5.5. During the last 40 years the available shelf space and pattern of purchasing of wholesale wine has changed with the consolidation of ownership of the retail channel to market now resting mainly in the hands of the multiples, including Coles and Woolworths.

5.6. Concurrently, those Multiples are seeking to increase the percentage of their **"Own Brands"** sold in those channels to enhance margins thus further restricting the available shelf space available to traditional suppliers.

5.7. By way of example Woolworths Liquor is Australia's largest liquor business in a market with annual revenues of $21,000,000,000 with Woolworth's share of the Market being 35% (AUD$7,500,000,00 of all retail sales of liquor in Australia (wine, beer, spirits and other) or 45% of all wine sold; of which 35% of sales are own Woolworth's own brands.

5.8. As a consequence of the proliferation of brands, increase in supply of Own Brands and the change in control of the Channel to market the downward pressure on retail prices flows back to the producer consequently there is limited profitability across all sectors of the wine industry (which often generally translates to a loss)

5.9. The industry is one that seeks owners of wine related business to invest "patient capital".

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

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

5.12. Prior to the 7th February 2014, ACN 133 861 579 Pty Ltd (in Liquidation) (Controller Appointed) was known as OenoViva (Australia & New Zealand) Pty Ltd **("the Company")**[1]**.**

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

5.13.1. AGFT

5.13.2. AGFT 3

5.13.3. AGFT 4

5.13.4. The OenoViva (Australia & New Zealand) Trust **("OVANZ")**

5.13.5. The OenoViva (Australia & New Zealand) Plant & Equipment Trust **("OVPET ")**

5.13.6. The OenoViva (Australia & New Zealand) Plant & Equipment Trust No 2. **("OVPET 2")**

5.14. On the 22nd January 2014, a liquidator was appointed to the company[2] pursuant to an application made in the Federal Court of Australia; South Australia Registry and given action

[1] Exhibit 1 tendered to court on the 4th April 2014 being an ASIC search of the Company evidencing its name and the appointment of both a liquidator and me as a controller of property.

No SAD 368 of 2013 that was commenced by the Respondents (in this action and the Respondents in SAD 368 of 2014.)

5.15. Subsequently on the 23rd January 2014 I was appointed to the company[3] **(also "The Chargee")** as the Managing Controller pursuant to;

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

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

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

5.16. I complain of Misconduct in respect to the Respondents over the last 12 years that is not just driven by the Respondents' actions related to OenoViva Business Systems which business has been developing for 7 years but is also driven by the desire to *"cover up"* and avoid *"embarrassment"* in respect to the Respondents' conduct related to my improper and invalid Bankruptcy in 2004, in respect to a debt that did not in fact exist, when a judgment was given in default in DCCIV-20013-1666 and the subsequent refusal of the Respondents to consent to orders setting aside the Default Judgment.[4]

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

6. **S 60(2) of the Act, The Rules of Precedent and the Decision in *Re Lofthouse* and *Duckworth***

6.1. On the grounds that this Appeal is not yet commenced it does not fall into the category of an action to which s60(2) applies

6.2. In ***Duckworth***[5] the Honourable Edelman J considered the rules of precedent at paragraphs 26 – 31 of His Honour Reasons and gave seven reasons for coming to the conclusion that the Decision in ***Re Lofthouse*** [6]should be applied in Duckworth at paragraphs 32 – 48

6.3. At the outset it is worth noting that the decisions in ***Duckworth*** and ***re Loftus*** were made in respect to actions commenced in very different circumstances to this proceeding where the party bringing the application in ***re Loftus*** was the Trustee in Bankruptcy exercising an election to prosecute the property of the Bankrupt Estate and in ***Duckworth*** where the Respondents was the Trustee of a Trust who had subsequently gone bankrupt

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[2] Exhibit 16 of my affidavit dated 9th April 2014 filed in these proceedings being a copy of the Order appointing a liquidator in SAD 368 of 2014.
[3] Exhibit 16 of my affidavit dated 9th April 2014 filed in these proceedings being a copy of the Order appointing a liquidator in SAD 368 of 2014.
[4] Volume 4 of my Sixth Affidavit filed in these proceedings.
[5] *DUCKWORTH -v- WATER CORPORATION* [2012] WASC 30
[6] *Lofthouse (In the matter of Guss)* [2001] FCA 25

6.4. His Honour Edelman J referred to the Reasons of the Deputy President in ***Re Singh***[7] who after considering the reasons in ***Re Lofthouse*** construed s 60(2) as if it included the words in italics: 'an action [*which is connected with property of the bankrupt vested in the trustee*] commenced by a person who subsequently becomes a bankrupt is … stayed'.

6.5. In ***Owens***[8] the Victorian Court of Appeal held (after citing Re Lofthouse), that a right of appeal can fall within s 60(2), even though it is not property and does not vest in the trustee in bankruptcy but only if there was '*such a connection between the action and the estate as to make s60(2) applicable*'

6.6. His Honour at paragraph 58 also stated;

> *'In any event, there is a difference between a cause of action at trial to vindicate an existing right, and the exercise of a statutory power of appeal. A bare majority of the High Court has held that a right of appeal 'does not have the character of property merely because it is the creature of statute':* ***Cummings v Claremont Petroleum NL*** *(133) (Brennan CJ, Gaudron & McHugh JJ).'*
>
> *'But their Honours also said that '[a] chose in action may be the property of the person entitled to enforce it' (133), citing* ***Georgiadis v Australian & Overseas Telecommunications Corporation*** *[1994] HCA 6; (1994) 179 CLR 297, 303 - 304 (Mason CJ, Deane & Gaudron JJ), 312 (Brennan J), 325 (McHugh J) where their Honours, respectively, spoke of 'property' as including 'every species of valuable right', an 'action for damages for negligence', and 'a liability ... to pay damages'.'*

6.7. The Appeal in so far as it is a creature of Statute does not fall into the definition of an action commenced by the Bankrupt falling within the definitions of s60(2)(5) and is not property vesting in the Trustee in Bankruptcy.

7. Joinder of The Trustee in Bankruptcy as a Respondent as a Mixed Proceeding

7.1. While VID 600 of 2014 and subsequently this appeal is a very broad action in terms of the capacities that I seek this court to accept that I stand there can also be little doubt that this proceeding may fall into the category of a mixed proceeding

7.2. I respectfully submit that there can be little doubt that the Trustee in Bankruptcy is possessed of property that is relevant in these proceedings and consequently is possessed of a chose in action against the Respondents in respect to the administration of the Income Tax Assessment Act personal to the Applicant.

7.3. This action is centered solely on the administration of the Tax Affairs of the Bankrupt

7.4. In so far as there is a chose in action available as property of the Bankrupt Estate it is open to the Trustee to bring those proceedings and not cause delay to these proceedings which also relate to completely different Trust Estates.

8. Relationship to VID 297 of 2015

[7] *Re Singh and Secretary, Department of Education, Employment and Workplace Relations* [2010] AATA 720
[8] *Owens v Comlaw* (No 62) Pty Ltd [2006] VSCA 151

8.1. On the 13th April 2015 a summons was issued to hear the application for an extension of time in which to hear the Appeal of the Orders of Derham AsJ made on the 26th May 2014 in this proceeding.

8.2. It was these costs orders given in favor of Francis Michael Cahill that were at the heart of the findings of Reithmuller J in respect to the act of Bankruptcy that led to the sequestration order.

8.3. Leave to initiate the Appeal of the Orders of Reithmuller J has not yet been given however ought to be heard together with this Appeal and the broader human rights issues and damages to mind and body under s60(4)

8.4. As the application relates to an Appeal in respect to the Bankrupt in various capacities the action is not 'Property' that can vest in the Trustee in bankruptcy.

8.5. The Appeal relates to a wrong perpetrated on the Applicant in all of his capacities by Francis Michael Cahill and is not stayed also for the reasons that the Appeal falls within the scope ofs60(4)

8.6. In *Zelino Pty Ltd and Ors v. Budai* [2001] NSWSC 501His Honour Palmer J considered ;

> TAX FRAUD — SOLICITORS — ACCOUNTANTS — Serious offences under Taxation Administration Act revealed in course of litigation — both parties to litigation involved — other parties in venture probably involved — grounds for believing that solicitor and accountant involved — ***Court cannot turn blind eye to serious breaches of revenue law and serious breaches of professional ethics*** — Court directs copies of judgment to be sent to Australian Taxation Office and professional regulatory bodies and directs exhibits to be retained pending outcome of investigations.
>
> *'[233] In the present case,* ***I think it would be contrary to the principles discussed in the authorities to which I have referred and highly offensive to public policy if I were to award to Mr Budai the costs of an issue*** *on which he has succeeded only by demonstrating that he and Mr and Mrs Tesoriero were engaged in conduct flagrantly and deliberately in contravention of the income tax laws.'*

8.7. In *Igaki Australia Pty Ltd v Coastmine* Pty Ltd (1996) 3 IPR 37, at 51-52. In dismissing the appeal, Spender, Whitlam and Beazley JJ said at p52:

> *"... we consider that the Court ought not be involved in any way in condoning conduct which is clearly in contravention of the income tax laws. To award costs to [the successful Applicant] in this case would have that effect."*

8.8. This approach is also consistent with the judgement of the New South Wales Court of Appeal in *New South Wales Bar Association v Hamman* [1999] NSWCA 404, (Unreported, Mason P, Priestley JA and Davies AJA, 29 October, 1999). The Court there considered disciplinary proceedings against a legal practitioner and said:

> *"... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (Wentworth v New South Wales Bar Association (1992) 176 CLR 239). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ..." (paragraph 21)*

9. **Personal Injury or Wrong under s60(4) and the Aspecis of Criminal Proceeding**

9.1. The reasons of His Honour in Duckworth are also a useful guide to the actions that are preserved to the Bankrupt and are analysed at paragraphs 83 – 89 of that Judgment.

