proceeding 2008/2197 that was referred to in my correspondence dated 28th August 2008 [40]

8.31. As a consequence of that Appearance I was better informed as to the appropriate steps to take next and advised the commissioner by way of fax [41]again restating my advice of December 2007 which was the subject of Complaint Case # 5898600

8.32. As a Direct result of that Fax I finally received an acknowledgement of my notification of entitlement on the 1st September 2008 advising of the steps I needed to take to obtain the refund[42]

8.33. I confirmed by way of letter on the 24th September 2008 that I had taken the appropriate steps as set out in that letter dated 1st September 2008 and lodged the amending activity statements.[43]

8.34. Exhibit AMG 10 of my Seventh Affidavit also sets out the further correspondence with the personnel of the Commissioner[44] dated;

8.34.1. 17th October 2008, and

8.34.2. 21st October 2008, and

8.34.3. 29th October 2008 being my first attempt to seek the Respondent to consent to orders to set aside the Default Judgment, and

8.34.4. 8th September 2011, and

8.34.5. 22nd October 2011 in respect to recognition of my valid appointment as Trustee of AGFT annexing copy of Confirmations of revised activity statements and the resultant amended RBA showing a positive balance for AGFT.

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[38] Exhibit AMG 10 of my Seventh Affidavit at page 393
[39] Exhibit AMG 10 of my Seventh Affidavit at pages 394 - 396
[40] Exhibit AMG 10 of my Seventh Affidavit at pages 397 - 398
[41] Exhibit AMG 10 of my Seventh Affidavit at pages 400 - 401
[42] Exhibit AMG 10 of my Seventh Affidavit at pages 402 - 404
[43] Exhibit AMG 10 of my Seventh Affidavit at pages 405 - 407
[44] Exhibit AMG 10 of my Seventh Affidavit at pages 408 - 435

8.34.6. 28th September 2012

8.35. Following the findings of this learned Court in *KAP Motors* the Respondent and his personnel sought the passing of *the Tax Laws Amendment (2008 Measures No 3) Act* [45]which relevantly;

8.35.1. Was Enacted on the 1st July 2008

8.35.2. Came into effect by Royal Assent on the 20th September 2008

8.36. PSLA 2002/12 relating to Refunds included in the price of Non Taxable Supply was withdrawn was withdrawn with effect from the 15th September 2008[46]

8.37. Between the date of commencement of payments by the Third Respondent in VID 425 of 2014 and the 26th July 2000 all payments made under the Garrett Family License were made to the Garrett Family Trust[47]

8.38. The Respondent and his personnel executed a Creditors Petition presented 12th May 2004 and was set down for its first hearing on the 21st June 2004.[48]

8.39. I first Drafted Consent Orders for the Respondent to consent to on the 29th October 2008 [49]

8.40. As at the 31st March 2004 a Balance Sheet and P&L prepared by my accountant evidenced that in the absence of the conduct of the National Australia Bank the AGFT was in excellent financial shape.[50]

8.41. As a consequence of my loss of standing as a trustee of the AGFT on the 4th June 2004 and the sequestration order I was no longer able to agitate proceedings in court which resulted in the Vexatious Litigant orders made by Anderson J and Layton J that are relied upon by the Respondents in seeking the orders under s37AO of the FCA.

8.42. A guide was published by the Commissioner for correction of GST Mistakes as NAT 4700-07.2004 as it applied prior to the KAP Motors Decision[51]

8.43. Further relevant details relating to the correction of GST Mistakes following the KAP Motors Decision were set out in the draft ruling 2008/D4[52]

[45] Exhibit AMG 10 of my Seventh Affidavit at pages 366 - 393
[46] Exhibit AMG 10 of my Seventh Affidavit at pages 384 - 390
[47] Exhibit AMG 10 of my Seventh Affidavit at pages 243 - 284
[48] Exhibit AMG 10 of my Seventh Affidavit at pages 285 – 303 including a copy of the affidavit in support,
[49] Exhibit AMG 10 of my Seventh Affidavit at pages 307 - 308
[50] Exhibit AMG 10 of my Seventh Affidavit at pages 309 - 312
[51] Exhibit AMG 10 of my Seventh Affidavit at pages 313 - 328
[52] Exhibit AMG 10 of my Seventh Affidavit at pages 329 - 362

8.44. I submit to this Honourable Court that were it not for the actions of the Respondent and his personnel as revealed in the relevant FOI releases then the Vexatious Litigant orders made never have been made in the Supreme Court of South Australia OR in the Federal Court of Australia in VID 248 of 2014;

8.45. For the reasons expressed in these submissions I respectfully submit that the conduct of the Respondent in cancelling the Amending Activity Statements in circumstances where the Commissioner was aware that he could not legally amend the Running Balance Account because of the Four Year Rule as it applied post 20 September 2008 following the passing of *the Tax Laws Amendment (2008 Measures No 3) Act* that the case of the Respondents in defending a writ of Mandamus sought under Order 8 of the Originating process would be hopeless and bound to fail.