9.2. At para 84;

> *Section 60(4) permits a bankrupt to continue an action which he has commenced 'for any personal injury or wrong done to the bankrupt'. At least in relation to Mr. Duckworth's action for damages for 'unconscionable conduct' this might be thought to fall within the words of 'wrong done to the bankrupt'.*

9.3. His Honour relied upon ***Daemar***[9]where Kirby P said '

> *'it is understandable that a person unversed in the principles of statutory construction and unaware of legal authority in the meaning of s60(4)(a) of the Act should have taken those words in isolation'*

9.4. On the basis of the breaches of the Criminal Statutes referred to above the unconscionable conduct of the Respondents falls into a different category of a wrong consequently this action is one that falls within s60(4)

10. **Human Rights**

10.1. *The Human Rights and Equal Opportunity Commission Act* 1986 (Cth)

> ***affected person,*** *in relation to a complaint, means a person on whose behalf the complaint was lodged.*
>
> ***human rights*** *means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument.*
>
> ***Covenant*** *means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia.*

10.2. Only the affected person or a person acting on behalf of the affected person is capable of making the relevant complaint.

10.3. *The Charter of Human Rights & Responsibilities Act* 2006 (Vic) enshrines that human rights belong to a person and sets out the definition of a person and human rights as follows

[9] *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45

> **"human rights"** means the civil and political rights set out in Part 2;
>
> **"person"** means a human being;

10.4. I cannot find any authority on whether Human Rights as property of the Bankrupt devolve to the Trustee in Bankruptcy; it appears that this may be a relatively little traversed question.

10.5. I act as a Trustee of Trusts as well as personally consequently my Human Rights pervade the Trust related claims a corporate Trustee of a Trust does not have the same causes in action.

10.6. I submit that the question can be answered by applying pragmatic jurisprudence on the basis that the Bankrupt must still retain his Constitutional Rights, his Common Law Rights and his inalienable Human Rights and that the act of Bankruptcy does not sever the Bankrupt from those rights or his ability to complain about breaches of those rights in actions commenced by the Bankrupt before the Bankruptcy commenced.

10.7. Consequently the action in so far as the action relates to causes of action related to Constitutional Rights, his Common Law Rights and his inalienable Human Rights complaints fall into the category of s60(4) of the Act and not into s60(2)(5) and cannot be stayed

10.8. Mason J in ***Gerhardy***[10] referred to Human Rights as being an exotic and rather troubling jurisprudential import

> As a concept, **human rights** and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood.[131]

11. **Evidence of Damage to Mind**

11.1. I seek to tender a Psychological assessment of me undertaken by Dr Elise Julien which speaks for itself in respect to the damage inflicted on me and my family by the Respondents in respect to their relentless campaign of abuse over a period of 12 years.

12. **Unlawful Administration**

12.1. A Tort is defined as a civil wrong arising from an act or failure to act, independently of any contract, for which an action for personal injury or damages may be brought.

12.2. The elements of the tort relating to misfeasance in Public Office are summarised by Smith J in *Tahche* [11] [at 16-19]

> *The basic elements of the tort of misfeasance in a public office have been identified as:*

[10] Gerhardy (1985) HCA 11
[11] *Tahche v Abboud* [2002] VSC 42

(1) the Applicant must hold a public office;

(2) there must be an invalid exercise of power or purported exercise of power;

(3) the Applicant must be shown to have had acted with the necessary intent;

(4) the Respondents must suffer damage as a consequence of the exercise of power or purported exercise of power.

12.3. On the 1st May 2015 I made complaint to the Australian Human Rights Commissioner.

12.4. My contention raises the question of the meaning to be given to the term 'subject matter' of the complaint in s 20(2)(c)(iii) of the Australian Human Rights Commission Act. The term may refer to the conduct underlying the complaint, or it may refer to that conduct and also its character as 'inconsistent or contrary to any human right'

12.5. I seek to expose the subject matter in these proceedings such that the Commissioner may take the findings of this learned court into account in review of the Subject Matter

13. **Duty of Court and exercise of discretion to Refer**

13.1. On the basis of the evidence filed in the action I seek the court to make a referral to the Director of Public Prosecutions, the Human Rights Commissioner and the Commonwealth Attorney General in respect to the conduct of the Respondents on the grounds that Human Rights and Criminal Aspects of this proceeding complained of by the Bankrupt are not stayed and that actions in respect to my Human rights are personal to me and are not property the subject of s60(2)(5) but are more properly property under s60(4)

13.2. Issues of Natural Justice and jurisdiction arise in circumstances where a Trustee in Bankruptcy is unlikely to expend His Resources in ventilation of complaints such as these.

14. **No Conditions for Granting of Leave/ FCR 1.34**

14.1. The Respondents seek a condition a condition be imposed on the granting of leave which I respectfully submit should not be imposed.

14.2. VID 600 of 2014 was dismissed by the Honourable Justice Pagone for a number of reasons however I respectfully submit that the making of the Vexatious Litigant Order by His Honour was one that was made at the instruction of others and did not in fact consider the merits of the Application.

14.3. The failure to consider the substantive merits of the Application flies in the face of significant weight of authority

14.4. I submit the imposition of a condition that effectively bars a review on the merits on appeal would further the barrier to justice under which the order was first made

14.5. In *Soden v Kowalski*[12] the Honourable Justice Stone of this court summarized the relevant principles as follows;

33 Pursuant to s 59(2)(l), the Federal Court Rules specifically provide for the control of vexatious proceedings. It provides:

> ***Vexatious litigant***
>
> *(1) If a person institutes a vexatious proceeding and the Court is satisfied that the person has habitually, persistently and without reasonable grounds instituted other vexatious proceedings in the Court or in any other Australian court (whether against the same person or against different persons), the Court may order:*
>
> *(a) that any proceeding instituted by the person may not be continued without leave of the Court; and*
> *(b) that the person may not institute a proceeding without leave of the Court.*
>
> *(2) An order under this rule may be made:*
> *……..*
> *(e) on the application of the Registrar.*

34 The Mitsubishi parties rely on O 21 r 2. allows a person against whom the vexatious litigant has brought a vexatious proceeding, to apply to the Court for relief. It states:

> ***Vexatious proceeding against a person***
>
> *Where any person (in this rule called the vexatious litigant) habitually and persistently and without any reasonable ground institutes a vexatious proceeding against any person (in this rule called the person aggrieved) in the Court, the Court may, on application by the person aggrieved, order that the vexatious litigant shall not, without leave of the Court, institute any proceeding against the person aggrieved in the Court and that any proceeding instituted by the vexatious litigant against the person aggrieved in the Court before the making of the order shall not be continued by him without leave of the Court.*

35 The relief for which these rules provide is extreme. It deprives the person subject to the order of a right that is fundamental to the preservation of a civil society governed by the rule of law, namely the right to call on the Court to resolve a dispute or adjudicate a claim simply by filing an application in the prescribed form. For this reason such an order is not made lightly: *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2007] FCA 1069 at [44]; *Ramsey v Skyring* (1999) 164 ALR 378 at [51].

36 There is, however, a countervailing consideration which is to be found in the purpose of the rules. In *Jones v Skyring* (1992) 109 ALR 303 at 312, Toohey J referred to the purpose of such a rule as,

> *reinforcing the power of the court to protect its own process against unwarranted usurpation of its time and resources and to avoid the loss caused to those who have to face*

[12] *Soden v Kowalski* [2011] FCA 318

actions which lack any substance.

In *Ramsey v Skyring* (1999) 164 ALR 378 at [52], Sackville J referred to Toohey J's comment and added,

> *Linked with that objective is the need to protect the community, including litigants who wish their disputes to be resolved in an orderly and expeditious manner, against disruption of the court system flowing from the repeated institution of groundless proceedings.*

Vexatious proceedings

45 The wording of rules 2 and 3 of O 21 suggest that a "vexatious proceeding" has some quality beyond being brought "habitually, persistently and without reasonable grounds". In *Jones v Skyring* (1992) 109 ALR 303 at 309, Toohey J commented that whatever that quality is, the test for a vexatious proceeding is not simply subjective nor is it whether the proceeding has been instituted vexatiously, maliciously or in bad faith. Similarly it is not to the point that the litigant genuinely believes in the merit of the claim or claims being pursued; see also *Re Vernazza* [1960] 1 QB 197 at 208.

46 In *Attorney-General v Wentworth* (1988) 14 NSWLR 481, Roden J gave detailed consideration to the authorities and to the questions of law relevant to a declaration that a person is a vexatious litigant. His Honour's analysis was in the context of s 84 of the *Supreme Court Act 1970* (NSW) however, in relation to the nature of vexatious proceedings, s 84 is not materially different to The Federal Court Rules under consideration here. On that point, his Honour observed, at 491:

> *It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:*
>
> *1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*
>
> *4. In order to fall within the terms of s 84:*
>
> *(a) proceedings in categories 1 and 2 must also be instituted without reasonable ground (proceedings in category 3 necessarily satisfy that requirement);*
>
> *(b) the proceedings must have been "habitually and persistently" instituted by the litigant.*

47 Although the respondent must have "instituted" vexatious proceedings, as Roden J pointed out, vexatiousness is a quality of the proceedings rather than the respondent's intention so that "the question is not whether they have been instituted vexatiously but whether the legal proceedings

are in fact vexatious"; Re Vernazza [1960] 1 QB 197 at 208 per Ormerod LJ. The intention to harass, embarrass or annoy may be a factor, even the precipitating factor, in an applicant's decision to institute a proceeding and yet that proceeding may involve a legitimate claim. Nevertheless such an intention may be a powerful indicator that a proceeding is vexatious because groundless, but it cannot be determinative. In *Attorney-General v Collier* [2001] NZAR 137 at [40] the Full Court made this point saying:

> *15. Although in many cases it may not be possible to decide whether litigation is wholly without merit until it is determined, a successful strike-out application by the defendant, at least where not based upon technical points (such as Limitation Act defences or error in the form of proceedings not known to the plaintiff) may be reliable evidence in the circumstances of vexatiousness.*

48 This is consistent with the observations of Toohey J in *Jones v Skyring*: see [45] above. In *Brogden v Attorney-General* [2001] NZAR 809 at [22] the New Zealand Court of Appeal made similar observation and observed that ultimately the test is whether "the various proceedings have been conducted by the litigant in a manner which properly attracts that epithet".

49 The concept of a vexatious proceeding is relevant to an application to dismiss a single proceeding pursuant to O 20 r 4 or r 5 which provide that the Court may stay or dismiss generally a proceeding or claim that is "frivolous or vexatious". I see no reason why "vexatious" in these rules should bear a different meaning to the meaning it bears O 21 r 1 and r 2. For practical purposes, the test of whether a proceeding is vexatious is whether it is, in Roden J's words, "so obviously untenable or manifestly groundless as to be utterly hopeless".

50 In *Gallo v The Honourable the Attorney-General,* Supreme Court of Victoria, 4 September 1984, (unreported) Starke J referring, at 11, to 'vexatious' as "an omnibus expression", said that the expression includes,

> *... proceedings which are scandalous which disclose no reasonable cause of action, which are oppressive, which are embarrassing, or which are an abuse of the process of the court. All of such and similar proceedings, in my opinion, fall within the meaning of the word 'vexatious' in the statute.*

51 In *Attorney-General for the State of Victoria v Horvath, Senior* [2001] VSC 269 at [28], Ashley J helpfully addressed practical issues of application:

> *It is one thing to know what the word "vexatious" means. It is another thing to apply*

> *s. 21(2) to the circumstances of a particular case. In the latter task the following matters are, according to the authorities, relevant: first, where an order has been made dismissing an action as frivolous or vexatious, or striking a pleading out, it is not for a court considering a s. 21 application to go behind the order and go into the merits of the argument as a court of appeal would do. Second, findings which are required do not depend on viva voce evidence or credibility of witnesses.* ***The critical evidence is to be found in court files - documents, judgments, orders and reasons****. For that reason, any hearsay material contained in an affidavit in support of an application, even though objectionable, should be treated simply as a distraction, and ignored. Third, the question is not whether the manner in which a proceeding is conducted is vexatious; it is whether, having regard to its nature and substance it should be so characterised. Fourth, and this is a more general proposition with respect to s. 21, in determining whether the Attorney-General has made out a case,* ***the court is not concerned with a minute individual examination of each proceeding. It must consider the overall impression created by the number of proceedings, their general character and their results****.*
> *[Footnotes omitted; emphasis added]*

52 As to what constitutes lack of reasonable grounds, the possibilities are endless. One point is clear and particularly relevant in the current proceeding and that is, where issues have previously been determined, the institution of proceedings with respect to them generally indicates a lack of reasonable grounds: see *Jones Lang Lasalle (Qld) Pty Ltd v Dart* [2005] FCA 1614 at [31] per Kiefel J and *Granich & Associates v Yap* [2004] FCA 1567 at [9] per French J.

53 None of this is to say that the mode of proceeding under O 20 should not be different than under O 21. In the case of a single proceeding it is necessary to consider if the absence of reasonable grounds arises, for instance, from a defect in pleading that might be cured. In the absence of a cure the proceeding remains vexatious and an application to dismiss it under O 20 should be given serious consideration.

Habitually and persistently and without reasonable grounds

54 It is important not to confuse the question whether a proceeding is vexatious with whether a particular litigant has habitually and persistently instituted such proceedings. Such confusion is invited by rules 1 and 2 of O 21 which require that the vexatious proceedings must have been instituted not only habitually and persistently but also without reasonable grounds. In my opinion being "without reasonable grounds" is essential for a proceeding to be vexatious. Consequently the express requirement that the proceedings have been instituted without reasonable grounds adds little, other than emphasis, to the requirement that only 'vexatious' proceedings are to be considered in determining if the institution of proceedings has been habitual and persistent. To maintain otherwise would be to contemplate that there could be reasonable grounds for instituting a vexatious proceeding.

55 In *Ramsey v Skyring* (1999) 164 ALR 378 at [55] Sackville J addressed the meaning of "habitually and persistently":

> *It has been said that the expression "habitually and persistently" implies more than "frequently" (the latter being the word used, for example, in High Court Rules, O 63, r 6(1) and in s 3 of the Vexatious Litigants Act 1981 (Qld)). In Attorney-General v Wentworth, Roden J (at 492) said this of the same expression, used in s 84(1) of the Supreme Court Act 1970 (NSW):*
>
> *'Habitually' suggests that the institution of such proceedings occurs as a matter of course, or almost automatically, when the appropriate conditions (whatever they may be) exist; 'persistently' suggests determination, and continuing in the face of difficulty or opposition, with a degree of stubbornness.*
>
> *Although Roden J eschewed any attempt to formulate a definition of universal application, his test has been cited with approval: Valassis v South Sydney City Council (1996) 92 LGERA 275, at 280; Attorney-General (Vic) v Lindsey (unreported, 16 July 1998, SC (Vic), Kellam J), at 9. I am content to proceed on the basis that Roden J's observations are correct.*

56 In *Jones Lang Lasalle (Qld) Pty Ltd v Dart* [2005] FCA 1614 Kiefel J also accepted Roden J's test and added, at [42] that it was not necessary for "proceedings to have been brought frequently and over a long period of time before an order may be made". In her Honour's view whether proceedings have been brought habitually and persistently "is one of fact, to be determined by reference to the circumstances of the case".

57 A similar view was expressed in *Brogden v Attorney-General* [2001] NZAR 809 at [21] where the New Zealand Court of Appeal brought out clearly the distinction between "habitually" and "persistently" to which Roden J referred:

> *What constitutes institution of such proceedings "persistently" will not depend merely on the number of them but, just as importantly, on their character, their lack of any reasonable ground and the way in which they have been conducted. A litigant may be said to be persisting in litigating though the number of separate proceedings he or she brings is quite small if those proceedings clearly represent an attempt to re-litigate an issue already conclusively determined against that person, particularly if this is accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying. The Court may also take into account the development of a pattern of behaviour involving a failure to accept an inability in law to further challenge decisions in respect of which the appeal process has been exhausted, or attacking a range of defendants drawn into the widening circle of litigation solely because of an association with a defendant against whom a prior proceeding has failed. The fact that one or more proceedings have been struck out does not inevitably lead to the conclusion that the litigation has been vexatious. But this may be a strong indication.*

Dated 11th June 2015

……..
Andrew Garrett
The Applicant

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/06/2015 11:40:52 AM AEST 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:	VID297/2015
File Title:	In the Matter of Andrew Morton Garrett
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 26/06/2015 9:21:05 AM AEST 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.

No VID 297 of 15

Federal Court of Australia

District Registry: Victoria

Division: General

ANDREW MORTON GARRETT

Applicant

FRANCIS MICHAEL CAHILL & OTHERS

Respondents

OUTLINE OF SUBMISSIONS OF APPLICANT
DATED 25th JUNE 2015

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1. Materials Relied Upon;

   1.1. My Submissions dated 11th June 2015 filed in VID 129 of 2015

   1.2. My Submissions dated 18th June 2015 filed in this proceeding

   1.3. My affidavit dated 7th May 2015 filed in MLG 177 of 2015

   1.4. My Informal Application for Stay dated 16th May 2015

   1.5. My Formal Application dated 19th May 2015 to re-open the hearing dated 15th May 2015 and adduce new evidence that was lodged but not accepted for filing

   1.6. The evidence in support of the Application to re-open to be advised subject to leave being granted to Appeal.

   1.7. List of Authorities in MLG 177 of 2015 provided as a Book of Authorities to the Court Below on the 15th May 2015 and VID 297 of 2015 dated 18th June 2015

5. **The Bankruptcy Notice**

   5.1. The Honourable Reithmuller J confirms at paragraph 3 of His Honors reasons that the act of Bankruptcy was the failure to pay the amount due under the Bankruptcy Notice and subsequent failures to set that Notice aside on appeal in both the Federal Circuit Court and the Federal Court of Australia.

   5.2. The Honourable Reithmuller J fell into appealable error in failing to go behind the Costs order and setting it aside in accordance with the findings of the High Court in Wren v Mahony.

5.3. His Honour fell into appealable error in making the sequestration order by not adjourning the hearing or setting aside the Creditors Petition pursuant to s52(b) of *the Bankruptcy Act* 1966 (Cth)[1]

5.4. On the 13th April 2015 a summons was issued in SCI-2013-02968 to hear the application for an extension of time in which to hear the Appeal of the Costs Orders of Derham AsJ made on the 26th May 2014,[2]

5.5. It was these costs orders given in favor of Francis Michael Cahill that were at the heart of the findings of Reithmuller J in respect to the act of Bankruptcy that led to the sequestration order.

5.6. The Honourable Judge fell into appealable error in not adjourning these proceedings until after the hearing of the application for extension of time to Appeal on the grounds that a successful appeal would cause the Bankruptcy Notice to be Invalid and any Judgment made in MLG 177 of 2015 to be a nullity.