8.46. I submit that this Honourable Court should make Order 8 in a form that embodies the principles of the Order 8 sought in the Originating Process.

Dated February 15th, 2015

……..
Andrew Garrett
Applicant

andrew.garrett@taggc.com.au

From: andrew.garrett@taggc.com.au
Sent: 22 January 2015 10:37
To: Tavolaro, Vincent
Subject: VID 600 of 2014; Offer to settle

Annexure 1

Importance: High

Dear Vincent

Further to your recent communications in respect to this matter I note from the Court File that your client has not filed a genuine Steps Statement in accordance with the provisions of the Civil Disputes Resolution Act 2011 (Cth)

As you are aware I have previously made three applications to the Commissioner for Compensation, I note that no further response has been received from the 14th Respondent in this regard.

Could you please confirm whether it is your client's intention to respond to the Third Application for Compensation and make an offer to settle this dispute?

I advise that I am willing to consider a reasonable offer to settle this dispute in order to save the Court and your Client further expense.

Please advise whether your client is amenable to making such an offer at your earliest convenience.

Andrew Garrett
Chief Executive Officer/ Winemaker
The Andrew Garrett Group of Companies (TAGGC)

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Annexure 2

Andrew Garrett

From: Tavolaro, Vincent <Vincent.Tavolaro@ags.gov.au>
Sent: 28 January 2015 13:27
To: 'Andrew Garrett'
Subject: RE: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [DLM=Sensitive:Legal]

I refer to your email below and respond as follows:-

1. The Commissioner of Taxation does not propose to make an offer of settlement at this point in time.

2. Given that what you are seeking as part of the 'Third Application for Compensation' is essentially the same as the relief sought in proceeding VID600/2014 Ms Ferry cannot consider the claim until that proceeding is concluded.

3. It is premature to consider whether there is any scope for an Agreed Statement of Facts. That should be deferred until after determination of our clients' Interlocutory Applications.

Vincent Tavolaro
Senior Executive Lawyer
Australian Government Solicitor
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vincent.tavolaro@ags.gov.au
Find out more about AGS at http://www.ags.gov.au

From: Andrew Garrett [mailto:andrew.garrett@oenoviva.com]
Sent: Tuesday, January 27, 2015 2:53 PM
To: Tavolaro, Vincent
Subject: RE: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [SEC=UNCLASSIFIED]
Importance: High

Noted, I will oppose hearing on that date although support that the matter is heard by Justice Pagone on a date to be fixed.

The usual sort of timetable in respect to swearing affidavit materials out to apply.

As you may be aware I have appealed the reasons of Tracey J delivered on the 21st November 2014 in VID 304 of 2014; *Andrew Garrett v Peter Macks* and VID of 2014; *Andrew Garrett v Stephen Duncan.*

On the 22nd January 205 I wrote to you and invited your client to make an offer to settle based on the evidence filed in VICSC-2013-02968, VICSC-201403880, , VID 187 of 2014, VID 197 of 2014, VID 557 of 2014, VID 600 of 2014, VID 739 of 2014 and the various AAT proceedings.

I made that invitation on the basis of your client's obligations under the CDDA Scheme, the Legal Services Directions 2005 and the Civil Disputes Resolution Act 2010 (Cth).

I note that I have not yet heard from Ms Ferry in respect to my Third Application for Compensation dated 7th August 2014 in which regard Ms Ferry last communicated with me on the 22nd August 2014.

Please confirm whether Ms Ferry intends to respond to my application by return email.

In the absence of an offer to settle could I suggest that we agree to settle a Statement of Agreed Facts in order to assist the court.

Andrew Garrett
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E: andrew.garrett@oenoviva.com

From: Tavolaro, Vincent [mailto:Vincent.Tavolaro@ags.gov.au]
Sent: 27 January 2015 09:49
To: 'Andrew Garrett'
Subject: RE: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [SEC=UNCLASSIFIED]

I am still awaiting a response from the Court.

Just to clarify, what was being requested was for the Interlocutory Application, which has since been e-lodged with the Court, be listed for hearing not "mention" before Justice Pagone on 4 February 2015.