5.7. The evidence before the learned Judge showed that I had also taken steps to appeal the reasons of the Honourable Justice Beach given in VID 49 of 2015 by way of Summons to Show Cause and issue of writ of Certiorari[3]

5.8. The evidence before the learned judge was that;

5.8.1. the Costs Order was not an order which finally disposes of the rights between the parties[4] and was in fact subject to an Appeal

5.8.2. The Dismissal of the Appeal in the Federal Court had not also finally disposed of the Rights between the parties as I had foreshadowed the issuing of the Summons in the High Court and the proceedings ought to have been adjourned until after the hearing of the High Court Proceeding.

5.8.3. That there was mutuality [5]of debt and claim between the Applicant and the Petitioning Creditor in accordance with s84 of *the Crimes Act* 1958 Vic, s2.7.19 & s7.2.12 of *the Legal Profession* Act 2004 (Vic) s588G, s588M of *the Corporations Act* 2001 (Cth) and s6.1 and s6.2 of *the Criminal Code* 1995 (Cth)

6. **The Notices to Produce[6] & The Respondent**

6.1. The Honourable Judge fell into appealable error in not first addressing the act of Bankruptcy rather than the alleged debts on the grounds that the Notices to produce issued in the proceedings would reveal the date of production of alleged invoices relied upon by the Legal Services Commissioner from the electronic file records and that there was no work done by the Respondent related to the alleged invoices.

6.2. On the Grounds that the Invoices were produced 9 months and 18 months respectively after they were dated for the sole purpose of misleading the Legal Services Commissioner [7]in

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[1] *Endresz v Australian Securities and Investments Commission (No 2)* [2015] FCAFC 33
[2] Exhibit AMG 2 of my affidavit dated 7th May 2015
[3] Paragraphs 109 – 112 of my affidavit dated 7th May 2015 exhibits AMG 11 and AMG 12
[4] *Carr v. Finance Corporation of Australia Ltd* (1981) 147 CLR 246
[5] *Lord & Anor v Rankine & Ors* [2010] FMCA 668, see also paragraphs 85 - 87 of my affidavit dated 7th May 2015
[6] See paragraphs 162- 175 of my affidavit dated 7th May 2015
[7] See paragraphs 6 - 70 of my affidavit dated 7th May 2015

respect to complaints against the Respondent and his partner then a substantial injustice would arise in making a sequestration order against a person who was a victim of a Crime perpetrated by the Respondent

7. **Substantial Injustice/Victim of a Crime**

7.1. His Honour fell into appealable error in failing to observe in His Honor's Reasons that the Respondent was the subject of a Fraud Report[8] first reported on the 17th February 2015 to the Melbourne Major Crimes Unit of Victoria Police.

7.2. In failing to make reference to that Report and the findings of a Sham and Tax Fraud against the Respondent by the Honourable Burkhardt J at paragraph 53 [9] his Honour turned a blind eye to the conduct of the Respondent which is reviewable error and grounds for setting aside the costs order[10]

7.3. In *Igaki Australia Pty Ltd v Coastmine* Pty Ltd (1996) 3 IPR 37, at 51-52. In dismissing the appeal, Spender, Whitlam and Beazley JJ said at p52:

> *"... we consider that the Court ought not be involved in any way in condoning conduct which is clearly in contravention of the income tax laws. To award costs to [the successful Applicant] in this case would have that effect."*

7.4. This approach is also consistent with the judgement of the New South Wales Court of Appeal in *New South Wales Bar Association v Hamman* [1999] NSWCA 404, (Unreported, Mason P, Priestley JA and Davies AJA, 29 October, 1999). The Court there considered disciplinary proceedings against a legal practitioner and said:

> *"... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (Wentworth v New South Wales Bar Association (1992) 176 CLR 239). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ..." (paragraph 21)*

7.5. The evidence on Appeal will show that the investigation of the Respondent has escalated to the Fraud Squad – Crime Command and been given Incident No 150139397

8. **Set off and Counterclaim re Respondent**

8.1. The evidence before the learned Judge was that the alleged Debt subject of the Bankruptcy Notice was the subject of a set off by the Applicant on the 6th September 2014 and further set out in the Letter of Demand dated 13th September 2014 [11]

8.2. The Honourable Judge fell into appealable error in failing to refer to the Letters of Demand annexed to the Notice of Intention to Oppose the Creditors Petition and not making the orders sought for Judgment Debt against the Respondent set out in the Amended Notice of Intention to oppose the Creditors Petition dated 8th April 2015

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[8] Exhibit AMG 6 of my affidavit dated 7th May 2015, see also paragraphs 71 - 84 of my affidavit dated 7th May 2015
[9] *Garrett v Cahill* (2015) FCCA 26
[10] *Zelino Pty Ltd and Ors v. Budai* [2001] NSWSC 501
[11] annexed to the Notice of Intention to Oppose Creditors Petition dated 7th March 2015 at Page 4

8.3. His Honour was of the view that Judgment debt should not be given in a bankruptcy proceedings which contradicts the findings of the High Court in *re Wakim; ex parte McNally* (see my other submissions) which findings set out that the source of the Courts Power (the Constitution) cannot be at odds with the Common Law and that complete just must not just be seen to be done but it must be done.

8.4. The evidence before the learned Judge was that I had commenced proceedings against the Respondent in the Supreme Court of Victoria [12] as SCI-2015-01232; Andrew Garrett v Francis Cahill and Anor and that no order should be made until the outcome of those proceedings was known

9. **The Second Respondent**

9.1. His Honour also fell into appealable error in his reliance in the debts alleged by the Second Respondent when the evidence before him clearly evidenced Conscious Maladministration [13]and was not refuted by the Second Respondent.[14]

9.2. His Honour is obliged to act impartially and not bring a biased mind to the proceedings[15] in which circumstances His Honour could not reject the affidavit materials before him without contradicting evidence from the Second Respondent

9.3. His Honour fell into appealable error in first rejecting the informal application for stay on the papers and then rejecting the application to reopen dated 19th May 2015 on the basis of new evidence and substantial injustice grounds.[16]

9.4. His Honour fell into error at paragraph 20 of His Honors reasons by failing to note that the internal advice of the ATO was that they Could not legally reverse the GST corrections.

9.5. His Honour failed to observe that the GST corrections entered by self-assessment in accordance with the instructions of the ATO were entered properly as they were corrections of GST mistakes .

10. **Alleged Debt at exhibit DP-1[17]**

10.1. His Honour placed heavy reliance in His Honor's Reasons in the making of the sequestration order based on the alleged Income Tax Liability subject of Default Judgment, however His Honour had already considered the question of arguability in respect to this alleged debt in his hearing on the 17th April 2015 in MLG 2265 of 2014; *Garrett v Commissioner of Taxation*.

10.2. The Statement of Claim that was on the Court file in MLG 2265 of 2014 [18]was struck off the Court file in order for it to be heard in VID 129 of 2015.

10.3. A Notice to Admit Facts dated 15th April 2014[19] remains on the court file of MLG 2265 of 2014

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[12] Exhibit AMG 7 of my affidavit dated 7th May 2015, see also paragraphs 83,84 & 113-117 of my affidavit dated 7th May 2015
[13] *Donoghue v Commissioner of Taxation* [2015] FCA 235; *Commissioner of Taxation v Futuris Corporation Limited* (2008) HCA 32
[14] See paragraphs 128 - 161of my affidavit dated 7th May 2015
[15] *Johnson v Johnson* 2000 HCA 48
[16] *Hacker v Weston* [2015] FCA 363 re Annulment
[17] Affidavit of Daniel Pownell dated 6th March 2015
[18] Exhibit AMG 6 of my affidavit dated 4th May 2015 filed in VID 129 of 2015 page 98 – 168
[19] Exhibit AMG 7 of my affidavit dated 4th May 2015 filed in VID 129 of 2015 page 169 - 183

10.4. On the 17th April 2015 His Honour adjourned the application to set aside the Bankruptcy Notice that was the subject of that Default Judgment until the 30th November 2015 until after the hearing of VID 129 of 2015 by Your Honour.

10.5. It is difficult to comprehend how the Honourable Judge understood the arguable case and accepted that the Counterclaim was on Foot on the 17th April 2015 in MLG 2265 of 2014 and then apparently reversed His Position less than one month later in MLG 177 of 2015.

10.6. The Honorable Reithmuller J did not have the evidence before him in support of the arguable case and fell into error in refusing to reopen the proceedings to adduce New Evidence. (see Hacker v Weston)

10.7. It is open to this court and the Trustee in Bankruptcy to go behind the Default Judgment dated 21st August 2014 that is the subject of DP-1 in accordance with the findings of the High Court in *Wren and Mahony*[20]

11. **Alleged Debt at exhibit DP-2**[21]

11.1. On the grounds that the Completion of Audit dated 6th December 2013 is reviewed under s39B in VID129 of 2015 or VID 600 of 2014 then the costs orders must be set aside.

12. **Alleged Debt at exhibit DP-3**[22]

12.1. The Originating Writ and Statement of Claim dated 11th June 2013 served upon me on the 10th July 2015 are demonstrably false, the evidence sworn in my affidavit dated 8th August 2015 shows that the RBA in respect to PAYG liability in respect to this debt did not exist and was in fact Zero as a consequence of the Commissioners own entries on the 4th October 2014 (after the date of the issuing of the Writ)

12.2. That evidentiary material was not available to the Honourable Mukhtar AsJ in the Victorian Supreme Court and is the subject of a Notice of Appeal filed in SCI-2013-02968 dated 27th August 2014.

12.3. That Appeal was then amended on the 1st October 2014 with leave given by the Honourable Justice Bell on the 17th and 22nd September 2014.

12.4. On this basis the affidavit materials sworn by Alyx Sudall and relied upon by the Honourable Mukhtar AsJ in the Supreme Court of Victoria in making his judgements dated 6th August and 20th September 2014 are also false.

12.5. The evidence showed (and was accepted by Mukhtar AsJ) that I was the Trustee of the Andrew Garrett Family Trust until the 8th June 2013 in which regard His Honour Reithmuller J fell into appealable error at paragraph 11 of His Honor's reasons by referring to the tax period in which the alleged debt occurred as being the relevant period; I respectfully submit that it is not.

12.6. PSLA 2012/02 sets out the person responsible for the Tax debts of a Trust is the Trustee in office at the end of the relevant Tax Period.; in this case the party who was the Trustee at the end of the relevant Tax Period being the 30th June 2013 was not me but Holy Grail Hospitality Pty Ltd of which entity I was the authorised/public officer.

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[20] See paragraphs 117 - 127 of my affidavit dated 7th May 2015
[21] Affidavit of Daniel Pownell dated 6th March 2015
[22] Affidavit of Daniel Pownell dated 6th March 2015

12.7. Even if there was a tax debt, which is denied, then I was not the liable person.

12.8. The evidence on Appeal will show that His Honour ought to have made findings that the Creditors Petition in so far as it applied to the Second Respondent should have been adjourned until after the Hearing of the Appeal as the Judgment debt dated 6th August 2015 was not a final order disposing of the rights between the parties.

13. **Alleged Debt at exhibit DP-4**[23]

13.1. I have not seen this alleged debt before and am not certain as to what it applies, if however it applies to GST liabilities accruing on the issuing of invoices for payroll services in respect to Hospitality Workforce Solutions Pty Ltd in its capacity as Joint Trustee of the Andrew Garrett Family Trust then it is the company who issued the invoices who is liable for the GST liability.

13.2. I am the public officer of that company and not its director; even if I were the Director I would not be personally liable for the GST Liability.

13.3. In any event the Payroll services business expired as a consequence of massive bad debts write off to Prospero Trading (In Liquidation) in excess of $7,000,000 and the bad debt provisions of the GST Act apply

13.4. The evidence on appeal will show that the Directors of Prospero were found to have traded while insolvent which claim has been settled by payment to the liquidators.

13.5. This debt shows AGFT has accrued a PAYG withheld liability and yet the AGFT has neve been registered for PAYG withholding

14. **Alleged Debt at exhibit DP-5**[24]

14.1. On the grounds that the GST liability of AGFT set out in DP-4 should be reduced by the amount of bad debts and the PAYG withholding liability should also be removed from the RBA then the debt asserted in the affidavit of Daniel Pownell dated 15th May 2015 of $8,228,930.31 allegedly in support of paragraph 4 of the Creditors Petition cannot be correct.

15. **Alleged Debt at exhibit DP-6**[25]

15.1. The issue of whether I am or have ever been a Trustee of OenoViva Plant and Equipment Trust No 2 is a matter set down for trial in SCI-2013-02968.

15.2. The Honourable Reithmuller fell into appealable error in relying on a debt that was listed for trial and which is the subject of findings by Deputy President Forgive in the AAT on the 16th April 2015 that there was no evidence to support the contention that I was the Trustee of that Trust[26]

15.3. In any event the debt is a construction for an improper purpose that is one of 300 adverse Taxation and other decisions made by the ATO

16. **Set off and Counterclaim re Second Respondent**

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[23] Affidavit of Daniel Pownell dated 6th March 2015
[24] Affidavit of Daniel Pownell dated 6th March 2015
[25] Affidavit of Daniel Pownell dated 6th March 2015
[26] Paragraph 104 AAT (2015) 247

16.1. The Evidence on Appeal that is the subject of the Notice to Admit Facts served in VID 129 of 2015 dated 22nd June 2015 reveals a minimum claim against the ATO well in excess of the total amount of the debt asserted to be owing (which is denied) in the affidavit of Daniel Pownell dated 15th May 2015

16.2. The filing of the affidavit of Daniel Pownell on the 15th May 2015 did not fulfil the verification requirements of paragraph 4 of the Creditor's Petition as suggested at paragraph 39 of His Honor's reasons.

17. **Solvency**

17.1. The Honourable Reithmuller J fell into appealable error at paragraph 37 and 38 of His Honor's Reasons.

17.2. A Notice to Admit served in VID 731 of 2015 expired on the 15th May 2015 while the Notices to Admit served in VID 158 – VID 166 of 2015 expired on the 21st and the 25th April respectively.

17.3. FCR 22.04 sets out that the facts and indebtedness set out in those Notices to Admit are taken to have been admitted as proof positive of Solvency and the Applicant is entitled to Judgment Debt pursuant to FCR 22.07

17.4. On the 13th May 2015 I sought Judgment debt pursuant to FCR 22.07 and s31A(2) of *the Federal Court of Australia Act* 1976 (Cth) before the Honourable Justice Davies which was orders were not made for reasons that have not yet been published in respect to orders that have also not been published.

17.5. My recollection is that Her Honour found that Notices to Admit were not appropriate vehicles for use in Corporations Proceedings which cannot be the case in circumstances where FCR 1.3 of the Corporations Rules clearly sets out that the Other Rules of the Court Apply.

17.6. Notices to Admit have been used in s459H proceedings before and I provided to His Honour Reithmuller J authorities to that effect.[27]

17.7. On the 17th June 2015 I made application under s37AO of *the Federal Court of Australia Act* 1976 (Cth) for leave to file and serve an application for extension of time in which to appeal Her Honour unpublished orders and reasons of the 13th May 2015.

17.8. His Honour fell into reviewable error when discounting the solvency statement dated 14th May 2015.

17.9. His Honour fell into reviewable error in discounting the value of the claim against the Fidelity Fund as evidence of solvency which has been used as evidence before for solvency and adjourning proceedings[28]

Dated 25th June 2015

Andrew Garrett
The Applicant

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[27] *John Hawkins Real Estate (Holdings) Pty Ltd and ors v Cassaniti* [2002] NSWSC 1212; *Site Foreman Pty Ltd, The v Brand* (2011) NSWSC 821
[28] *Schepis v Osborne* (2015) FCA 192

No VID 297 of 2015

Federal Court of Australia

District Registry: Victoria

Division: General

ANDREW MORTON GARRETT

Applicant

FRANCIS MICHAEL CAHILL and OTHERS

Respondents

OUTLINE OF SUBMISSIONS OF APPLICANT
DATED 18th JUNE 2015

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1. I ask that my submissions made in VID 129 of 2015 on the 11th June 2015 are also relied upon as submissions in these proceedings rather than repeat parts of those submissions unnecessarily in these submissions.

2. Additionally I also rely on my submissions made in VID 600 of 2014 dated 18th February 2015,

3. The Alleged Debt that is the subject of the Default Judgment made in SCI-2014-03380 (and VID 129 of 2015 on Appeal from VID 600 of 2014) is an assessment for Income Tax Liability against me that is a function of a Notice of Completion of Audit dated 6th December 2013 [1]

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

   3.2. Subsequently, Notices of Assessment were allegedly issued dated 13th December 2013 [2] **("the Assessments")** that I had not yet received a copy of at the time of the swearing of my first affidavit filed SCI-2014-03380 dated 27th August 2014.[3] Which affidavit was amongst the evidence struck off the Court Files.

   3.3. It is that Income Tax Liability that is one of over 300 adverse taxation decisions made against me and entities related to me over a period of 2 years.

[1] Pages 67 -169 of the Court being exhibit AMG 4 of my affidavit dated 27th August 2014
[2] Pages 311 – 352 of the Court being exhibits AS-1 to AS-14 of the affidavit of Alyx Sudall dated 26th September 2014
[3] Pages 39 – 281 of the Court Book being My First Affidavit dated 27th August 2014 see paragraph 14 of that affidavit

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

3.5. On the basis of the FOI releases in my possession (which is voluminous) I assert and verily believe that the Notices of Assessment that are the subject of the Default Judgment all fail "the Futuris Test"[4] in respect to conclusive evidence of debt in circumstances of allegations of conscious maladministration

3.6. The Conscious Maladministration issue, and application for injunction to prevent the Commissioner from taking further enforcement steps under the assessments and relevant applications for mandamus are the subject of the aforementioned application made under section 39B of the Judiciary Act to the Federal Court of Australia given action VID 600 of 2014; *Andrew Garrett v Commissioner of Taxation & Ors* [5]as described in the ensuing paragraphs

3.7. The Commissioner issued those notices of assessment in circumstances where the Commissioner knew he could not legally make issue those assessments which reflects his conduct on the 18th February 2009 when he cancelled amended activity statements properly processed on the 6th & 7th October 2008 at a time when he knew he could NOT LEGALLY reverse those GST Corrections to the Running Balance Account of the Andrew Garrett Family Trust [6],[7]

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

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

4. **Garrett v Cahill (2015) FCCA 26/Fraud/Bona Fide Dispute**

[4] *Commissioner of Taxation v Futuris Corporation Limited* (2008) HCA 32

[5] Application dated 30th September set out at exhibit AMG 15 of My Second Affidavit dated 30th September 2014 filed in this proceeding and subsequently filed by the Federal court on the 13th October a copy of which is set out My Third Affidavit filed in this proceeding dated 22nd October 2014 pages 33-57.

[6] Page 159 of my Third Affidavit filed in these proceedings.

[7] Page 176 of my Third Affidavit filed in these proceedings.

> *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."*

4.1. The findings of His Honour Judge Burckhardt against the First Respondent as highlighted above are extremely serious and criminal in their nature,

4.2. The evidence struck of the Court files shows that between the 13th December 2011 and the 13th March 2012 the Respondent and his partner withdrew a total of just under $4,900,000 from the Bank Accounts of HC Legal Pty Ltd (In Liquidation)(Controller Appointed)[8] and not $2 million as asserted by the Respondent.