Vincent Tavolaro
Senior Executive Lawyer
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From: Andrew Garrett [mailto:andrew.garrett@oenoviva.com]
Sent: Sunday, January 25, 2015 12:53 PM
To: Tavolaro, Vincent
Subject: FW: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [SEC=UNCLASSIFIED]

Dear Vincent

Further to my email dated 2oth January 2015 I am not clear whether the Federal Court has responded to you with respect to your letter seeking that VID 739 of 2014 is listed for mention with VID 600 of 2014 on the 4th February 2015.

I am prepared to consent to orders in this regard……and ask whether your client would consider instructing you to draft appropriate consent orders.

Andrew Garrett
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From: Andrew Garrett [mailto:andrew.garrett@oenoviva.com]
Sent: 20 January 2015 12:44
To: 'Tavolaro, Vincent'
Subject: RE: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [SEC=UNCLASSIFIED]

Dear Vincent,

Thank you for your note I have been travelling Internationally since the 21st December 2014 and arrived back in Australia on the 9th January 2015 working up sales for various territories abroad.

I have commenced work on further affidavit materials and the relevant submissions and advise a further application for orders will be forthcoming.

Amongst the orders sought will be applications for Writs of Prohibition, Mandamus and Certiorari which flows from recent Taxation decisions made by the Commissioner

While abroad I received an email from you copying a communique to the Federal Court seeking that VID 739 of 2014 be heard together with VID 600 of 2014.

I also provide preliminary advice that I will also be issuing a further application in respect to the Reasons of Senior Member Egon Fice delivered on the 28th August 2014.

I would hope to be in a position to file and serve that additional detail by Monday 26th January 2015.

My sincere apologies for the inconvenience.

As you know I am an unrepresented party and admit that I am finding the sheer volume of the matters all consuming.

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From: Patrick, Cathy [mailto:Cathy.Patrick@ags.gov.au] **On Behalf Of** Tavolaro, Vincent
Sent: 20 January 2015 12:32
To: 'Andrew Garrett'; 'andrew.garrett@taggc.com.au'
Subject: Commissioner of Taxation -ats- Andrew Morton Garrett (VID 600 of 2014) [SEC=UNCLASSIFIED]

I refer to the Orders made by the Court on 27 November 2014.

Pursuant to Order 2, you were required to file and serve any affidavits on which you intended to rely in opposition to our client's Interlocutory Applications together with an outline of submissions and, any affidavit on which you intended to rely in support of paragraph 3 of the orders in the Interlocutory Application filed by you on 19 November 2014 together with an outline of submissions by **4:00pm on 16 January 2015**.

You have not complied with the Orders.

We have not received any communication from you providing an explanation as to why you have not complied with the Orders. Please advise why you have not complied with the Orders and, more importantly, when you will comply with the Orders.

Regards

_____

Catherine Patrick on behalf of Vincent Tavolaro
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Annexure 3

1 of 1 DOCUMENT: Practice & Procedure High Court & Federal Court of Australia/Federal Court Rules 2011/FEDERAL COURT RULES 2011/CHAPTER 2 ORIGINAL JURISDICTION -- PROCEEDINGS GENERALLY [rr 7.01-30.58]/PART 16 PLEADINGS [rr 16.01-16.60]/DIVISION 16.2 STRIKING OUT PLEADINGS [r 16.21]

DIVISION 16.2 STRIKING OUT PLEADINGS [r 16.21]

DIVISION 16.2

Legislation cited in [r 16.20.5] below. LawNow subscribers click through for daily updates and historical versions. (CTH) Federal Court Rules 2011 Division 16.2.(CTH) Federal Court Rules O 11 r 16.

[r 16.20.5] Introductory note

Division 16.2 provides a means by which a party may apply to the Court to have another party's pleading struck out, either in whole or in part. It is the equivalent of O 11 r 16 of the former Rules.

[r 16.21] Application to strike out pleadings

16.21

(1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:

(a) contains scandalous material; or
(b) contains frivolous or vexatious material; or
(c) is evasive or ambiguous; or
(d) is likely to cause prejudice, embarrassment or delay in the proceeding; or
(e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or
(f) is otherwise an abuse of the process of the Court.

(2) A party may apply for an order that the pleading be removed from the Court file if the pleading contains material of a kind mentioned in paragraph (1)(a), (b) or (c) or is otherwise an abuse of the process of the Court.

RULE 16.21

Legislation cited in [r 16.21.5] below. LawNow subscribers click through for daily updates and historical versions. (CTH) Federal Court Rules O 11 r 16.(CTH) Federal Court Rules 2011 r 16.02(2), subr (1)(a), (b), (c), subr (1)(d), (e), (f), Subrule (2).

[r 16.21.5] General

This rule reproduces O 11 r 16 of the former Rules in subr (1)(d), (e) and (f). In addition to the grounds for strike out under the former Rules, pleadings may now be struck out on the ground that they contain material that is scandalous, frivolous or vexatious, or evasive or ambiguous (subr (1)(a), (b) and (c)).