4.3. The Liquidator's Report dated 6th March 2014 reveals that there has not been any repayment of $350,000 by the Respondent as asserted by Counsel for the Respondent in VID515 of 2012; *HC Legal Pty Ltd v DCOT*.

4.4. The Respondent instructed counsel to mislead that learned court as to the alleged repayment of $350,000 which was found by the Liquidator NOT to have been paid in the report to Creditors.

4.5. It was the conduct and actions of the First Respondent that drove the conduct of the Second Respondent to make allegations of Fraud Against me[9] as was submitted to the House of Representatives Standing Committee on Taxation Disputes published in March 2015

4.6. It is my case that the Second Respondent has settled its claims against the First Respondent which matter ought to be the subject of Discovery

5. **Relationship to VID 129 of 2015**

5.1. On the 13th April 2015 a summons was issued in SCI-2013-02968 to hear the application for an extension of time in which to hear the Appeal of the Orders of Derham AsJ made on the 26th May 2014 in this proceeding.

5.2. It was these costs orders given in favor of Francis Michael Cahill that were at the heart of the findings of Reithmuller J in respect to the act of Bankruptcy that led to the sequestration order and is noted by His Honour on the Court Transcripts.

5.3. The Submission made by counsel for the Second Respondent at paragraph 8 must be rejected as it is not true and will mislead the court to fall into reviewable error.

5.4. I am impecunious and have not been able to obtain a copy of the Court Transcripts in MLG 177 of 2015, I have also applied to the Federal Circuit Court for access to the Court Files under FCR 2.32 but have been unsuccessful in obtaining that access

5.5. In *Zelino Pty Ltd and Ors v. Budai* [2001] NSWSC 501His Honour Palmer J considered ;

[8] P270-280 of Exhibit AMG 1 of my affidavit dated 20th October 2014 and also P237-248 of my Affidavit dated 11th August 2014, both filed in the Court below

[9] House of Representatives Inquiry into taxation Disputes March 2015 see exhibits 7,8 & 9 Appendix B

TAX FRAUD — SOLICITORS — ACCOUNTANTS — Serious offences under Taxation Administration Act revealed in course of litigation — both parties to litigation involved — other parties in venture probably involved — grounds for believing that solicitor and accountant involved — ***Court cannot turn blind eye to serious breaches of revenue law and serious breaches of professional ethics*** — Court directs copies of judgment to be sent to Australian Taxation Office and professional regulatory bodies and directs exhibits to be retained pending outcome of investigations.

'[233] In the present case, ***I think it would be contrary to the principles discussed in the authorities to which I have referred and highly offensive to public policy if I were to award to Mr Budai the costs of an issue*** *on which he has succeeded only by demonstrating that he and Mr and Mrs Tesoriero were engaged in conduct flagrantly and deliberately in contravention of the income tax laws.'*

5.6. In *Igaki Australia Pty Ltd v Coastmine* Pty Ltd (1996) 3 IPR 37, at 51-52. In dismissing the appeal, Spender, Whitlam and Beazley JJ said at p52:

"... we consider that the Court ought not be involved in any way in condoning conduct which is clearly in contravention of the income tax laws. To award costs to [the successful Applicant] in this case would have that effect."

5.7. This approach is also consistent with the judgement of the New South Wales Court of Appeal in *New South Wales Bar Association v Hamman* [1999] NSWCA 404, (Unreported, Mason P, Priestley JA and Davies AJA, 29 October, 1999). The Court there considered disciplinary proceedings against a legal practitioner and said:

"... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (Wentworth v New South Wales Bar Association (1992) 176 CLR 239). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ..." (paragraph 21)

5. Matter before the court to consider entire justice, the Whole of the Matter and FCR 1.32

5.1. The fundamental source of the Federal Court's original jurisdiction in any matter[10] is statutory[11]. By s. 5(2) of the *Federal Court of Australia Act 1976* (Cth), the Court is a superior court of record and a court of law and equity. Since the enactment of s. 39B of the *Judiciary Act 1903* (Cth), the court can now be seen as a court of general jurisdiction in civil matters, although it will always be necessary to ensure that the matter sought to be litigated is within federal jurisdiction. Once the jurisdiction of the Court has been effectively invoked it has "*accrued jurisdiction*" to determine the whole "*matter*" or controversy between the parties: *Re Wakim; Ex parte McNally*[12].

5.2. His Honour McHugh J observed at para 34 page 13;

10 see *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

11 s. 19 (as to original jurisdiction) and s. 24 (as to appellate jurisdiction) of the *Federal Court of Australia Act* 1976

12 (1999) 198 CLR 511 at 584-588 [136]-[147]

34 "I do not think that it can be seriously doubted that, if Australia is to have a system of federal courts, the public interest requires that these courts should have jurisdiction to deal with all existing controversies between litigants in those courts."

5.3. His Honour went on to say at para 75 on page 29

75 "However, there will ordinarily be a single controversy and, therefore, a "matter" for the purpose of Ch III if all the claims arise out of "a common substratum of facts" . Moreover, in Fencott v Muller Mason, Murphy, Brennan and Deane JJ said that there may be a single controversy even though the facts from which the various claims arise "do not wholly coincide". Thus, if a plaintiff has been injured in an accident as a result of independent acts of negligent driving by a Commonwealth employee and a private citizen, the High Court will have jurisdiction under s 75(iii) in respect of both claims even though the acts or omissions constituting negligence and the facts giving rise to them are very different."

5.4. at para 79 on page30

79 "As this Court made plain in Lange v Australian Broadcasting Corporation , the common law cannot be at odds with the Constitution and must conform with it."

5.5. at para 82 on page31

82 "Since the recent decision of this Court in Northern Territory of Australia v GPAO , the jurisdiction of the Federal Court to make the orders in question cannot be challenged."

5.6. At para 140 on page 55
Gummow J and Hayne J
observe

140 In Fencott it was said that :

"in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."

6. **<u>The Second and Third Respondents /No Conditions for Granting of Leave/ FCR 1.32</u>**

6.1. The Commissioner of Taxation and the Second Respondent are officers of the Commonwealth and are subject to the Legal Services Directions 2005 at Annexure B to act as Model Litigants.

6.2. The orders made by the Honourable Judge Reithmuller in the Court below on the 27th April 2015 were made based on orders drafted by the Second Respondent that were drafted to remove evidence from the proceedings that would have assisted the court below in avoiding falling into appealable error.

6.3. The Respondents seek conditions be imposed on the granting of leave which I respectfully submit should not be imposed as this would effectively place limitations on the courts ability to hear the whole of the Matter arising and review the evidence that is available subject to reinstatement of the evidence that was struck off by the orders of Reithmuller J on the 27th April 2015.

6.4. The Crown as a model litigant has an obligation to call witnesses and submit evidence to this learned Court that is relevant to the proceedings as set out in the following authorities.

6. Model Litigant Obligations

Authority	Principle	Judge	Cite
Duties of Model Litigants			
Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333	Early HC authority stating that Crown parties have to observe a standard of fair play.	Griffith CJ	342
Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1 [Federal Court]	The 'model litigant' standard exists 'to protect the reasonable expectations of those dealing with public bodies', that public bodies use their authority for the public good, and that they act as exemplars for good litigation.	Finn J	40-42
Scott v Handley (1999) 58 ALD 373 [Federal Court]	The standards of model litigants carry positive duties to conscientiously comply with procedures and seek just outcomes, and negative duties to not pursue technicalities or unfairly impair the other party's capacity to defend itself.	Spender, Finn and Weinberg JJ	[43]-[45]
Obligation to give evidence			
Australian Securities and Investments Commission (ASIC) v Hellicar (2012) 247 CLR 347	This case is an authority that will likely be used to argue that a model litigant does not have extra responsibilities to call witnesses or other evidence. The key passage: Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. That procedural rules apply to model	French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ	[240]

	litigants uniformly with other litigants.		
R v Rigney [2005] SASC 264	When acting as a prosecutor or similar party a model litigant has a duty to call witnesses for reasons of justice and not tactical reasons. This is so even if the witness would give evidence contrary to their case. Even if the defendant can access the witness, the prosecutor's failure to call them can adversely affect their evidence and the defendant's case.	Vanstone J, Bleby and Anderson JJ agreeing	[14], [16], [20]
Police v Kyriacou [2009] SASC 66	The prosecution has a duty to call all relevant witnesses. If they determine not to call a witness they should make available any statement made by the witness to the defence and take steps to make the witness available to the defence. It is open to the defence to ask the judge to inquire as to why the prosecution did not call the witness.	Sulan J, Gray and Kourakis JJ	[62]-[63]

6.5. The recent High Court case of *ASIC v Hellicar* [13] sets authority that a model litigant has a duty to pursue procedural fairness with evidence such as calling witnesses, but not beyond the standards of ordinary litigants, unless otherwise required by regulations. In particular at [240] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ:

> *[240] "ASIC also did not dispute that it had a duty to act as a "model litigant" pursuant to the Legal Services Directions made under s 55ZF of the Judiciary Act 1903 (Cth). But App B of the directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that noncompliance cannot be raised in any proceeding except by or on behalf of the Commonwealth. The Commonwealth has the same rights as any other litigant. It has the same powers to enforce those rights. That is so whether the Commonwealth is suing or being sued. And it is so even where, as here, no other person could have brought the proceedings. Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that*

[13] *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 286 ALR 501

the Court of Appeal's reasoning contemplated. The Solicitor-General of the Commonwealth correctly submitted that the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants -- they apply uniformly."