Importantly, the grounds for striking out replicate the matters that r 16.02(2) prohibits a pleading from containing. Accordingly, the annotations to r 16.02(2) are also relevant to the present rule, and vice versa.

Subrule (2) additionally grants the Court power to order that the pleadings be removed from the Court file if they are struck out on the basis of containing material that is scandalous, frivolous or vexatious, or evasive or ambiguous, or if the pleading is otherwise an abuse of the process of the Court.

Legislation cited in [r 16.21.10] below. LawNow subscribers click through for daily updates and historical versions. (CTH) Federal Court Rules 2011 Rule 16.21, r 16.21(1)(a)-(f).

[r 16.21.10] Power to strike out pleadings

The power to strike out pleadings or portions of pleadings is discretionary. It should be employed sparingly and only in a clear case: *Radisich v McDonald* (2010) 198 IR 244; [2010] FCA 762; BC201005037 at [20] citing *Australian Competition and Consumer Commission (ACCC) v Pauls Ltd* (2000) ATPR 41-747; [1999] FCA 1750; BC9908494 at [10]; *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; BC201204877 at [43]; *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263; [2011] FCA 803; BC201105281 at [91]; *Nulyarimma v Thompson* (1999) 96 FCR 153; 165 ALR 621; [1999] FCA 1192; BC9905436 at [208]. A court will be cautious in exercising its discretion to strike out a pleading "lest one deprive a party of a case which it ought to be able to bring": *Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164; 124 ALR 685; (1994) ATPR 41-345; BC9406833 .

A pleading may be struck out, in whole or in part, on the basis of any one or any number of the grounds listed in r 16.21(1)(a)-(f).Ultimately, whether a pleading will be struck out depends upon whether, in the particular circumstances, it is necessary to do so in the interests of justice: *John Holland Pty Ltd v Maritime Union* [2009]FCA 437; BC200903492 at [60]. If the object of the pleading is sufficiently met, the striking out will be unnecessary: *Guglielman v Trescowthick* (2004) ATPR 41-995; [2004] FCA 326; BC200401278 at [8].

Unless futile to do so, a court will ordinarily grant leave to a party to replead those parts of its pleading that have been struck out, or it may give leave to file an entire amended or substituted pleading: *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6; (1992) ATPR 41-192; BC9203668 ; *Nulyarimma v Thompson, above*, at [208]. Leave to file an amended pleading may be subject to terms: *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305; 92 ALR 395; (1990) ATPR 41-001 ; *Mitanis v Pioneer Concrete (Vic) Pty Ltd* (1997) ATPR ¶41-591; BC9705104 (in both cases, an affidavit was sworn verifying the facts to be alleged in the proposed amendments); *Fuller v Toms* [2012]FCA 27; BC201200227 (a date was specified for the filing of amended pleading, following which proceeding would be dismissed).

Leave to replead, however, is not always given, and whether it is given depends on the circumstances of the case: *Fair Work Ombudsman v Eastern Colour Pty Ltd, above*, at [94]; *Kowalski v Mitsubishi Motors Australia Ltd* [2010] FCAFC 73; BC201004196 at [41]. Leave may not be given if the refining process of amendment and further amendment has already occurred: *Fuller v Toms, above*, at [87].The ultimate guiding principle is to do what is just: *Nulyarimma, above*, at [208]; *Fair Work Ombudsman v Eastern Colour Pty Ltd, above*, at [93]. Ordinarily, however, unless the Court's process is being abused by a futile attempt to plead an unarguable cause of action, leave to replead will be granted: see *Coshott v Kam Tou Mak* [1998] FCA 147; BC9800467 , where leave to amend the pleadings was granted even though "heroic surgery" was required because the statement of claim needed to be totally rewritten.

It is unlikely that a pleading will be struck out where a deficiency or lack of detail in the pleading causes no confusion and the substance of the allegations is plain (*HECEC Australia Pty Ltd v Hydro-Electric Corp* (1999) ATPR 46-196; [1999] FCA 822; BC9903580 at [59]; *Forty Two International Pty Ltd v Barnes* [2010] FCA 397; BC201002600 at [110]), or where deficiencies can be overcome by ordering the provision of particulars or the fur-

nishing of affidavits (*Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR 41-691 at 42; [1999] FCA 499; BC9902211).

Rule 16.21 does not grant power to the Court to strike out a statement of facts and contentions: *Australian Securities Investment Commission (ASIC) v Kyriackou* (2010) 76 ACSR 428; [2010] FCA 9; BC201000087 at [35].

[r 16.21.15] Evasive or ambiguous

A party must commit itself clearly to the case it chooses to mount: *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (1996) ATPR 41-522. A pleading may be struck out if it is unintelligible, ambiguous or so vague that it fails to identify the material factual allegations to the extent that the other party is not given notice of the real substance of the claim or defence.

The Court may strike out the whole of a pleading in circumstances where the residue of the pleading, following the striking out, is confusing: *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305; 92 ALR 395; (1990) ATPR 41-001 ; *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1998) 99 LGERA 263; 157 ALR 135; BC9803079 .

Legislation cited in [r 16.21.20] below. LawNow subscribers click through for daily updates and historical versions. (CTH) Federal Court Rules 2011 r 16.21(1)(d).

[r 16.21.20] Pleading likely to cause prejudice, embarrassment or delay

Embarrassment in the context of r 16.21(1)(d) "carries the connotation of a pleading which is susceptible to various meanings, or contains inconsistent allegations or in which alternatives are confusingly intermixed or in which irrelevant allegations are made tending to increase expense. This list is not intended to be exhaustive": *Bartlett v Swan Television & Radio Broadcasters Pty Ltd* (1995) ATPR 41-434; BC9501953 ; *Spiteri v Nine Network Australia Pty Ltd* [2008] FCA 905; BC200804409 at [22]. A pleading will be "embarrassing" where it includes defects resulting in the pleading being unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him or her: *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263; [2011] FCA 803; BC201105281 at [18].

A pleading which is internally inconsistent is embarrassing: *Spiteri v Nine Network Australia, above*, at [23]. A pleading is embarrassing if it contains inconsistencies, or confusing or irrelevant allegations: *Shelton v National Roads and Motorists Association Ltd (NRMA Ltd) (NRMA Ltd)* (2004) 51 ACSR 278; [2004] FCA 1393; BC200407144 at [18].

A pleading may be struck out as having a tendency to cause prejudice, embarrassment or delay in the proceedings, within the meaning of r 16.21(1)(d), if it is plain that the pleading party can not lawfully call any evidence at the hearing to substantiate the pleading, for example, if evidence has been unlawfully obtained: *JC Techforce Pty Ltd & Steinhardt v Pearce* (1996) 138 ALR 522; 35 IPR 196; (1996) AIPC 91-272; BC9603173 .

A pleading that raises a false issue will be liable to be struck out as it would prejudice the other side in having to contest the issue and would inevitably introduce unwarranted delay in the resolution of the real issues: *Radisch v McDonald* (2010) 198 IR 244; [2010] FCA 762; BC201005037 at [33].

[r 16.21.25] Pleading a conclusion

A pleading may be struck out as embarrassing if it simply asserts a conclusion to be drawn from the facts not stated: *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114; (1985) ATPR 40-607 ; *Spiteri v Nine Network Australia, above*, at [23]; *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263; [2011] FCA 803; BC201105281 , at [39]. Although the pleading of a conclusion may in some circumstances constitute a material fact, the pleading will be embarrassing if allegations are made at such a level of generality that

the other party does not know in advance the case it has to meet: *Fair Work Ombudsman v Eastern Colour Pty Ltd, above*, at [40]; *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at 418; [1999] FCA 1101; BC9904933 . However, in recent times there has been some relaxation of this rule.The modern approach to litigation in the Federal Court is not to strike out or order further particulars of a conclusionary pleading if it appears unnecessary in the circumstances of the particular case to achieve the object of pleadings: *Fair Work Ombudsman v Eastern Colour Pty Ltd, above*, at [42].

Legislation cited in [r 16.21.30] below. LawNow subscribers click through for daily updates and historical versions. (CTH) Federal Court of Australia Act 1976 s 31A.(CTH) Federal Court Rules 2011 r 16.21, r 26.01(1)(c).

[r 16.21.30] No reasonable cause of action or defence

The power to strike out a pleading because it discloses no reasonable cause of action will be exercised only in a plain and obvious case, where it is clear that no reasonable amendment can cure the alleged defect and there is no reasonable question to be tried: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; BC201204877 at [43]; *Van Aken (as Trustee of the Van Aken Family Trust) v Diver Nominees Pty Ltd (in the matter of Microheat Technologies Pty Ltd)* [2012]FCA 829; BC201205830 at [62]; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130; [1965] ALR 636; (1964) ALJR 253; BC6400590 ; *Webster v Lampard* (1993) 177 CLR 598 at 602; 116 ALR 545; 67 ALJR 886; BC9303614 . The mere fact that the case appears to be a weak one is not of itself sufficient to justify striking out of the action: *Allstate Life Insurance Co v ANZ Banking Group Ltd* [1994] FCA 636; BC9400129 at [24]; *Van Aken, above*, at [62]. If a question raised by a pleading is "fairly arguable" the Court will decline to strike out the pleading: *Metroplaza Pty Ltd v Girvan (NSW) Pty Ltd (in liq)* (1993) ATPR 41-241; BC9304777 .