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

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

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

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

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

> *"Conscientious compliance with the procedures designed to minimize cost and delay":*

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

> *"the court to arrive at the proper and just result":*

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

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

> ***[14]*** *Mrs Shaw QC, who appeared for the appellant upon the appeal, submitted that notwithstanding these matters Ms. Wright should have been called to give evidence by the prosecution; even if only presented for cross-examination. It was submitted that despite the fact that Ms. Wright was made available to the defence to be called, and was called by defence counsel, a miscarriage of justice resulted. That was said to be because the value of the evidence was potentially depreciated on account of Ms. Wright being a defence and not a prosecution witness. In that context reliance was placed upon* R v Shaw *(1991) 57 A Crim R 425 at 450. It was also because of the course of cross-examination of Ms. Wright by the same prosecutor and further because of submissions made about Ms. Wright's evidence by that prosecutor in the final address.*
>
> ***[16]*** *There is no doubt about the obligation of prosecuting counsel to act objectively and with propriety in carrying out that important role. The principles which apply have been clearly stated and need no repetition:* Whitehorn v R *(1983) 152 CLR 657;* R v Apostilides *(1984) 154 CLR 563;*

Ziems v Prothonotary of the Supreme Court of New South Wales *(1957) 97 CLR 279 , 294 per Fullagar J.*

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

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

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

It is noteworthy that in the cases of Kneebone *and* Shaw *the witness under consideration was said to be an eye witness to the crime. The significance of a witness in a case will obviously be an important factor in the decision as to whether to call that witness.*

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

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

> ***[62]*** *There is substance in the submissions of counsel for the appellant, although I do not accept that all the matters to which he refers are required to be established before the principle in* Jones v Dunkel *is applied. The matters to which counsel refers are relevant to the Court's consideration whether to give a* Jones v Dunkel *direction. I observe the direction is simply a direction as to the process of reasoning open to a jury in arriving at its ultimate decision. I consider that the principle in* Jones v Dunkel *has limited application to criminal trials, and should rarely be given in respect of the prosecution's failure to call witnesses. Insofar as its application in cases in which it is argued that the prosecution has failed to call a material witness, there are a number of factors to which a court should have regard before applying the principle.*
>
> ***[63]*** *First, the prosecution has a duty to call material witnesses. The prosecutor has a discretion as to what evidence will be adduced by the prosecution. The prosecutor, nevertheless, is under a duty to call all relevant witnesses or, if he has determined not to call a material witness, then that witness's statement, if available, should be provided to the defence. Secondly, if no statement is available, then the identity of a potentially material witness should be provided to the defence and steps should be taken by the prosecution to make that witness available to the defence. Thirdly, it is open to defence counsel to ask the judge to make an inquiry of the prosecutor as to why the witness is not be called.[36] If an explanation acceptable to the court is given, then it is not appropriate for a Jones v Dunkel direction to be given in respect of the failure of the prosecution to call that witness. In deciding whether an explanation is acceptable, the court will have regard to the prosecutor's discretion not to call a witness who the prosecutor considers is not honest or not reliable. A judge may direct the jury that the failure of a witness to have been called is a factor to which they are entitled to have regard when considering whether they are satisfied beyond reasonable doubt that the prosecution has proved its case.[37]*

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

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

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

7—Role of Crown Solicitor

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

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

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

Common Law authorities

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

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

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

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

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

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

> ***[192]*** *As an aside I should observe that this submission was illustrative of the general tenor of a number of the submissions of the Ombudsman. The*

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

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

"And, in this regard, it is proper to have in mind that the council is a corporation constituted by statute, and discharging public functions. It has acquired the property by a procedure which was invalid, and it may retain it only if it is to have the unfettered benefit of protection designed primarily for the protection of third parties. It is well settled that there is expected of the Crown the highest standards in dealing with its subjects: see Melbourne Steamship Co. Ltd. v. Moorehead, per Griffith C.J. What might be accepted from others would not be seen as in full accord with the principles of equity and good conscience to be expected in the case of the Crown: see P. & C. Cantarella Pty. Ltd. v. Egg Marketing Board (N.S.W.). In my opinion, a standard of conduct not significantly different should be expected of a statutory corporation of the present kind; there being no competing interests, the council should be seen as holding the land subject to the appropriate rights in equity."

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

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

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

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

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

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

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

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

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

members) of non-governmental bodies and associations: see Aronson and Dyer, Judicial Review of Administrative Action, LBC, Sydney, 1996, pp 493-5.

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

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

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

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

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

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

> ***[14]*** *It is convenient to say something at this stage about the status of the State Rail Authority. At the time of the appellant's accident, it was a corporation*

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

[15] *On 1 July 2007 the name of the State Rail Authority was changed to the "State Rail Authority Residual Holding Corporation": State Revenue and Other Legislation Amendment (Budget) Act 2007, Sch 4 [11], inserting new subcl (1A) in Sch 8, cl 1 of the Transport Administration Act. The functions of the State Rail Authority changed with these amendments, but it has not been suggested to the Court that anything turns on these new administrative arrangements. Accordingly, the State Rail Authority is and was a statutory body representing the Crown. As such, it is a part of the executive government and should conduct itself, in the conduct of litigation, in the manner expected of the executive government.*

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

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

> ***[114]*** *What do the dictates of justice require in the circumstances of this case? I have regard to all of the matters raised on behalf of the Plaintiff and the Commonwealth. I have concluded that officers of DIMIA failed to exercise reasonable diligence with respect to contacting Ms. Jaleeli in the manner advised by Counsel for the Commonwealth. This failure has had a significant impact upon this litigation. I have had regard to the obligations of the Commonwealth as a litigant before this Court, under its own model litigant code and, since 15 August 2005, under the provisions of the Civil Procedure Act 2005, some of these obligations having a direct bearing on the present application. There have been failures to comply on the part of the Commonwealth with respect to a number of orders. The manner in which my orders of 13 October 2005 were approached and the way in which the privilege claim unfolded on 7 November 2005 with the disorderly presentation of documents by the Commonwealth did not assist the Court. However, I do not consider that these matters bear significantly on the present question.*
>
> ***[115]*** *Justice is the paramount consideration in determining this application. Save insofar as costs may be awarded against the party seeking leave, such an application is not the occasion for punishment of the party making the application: Queensland v JL Holdings Pty Ltd at 155.*

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

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

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

7. From the aforementioned authorities……. in a normal circumstance where Conscious Maladministration and Collusion are not present, I would expect that the second and third respondents and the Second and Third Respondents' respective Solicitors, both as representatives of the Crown, to properly adhere to the Crown's Model Litigant Obligations by ensuring that I, as an unrepresented party, am properly apprised in respect to the issues raised by the Crown, can cross examine witnesses and have had the benefit of reviewing the Crown's Outline of Submissions at least one week before the hearing of a particular matter in which jurisdiction has been enlivened.

Dated 18th June 2015

……..
Andrew Garrett
The Applicant

ANNEXURE 2

Australian Securities & Investments Commission

Form 504
Corporations Act 2001
427(1), 427(1A), 427(1B)

Notification that a person has been appointed controller/ entered into possession etc.

If there is insufficient space in any section of the form, you may photocopy the relevant page(s) and submit as part of this lodgement

Details of company in receivership

Company name
Westpac Banking Corporation

ACN/ABN/ARBN
ABN 33 007 457 141

Tick one box

This notice is being given by:

		ASIC internal form code
☐	the person who obtained an order for the appointment of, or who appointed, the receiver or receiver and manager under s427(1)	504A & B
☐	the appointer of the controller under s427(1A)	504C
☐	the controller (other than receiver, receiver and manager or managing controller) under s427(1B)	504D
☒	the managing controller (other than receiver and manager) under s427(1B)	504E

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
The Trustees of OenoViva Capital Resources and the Australian People Future Fund

Contact name/position description
Andrew Morton Garrett

ASIC registered agent number (if applicable)

Telephone number
+61 424 324 135

Postal address or DX address
Care of 29 Hunter Street, Hobart, Tasmania, 7000

1 Details of the appointment/entry into possession etc.

Tick one box

- ☐ Receiver of the property described in the Schedule to this form
- ☐ Receiver and manager of the property described in the Schedule to this form
- ☐ Controller (other than receiver, receiver and manager or managing controller) of the property described in the Schedule to this form
- ☒ Managing controller (other than receiver and manager) of the property described in the Schedule to this form

1 Continued... **Details of the appointment/entry into possession etc.**

If appointment by Court order, tick box to indicate the Court and provide details

☐ **Appointment by Court order**

☐ Federal Court of Australia
State or territory registry

☐ Family Court of Australia
State or territory registry

☐ Supreme Court
State or territory

Date of obtaining order
☐☐/☐☐/☐☐
[D D] [M M] [Y Y]

Proceeding-matter number

Year

If appointment by instrument, tick box to indicate the type of instrument and provide details

☒ **Appointment by instrument**

Date of appointment/entry into possession etc.
23/06/19
[D D] [M M] [Y Y]

Date of instrument
Various Dates
[D D] [M M] [Y Y]

Description of instrument

☒ Instrument registered in the Personal Property Securities Register

Security interest number

201310200000960; 201611290014649; ~~201704160000221; 201707180~~029034; 201709170000781; 201712240000544; 201804220001047; ~~201810010034506201605190~~014552; 201705070000609; 201809170059490; 201805140023684; 201808290011555; 201809070096183; 201812270025300

Description of instrument
Personal Property Security Interests, Contractual, Statutory & Equitable Charges of various dates

20160501000143 6

☐ Instrument registered in other register
Please specify details

☐ Instrument not registered
Name of appointer

2 Details of the person(s) appointed

Family name: Garrett
Given name: Andrew , Morton
Firm name (if applicable): OenoViva Capital Resources/ Australian People Future Fund
Unit, level: 10
Street number and street name: 15 Hunter Street
Suburb/City: Hobart
State/Territory: Tasmania
Postcode: 7000
Country (if not Australia):

Type of appointment

[X] appointed singly [ ] appointed jointly [ ] appointed jointly and severally

Family name:
Given name:
Firm name (if applicable):
Unit, level:
Street number and street name:
Suburb/City:
State/Territory:
Postcode:
Country (if not Australia):

Type of appointment

[ ] appointed singly [ ] appointed jointly [ ] appointed jointly and severally

4 Schedule of property

All assets and Undertakings in the Territory of the World including but not limited to Any thing of Value, Loans to other persons, Moneys on Deposit, Charges and Security Interests of Any Kind over and person or Entity, Certificates of Title to Real Property, Interests in Real Estate, Intellectual Property, Plant & Equipment, Goodwill, shares in Pubic and Private Companies, Beneficial Interests in Trusts, Public Office, Licenses to trade as a Bank, SWIFT Membership, Cash any other thing of value not stated in this schedule

(If insufficient space) Further details are enclosed in the annexure marked ( ) of ( ) pages.

Signature

This form must be signed by:

(a) where the form is lodged for the purposes of s427(1) or s427(1A), by the person who obtains an order for the appointment of, or who appoints, the controller, or

(b) where the form is lodged for the purposes of s427(1B), by the controller or managing controller.

Name

Andrew Morton Garrett

Capacity

Managing Controller

Corporation name (if applicable)

OenoViva Capital Resources/ Australian People Future Fund

Signature

Date signed

2 3 / 0 6 / 1 9

[D D] [M M] [Y Y]

Lodgement

Send completed and signed forms to:
Australian Securities and Investments Commission,
PO Box 4000, Gippsland Mail Centre VIC 3841.

For more information

Web www.asic.gov.au
Need help? www.asic.gov.au/question
Telephone 1300 300 630

OENOVIVA

amg signature

2019.06.25 14:28:17+10'00

Australian Securities & Investments Commission

Form 504
Corporations Act 2001
427(1), 427(1A), 427(1B)

Notification that a person has been appointed controller/ entered into possession etc.

If there is insufficient space in any section of the form, you may photocopy the relevant page(s) and submit as part of this lodgement

Details of company in receivership

Company name
National Australia Bank Limited

ACN/ABN/ARBN
004 044 937

This notice is being given by:

Tick one box

		ASIC internal form code
☐	the person who obtained an order for the appointment of, or who appointed, the receiver or receiver and manager under s427(1)	504A & B
☐	the appointer of the controller under s427(1A)	504C
☐	the controller (other than receiver, receiver and manager or managing controller) under s427(1B)	504D
☑	the managing controller (other than receiver and manager) under s427(1B)	504E

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
Deloitte Capital Resources

Contact name/position description
Andrew Garrett

ASIC registered agent number (if applicable)

Telephone number
0424 824 185

Postal address or DX address
Level 1/82 Flinders St
Adelaide, SA 5000

1 Details of the appointment/entry into possession etc.

Tick one box

☐	Receiver of the property described in the Schedule to this form
☐	Receiver and manager of the property described in the Schedule to this form
☐	Controller (other than receiver, receiver and manager or managing controller) of the property described in the Schedule to this form
☑	Managing controller (other than receiver and manager) of the property described in the Schedule to this form

1 Continued... **Details of the appointment/entry into possession etc.**

If appointment by Court order, tick box to indicate the Court and provide details

☐ **Appointment by Court order**

☐ Federal Court of Australia
State or territory registry

☐ Family Court of Australia
State or territory registry

☐ Supreme Court
State or territory

Date of obtaining order
[D D]/[M M]/[Y Y]

Proceeding-matter number

Year

If appointment by instrument, tick box to indicate the type of instrument and provide details

☑ **Appointment by instrument**

Date of appointment/entry into possession etc.
01/05/16
[D D]/[M M]/[Y Y]

Date of instrument
04/08/04 + 23/04/2016
[D D]/[M M]/[Y

Description of instrument

☑ Instrument registered in the Personal Property Securities Register

Security interest number
201604240003952

Description of instrument
Undertaking given to the Court in SCI-2004-927;

☐ Instrument registered in other register
Please specify details

☐ Instrument not registered
Name of appointer

Signature

This form must be signed by:
(a) where the form is lodged for the purposes of s427(1) or s427(1A), by the person who obtains an order for the appointment of, or who appoints, the controller, or
(b) where the form is lodged for the purposes of s427(1B), by the controller or managing controller.

Name: Andrew Hoban Garrett

Capacity: Managing Controller

Corporation name (if applicable): Cayenne Capital Resources

Signature:

Date signed: 01/05/16 [D D] [M M] [Y Y]

Lodgement

Send completed and signed forms to:
Australian Securities and Investments Commission,
PO Box 4000, Gippsland Mail Centre VIC 3841.

For more information
Web www.asic.gov.au
Need help? www.asic.gov.au/question
Telephone 1300 300 630

2 Details of the person(s) appointed

Family name: Garrett
Given name: Andrew Hobson
Firm name (if applicable):
Unit, level: Level 1
Street number and street name: 82 Flinders St
Suburb/City: Adelaide
State/Territory: SA
Postcode: 5000
Country (if not Australia):

Type of appointment: ☑ appointed singly ☐ appointed jointly ☐ appointed jointly and severally

Family name:
Given name:
Firm name (if applicable):
Unit, level:
Street number and street name:
Suburb/City:
State/Territory:
Postcode:
Country (if not Australia):

Type of appointment: ☐ appointed singly ☐ appointed jointly ☐ appointed jointly and severally

4 Schedule of property

See Schedule 1 of Notice of Crystallisation / Seizure of Assets Annexure 1

(If insufficient space) Further details are enclosed in the annexure marked ( ) of ( ) pages.

Australian Securities &
Investments Commission

Form 504
Corporations Act 2001
427(1), 427(1A), 427(1B)

Notification that a person has been appointed controller/ entered into possession etc.

If there is insufficient space in any section of the form, you may photocopy the relevant page(s) and submit as part of this lodgement

Details of company in receivership

Company name
Commonwealth Bank of Australia Limited

ACN/ABN/ARBN
ABN 48 123 123 124

This notice is being given by:

Tick one box

		ASIC internal form code
☐	the person who obtained an order for the appointment of, or who appointed, the receiver or receiver and manager under s427(1)	504A & B
☐	the appointer of the controller under s427(1A)	504C
☐	the controller (other than receiver, receiver and manager or managing controller) under s427(1B)	504D
☒	the managing controller (other than receiver and manager) under s427(1B)	504E

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
The Trustees of OenoViva Capital Resources and the Australian People Future Fund

Contact name/position description
Andrew Morton Garrett

ASIC registered agent number (if applicable)

Telephone number
+61 424 324 135

Postal address or DX address
Care of 29 Hunter Street, Hobart, Tasmania, 7000

1 Details of the appointment/entry into possession etc.

Tick one box

- ☐ Receiver of the property described in the Schedule to this form
- ☐ Receiver and manager of the property described in the Schedule to this form
- ☐ Controller (other than receiver, receiver and manager or managing controller) of the property described in the Schedule to this form
- ☒ Managing controller (other than receiver and manager) of the property described in the Schedule to this form

1 Continued... Details of the appointment/entry into possession etc.

If appointment by Court order, tick box to indicate the Court and provide details

☐ **Appointment by Court order**

☐ Federal Court of Australia
State or territory registry

☐ Family Court of Australia
State or territory registry

☐ Supreme Court
State or territory

Date of obtaining order
☐☐/☐☐/☐☐
[D D] [M M] [Y Y]

Proceeding-matter number

Year

If appointment by instrument, tick box to indicate the type of instrument and provide details

☒ **Appointment by instrument**

Date of appointment/entry into possession etc.
☐☐/☐☐/☐☐
[D D] [M M] [Y Y]

Date of instrument
☐☐/☐☐/☐☐
[D D] [M M] [Y Y]

Description of instrument

☒ Instrument registered in the Personal Property Securities Register

Security interest number
201605050023442

Description of instrument
Contractual, Statutory & Equitable Charges of various dates

☐ *Instrument registered in other register*
Please specify details

☐ Instrument not registered
Name of appointer

2 Details of the person(s) appointed

Family name: Garrett
Given name: Andrew , Morton
Firm name (if applicable): OenoViva Capital Resources/ Australian People Future Fund
Unit, level: 10
Street number and street name: 15 Hunter Street
Suburb/City: Hobart
State/Territory: Tasmania
Postcode: 7000
Country (if not Australia):

Type of appointment

[X] appointed singly [ ] appointed jointly [ ] appointed jointly and severally

Family name:
Given name:
Firm name (if applicable):
Unit, level:
Street number and street name:
Suburb/City:
State/Territory:
Postcode:
Country (if not Australia):

Type of appointment

[ ] appointed singly [ ] appointed jointly [ ] appointed jointly and severally

4 Schedule of property

All assets and Undertakings in the Territory of the World including but not limited to Any thing of Value, Loans to other persons, Moneys on Deposit, Charges and Security Interests of Any Kind over and person or Entity, Certificates of Title to Real Property, Interests in Real Estate, Intellectual Property, Plant & Equipment, Goodwill, shares in Pubic and Private Companies, Beneficial Interests in Trusts, Public Office, Licenses to trade as a Bank, SWIFT Membership, Cash any other thing of value not stated in this schedule

(If insufficient space) Further details are enclosed in the annexure marked ( ) of ( ) pages.