An application to strike out a statement of claim on the ground that it does not disclose a reasonable cause of action involves establishing that the applicant's case is so untenable that it cannot possibly succeed: *General Steel Industries Inc, above*at 130 ; *Empire Shipping Co Inc v Owners of The Ship Shin Kobe Maru* (1991) 32 FCR 78; 104 ALR 489; BC9103462 . In the case of a defence, it involves establishing that the defence discloses no reasonable defence: *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq)* (1993) 43 FCR 510; 115 ALR 377; BC9304923 . In order to succeed on an application for strike out on this basis, a party must show that the claims made against it are hopeless and would have no chance of success if the action were to proceed to hearing: *Warne v Genex Corp Pty Ltd* (1996) 35 IPR 284; BC9603040 ; *Alcock v Commonwealth* [2012] FCA 870; BC201205999 . A matter will have no real prospect of success where there is a fanciful rather than a realistic prospect of success: *Vranic v Secretary, Dept of Education, Employment and Workplace Relations* [2009] FCA 672; BC200905443 at [24].

The power to dismiss the proceeding under s 31A of the Federal Court of Australia Act 1976 (see [33,107]) is distinct and separate from the power to strike out a pleading. The striking out of a pleading leaves the proceeding itself on foot. Admittedly, this raises the question of what will replace it – an amended pleading or affidavits. If the Court concludes, not just that the particular pleading must be struck out, but also that to allow it to be replaced would be futile because the proceeding itself is also futile, the Court will generally order that the proceeding be dismissed.

Under s 31A, the Court must be satisfied that the relevant party has no reasonable prospects of success, which does not involve looking at whether the case is hopeless or bound to fail: *Spencer v Commonwealth* (2010) 241 CLR 118; 269 ALR 233; [2010] HCA 28; BC201006309 at [17] and [23]; *Van Aken, above*, at [63]; *Polar Aviation, above*, at [47].

For the purpose of r 16.21, the question is not whether the facts pleaded are in themselves sufficient to give rise to a cause of action; rather, the question is whether it would be open to the applicant upon the pleadings to prove facts at the hearing which would constitute a cause of action: *Pancontinental Mining Ltd v Posgold Investments Pty Ltd* (1994) 121 ALR 405; 13 ACSR 117; BC9406044 .

For a summary of the relevant principles applicable in determining whether a statement of claim should be struck out for disclosing no reasonable cause of action, see *Christou v Stantons International Pty Ltd* [2010] FCA 1150; BC201007776 at [3]-[5].

See also r 26.01(1)(c) for the Court's power to dismiss proceedings summarily for disclosing no reasonable cause of action.

[r 16.21.35] Abuse of process

What amounts to an abuse of court process is insusceptible of a formulation comprising closed categories and "the possible varieties of abuse of process are only limited by human ingenuity": *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; 227 ALR 425; [2006] HCA 27; BC200604226 at [9]; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; 282 ALR 685; [2011] HCA 48; BC201109206 at [88]; *Sea Culture International Pty Ltd v Scoles* (1991) 32 FCR 275 at 279; BC9103482 .

The concept extends to proceedings "instituted for an improper purpose" so as to obtain a collateral advantage (*Van Aken (as Trustee of the Van Aken Family Trust) v Diver Nominees Pty Ltd (in the matter of Microheat Technologies Pty Ltd)* [2012] FCA 829; BC201205830 at [76]; *Williams v Spautz* (1992) 174 CLR 509; 107 ALR 635 at 655; 61 A Crim R 431; BC9202694 ; *Re Limbo* (1989) 92 ALR 81; 64 ALJR 241; BC8902687), proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment" (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247; 79 ALR 9; 62 ALJR 389; BC8802600 ; *Ridgeway v R* (1995) 184 CLR 19 at 74-5; 129 ALR 41; 78 A Crim R 307; BC9506420 ; *Trade Practices Commission v TNT Australia Pty Ltd* (1994) ATPR 41-296; BC9406535) and situations where "the use of the court's procedures would bring the administration of justice into disrepute": *Rogers v R* (1994) 181 CLR 251 at 286; 123 ALR 417; 74 A Crim R 462; BC9404645 ; *Michael Wilson & Partners Ltd v Nicholls*, *above* at [89].

One recognised class of abuse of process is where proceedings are instituted against a party in a second forum when there are proceedings against that party pending in another, and the continuance of the second would be an abuse of the process of the first: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; 97 ALR 124; 65 ALJR 83; BC9002894 . In such a case, the continuance of the second proceedings would be an abuse if it would be unjustifiably oppressive to the party that is named as respondent in both forums: *Michael Wilson & Partners Ltd v Nicholls*, *above*, at [90].

The Court will find an abuse of process where an applicant commences proceedings with a view to obtaining a public forum for his or her political views: *Re Limbo* (1989) 92 ALR 81; 64 ALJR 241; BC8902687 .

It is an abuse of process to maintain an action which is doomed to fail: *Walton v Gardiner* (1993) 177 CLR 378 at 393; 112 ALR 289; 67 ALJR 485; BC9303612 . Thus leave to file an amended pleading may not be granted if the refining process of amendment has already gone on long enough or if amendment would otherwise constitute a futile attempt to plead an unarguable cause of action: *Fuller v Toms* [2012] FCA 27; BC201200227 ; *Corhott v Kam Tou Mak* [1998] FCA 147; BC9800467 .

An abuse of process may be constituted by raising in pleadings matters which could and therefore should have been litigated in earlier proceedings: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; 258 ALR 14; [2009]HCA 27; BC200906905 at [33]; *Walton v Gardiner*, *above*. It is an abuse of process to bring a proceeding not to obtain the relief for which the ability to bring that proceeding was provided, but in order to make a collateral attack upon an unappealed decision of the Court, or upon a decision which has been affirmed on appeal: *Temwell Pty Ltd v DKGR Holdings Pty Ltd (in liq)* [2005] FCA 1403; BC200507445 .

It may also be an abuse of process leading to strike out if the pleadings are drawn from materials obtained in contravention of an order (such as an Anton Piller order: *J C Techforce Pty Ltd v Pearce* (1996) 138 ALR 522; 35 IPR 196; (1996) AIPC 91-272; BC9603173).

[r 16.21.40] Summary dismissal

A party applying for an order that all or part of the pleading be struck out may additionally seek an order for summary dismissal of the whole or any part of a proceeding: see, for example, *Donnelly (Trustee) v Windoval Pty Ltd (Trustee), Re Donnelly (Trustee)* [2012] FCA 943; BC201206555 , where the respondents sought an order for summary dismissal of the proceedings (pursuant to s 31A of the Federal Court of Australia Act 1976) on the basis that the applicant's case had no reasonable prospect of succeeding or, alternatively, that the pleadings be struck out. The Court declined to dismiss the proceeding summarily but granted leave to the applicant to amend his pleading and to supplement the particulars upon which he proposes to rely in establishing certain allegations relating to bankruptcy: *Donnelly (Trustee), above*, at [95]-[98].

Section 31A of the Federal Court of Australia Act 1976 permits the Court to grant a summary judgment in relation to the whole or any part of a proceeding where satisfied that a party has no reasonable prospects of success (see *Spencer v Commonwealth* (2010) 241 CLR 118; 269 ALR 233; [2010] HCA 28; BC201006309 at [58]-[60] for discussion of the phrase "no reasonable prospects of success"). The power to strike out defective pleadings is distinct from the power to order summary dismissal in s 31A of the Federal Court of Australia Act, the latter requiring the Court to be satisfied that it is clear that there is no question to be tried: *Donnelly, above*, at [53]; *Singh v Super City Home Loans Pty Ltd* [2011] FCA 646; BC201103905 at [129]; *Spencer v Commonwealth* (2010) 241 CLR 118; 269 ALR 233; [2010] HCA 28; BC201006309 at [23]; *Van Aken (as trustee of Van Aken Family Trust) v Diver Nominees Pty Ltd* [2012] FCA 829; BC201205830 at [63].

In addition to s 31A of the Federal Court of Australia Act, r 26.01 grants the Court power to give a summary judgment in circumstances where the proceeding is frivolous or vexatious, no reasonable cause of action is disclosed, the proceeding is an abuse of process of the Court, or a party has no reasonable prospect of success. These grounds correspond to those grounds for strike out of pleadings contained in r 16.21(1)(b), (c) and (f). The Court will proceed to strike out under r 16.21, rather than dismiss under r 26.01, where, although deficiencies in a statement of claim are identifiable, a case may still exist: *Donnelly (Trustee), above*, at [53]. This is because the granting of leave to re-plead might reveal material facts within a properly identified legal framework that, upon proof, gives rise to entitlement to a recognised remedy: *Rogers v Asset Loan Co Pty Ltd* [2007] FCA 195; BC200700864 at [59]. As held in *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256; 227 ALR 425; [2006] HCA 27; BC200604226 at [46] per Gleeson CJ, Gummow, Hayne and Crennan JJ:

> Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways (*Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 per Barwick CJ), but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

An application for summary judgment under r 26.01, unlike an application for strike out under r 16.21, requires accompanying affidavit evidence: r 26.01(2).

To go further than striking out a statement of claim and to dismiss the proceeding summarily would require a firm conclusion that "no reasonable amendment could cure the alleged defect and [that] there was no reasonable question to be tried", a conclusion not lightly to be reached: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* (2012) 203 FCR 325; [2012] FCAFC 97; BC201204877 at [42]-[43] .

[r 16.21.45] Stay of proceedings

Proceedings may be stayed until further order in respect of a portion of a statement of claim that must be re-pleaded for failure to give adequate particulars: *Mitanis v Pioneer Concrete (Vic) Pty Ltd* (1997) ATPR 41-591; BC9705104 ; *Van Aken (as Trustee of the Van Aken Family Trust) v Diver Nominees Pty Ltd (in the matter of Microheat Technologies Pty Ltd)* [2012] FCA 829; BC201205830 . Where the continued maintenance of proceedings would be an abuse of process, it is not appropriate merely to strike out a statement of claim; rather, the proper exercise of discretion requires that it be struck out and that the proceeding be permanently stayed: *Garvey v Australian*

Federal Police (Fed C of A, Cooper J, QG 83 of 1994, 28 October 1994, unreported, BC9400049); *Doorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394; 67 IPR 124; [2005] FCA 1483; BC200507903 .

Rules 16.22-16.30 left blank

Annexure 4

Federal Court of Australia
Federal Circuit Court of Australia

Application for Exemption from Paying Court Fees - General

Federal Court and Federal Circuit Court Regulation 2012
Section 2.05

Court Details

File Number: VID of 2014

File name: Andrew Garrett v Commissioner of Taxation

Date filed: 6th December 2014

Cross boxes, for example ☒, where applicable

Notice to applicant

Use this form if:

- you are receiving legal aid for your proceeding in the Federal Court or the Federal Circuit Court from a State/Territory Legal Aid Office or an approved legal aid scheme or service (including an approved community legal centres); or
- you are the primary cardholder of a Health Care Card, Pensioner Concession Card, Commonwealth Seniors Health Card or any other card that entitles you to Commonwealth health concessions (this does not extend to a dependant of the primary cardholder), or
- you are an inmate of a prison or otherwise detained in a public institution, or
- you are younger than 18, or
- you are receiving youth allowance or Austudy payments or Abstudy benefits, or
- you have been granted assistance under Part 11 of the *Native Title Act 1993* for your proceeding in the Federal Court.

Information about approved legal aid schemes and services can be found on both Courts websites on their 'fee exemption' webpages. If you are unsure whether the legal aid scheme or service you are receiving assistance from is approved, ask registry staff for assistance.

When returning your completed application form to the registry you will need to attach photocopies of documentary evidence of any of the above (such as your Health Care Card, Legal Aid or legal assistance provider letter or Native Title funding letter) to support your claim. Photocopy both sides of the card or other document if it has writing on both sides. If more supporting information is required the Registry will contact you.

If you do not qualify for any of the above, you may be able to apply for individual fees to be exempted on the basis of financial hardship. Ask registry staff for the appropriate form and guidelines.

You must notify the Court Registry if there is any change to your circumstances that alter the information given in this application while the Court is dealing with your case.

WARNING

Under the Criminal Code any person who knowingly makes an untrue representation or statement to obtain a benefit or advantage from the Commonwealth is guilty of an offence and, if found guilty, can be fined or imprisoned.

Details

1 Name and address

family name (surname): GARRETTT

given names: ANDREW MORTON

PO BOX 1168,
ARMADALE NORTH postcode 3143 tel 0424 324 135

2 Court in which exemption is sought

X **Federal Court** ☐ **Federal Circuit Court**

Type: ☒ All filing, setting down, hearing and other fees that may be payable in these proceedings

3 Reason for seeking exemption

I currently hold or receive:

X Health Care Card ☐ Pensioner Concession Card
☐ Commonwealth Seniors Health Card
☐ Any other card that certifies entitlement to Commonwealth health concessions
☐ Youth allowance
☐ Austudy payments ☐ ABSTUDY benefits

Or:

☐ I am in receipt of legal aid or other approved legal assistance for these proceedings
☐ I have been granted assistance for these proceedings in the Federal Court under Part 11 of the *Native Title Act 1993*
☐ I am younger than 18 years of age
☐ I am an inmate of a prison or otherwise detained in a public institution

Signature

date 6 / 12 / 2014

Court Use Only

☐ Copy of relevant documents attached ☐ Exemption granted (copy of this approval decision given/sent to applicant / /)

Signature of officer Date / /