FOR ANNEXURE TO AFFIDAVIT
This is the annexure marked ......TAB 1
Referred to in the Affidavit of ......Andrew Garrett
Sworn ... before me at Prospect, South Australia
On this 22nd ......day of......July ......2026



**TAB 1**

RALPH DESMOND CLARKE
A Justice of the Peace
for South Australia
ID No: 21952
128 Prospect Road
PROSPECT SA 5082

22 JUL 2026

# Faith in umpires key to law and order

CHRIS KOURAKIS

WHY is the independence of the judiciary important? In all spheres of life we depend on common agreement on ground rules that are well known in advance.

We rightly complain if the goalposts are constantly changed. Without an ordered and level playing field, sporting games would become all-in brawls. Ground rules only work if enforced by officials who know the rules, are independent and rational, and have the character to withstand outside pressures.

If the umpires at this week's Adelaide Oval game come out wearing Richmond jumpers instead of neutral colours, the Power fans would have every reason to jeer.

Every Australian judge is well studied in the law, earns his or her appointment through many years of hard work as a legal practitioner. Every judge is appointed by a government acting for the whole of the people of the jurisdiction in which they are appointed and takes an oath to, and does, administer justice according to law and free of fear or favour.

There are around 270 cases heard and finalised in SA courts every day. Of all of those cases, around half of 1 per cent result in appeals being instituted. Only a very small number of cases attract public attention. South Australia is served well by its judiciary.

Unfortunately in the administration of justice, like sport, there are "wannabe coaches" who know little about the rules, are captives of their personal prejudices and interests and shout from the sidelines. They are briefly placated when the rules are explained to them, until, in the heat of the moment, they revert to type.

One or two strong voices can add some interest to a sporting match. Too many such voices, and the game is soon ruined for players and more reasonable spectators. Trashing judicial independence and the rule of law has much graver consequences. Mob rule deserves no respect.

Criminals may still be caught and sentenced, but the most effective deterrent of crime is respect for the law. If that is lost, no police force will be big enough to control the outbreak of offending. If the community loses faith in the courts to justly redress civil wrongs, our state will become a cheat's paradise, and consumer and commercial confidence will be lost. What needs to be done?

All judges welcome constructive criticism and reminders of our community's core values. Historically attorneys-general carried much of the burden of explaining how the courts work to their government colleagues and the community. Judges learnt long ago that, with some exceptions, attorneys-general have abandoned that responsibility.

The legal profession will continue its advocacy for judicial independence. I hope that other commentators accept that their privileged access to the mass media comes with a responsibility to investigate and consider before offering a criticism from the sidelines.

CHRIS KOURAKIS IS CHIEF JUSTICE OF SOUTH AUSTRALIA

## HUMPHRIES, Peter

ADMITTED:

1 February 1972

EMPLOYMENT:

Duncan Basheer Hannon

AREAS OF EXPERTISE:

Personal injury and medical negligence in particular Class actions/mass tort litigation

**CANDIDATE STATEMENT**

*In considering my nomination, Members are asked to take account of:*

I have been a practising lawyer for in excess of forty years and have been Managing Partner of Duncan Basheer Hannon for the last ten years. I have a broad experience of areas of practice and have variously been a criminal lawyer, family lawyer and for the last twenty five years predominantly a personal injury lawyer with a particular interest in Class Actions/ Mass Tort Litigation

*I am particularly interested in the following issues, which I believe are important to the Society/ and or the profession:*

I have long been concerned about the increasing unbalance between law graduates and jobs on offer within the legal profession. I think Universities have regarded law degrees as a cash cow, costing little to provide but with unreasonably high HECS fees which are used (at least in part) to subsidise medical degrees. I am also concerned about the insidious erosion of judicial independence by Governments of all persuasions and the lack of regard for the importance of the separation of powers.

ABC NEWS

# Australia's 'vexatious litigants' are diverse — they include a mass killer and an inventor

By Meagan Dillon

*Posted Thu 27 Jun 2019, 6:34am*

**Australians who have been declared vexatious litigants are diverse — they include a successful South Australian winemaker, a Melbourne mass murderer and a Northern Territory "rubbish warrior".**

But they have one thing in common. They believe they have been wronged in some way and want a court order to say so.

There have been 99 people declared "vexatious litigants" by state-based Australian courts, including seven in South Australia, 21 in Victoria and 43 in New South Wales.

The term refers to people who repeatedly launch lawsuits without having reasonable grounds, or for an ulterior purpose.

The High Court has declared four people serial litigants, while the Federal Court has 49 people on its internal register of vexatious litigants. The Family Court was unable to provide a figure.

Simon Smith, an adjunct professor and leading legal history scholar at Victoria University, said there has been a surge in serial litigants because of an "explosion of law" since the 1970s.

"The Commonwealth has become a much bigger player and we now have all these tribunals and all of these laws that we didn't have before," he said.

"There's so much more scope for dispute."

**PHOTO:** Vexatious litigants have been clogging up the judicial system since the 1930s. (Flickr: Isaac Bowen)

**RELATED STORY:** Hoddle St killer declared vexatious litigant for life

**RELATED STORY:** Serial litigant fights move to block him from courts

**RELATED STORY:** Man has charge overturned after abusive tirade in court

Key points:

- At least 173 people have been declared vexatious litigants in Australia
- Hoddle Street killer Julian Knight is a vexatious litigant, launching 40 lawsuits over 10 years
- Australia's first vexatious litigant, Rupert Frederick Millane, was declared in 1930

## SA winemaker ran a 'royal commission' into his own life

https://www.abc.net.au/news/2019-06-27/more-than-100-people-declared-australian-vexatious-litigants/11225640 3/4

6/27/2019 Australia's 'vexatious litigants' are diverse — they include a mass killer and an inventor - ABC News (Australian Broadcasting Corpor...

In one case, former South Australian winemaker Andrew Garrett wrote a 433-page document detailing "scandalous" allegations against the National Australia Bank (NAB), his own lawyers and liquidators.

He also claimed Supreme Court judges had spent 10 months trying to "gag" him.

When Justice Tim Anderson declared Mr Garrett a vexatious litigant in the SA Supreme Court in 2007, he described the 433-page document as "puzzling" and stated the bankrupt man had wanted to "run a royal commission" into his own life.

"Mr Garrett is an intelligent man who has chosen to be stubborn and belligerent in taking on NAB but also many other professional people," he said in his decision.

Court documents stated Mr Garrett owed NAB more than $15 million as of January 2006.

Mr Garrett launched more than 30 lawsuits between 2004 and 2007.

Another SA serial litigant, Kazimir Kowalski, started his legal crusade against Mitsubishi Motors more than 30 years ago.

He settled with Mitsubishi Motors in 1998 and received $200,000 in compensation after numerous injury claims from 1986.

Despite the settlement, the SA Attorney-General claimed 109 lawsuits initiated by Mr Kowalski — in seven different courts and tribunals — were vexatious, and Mr Kowalski was declared a vexatious litigant in 2014.

SA Attorney-General Vickie Chapman said vexatious litigants "not only clog up the system" but they also cost both the taxpayer and private individuals who may be subject to numerous, baseless claims.

"Access to justice in a timely manner is an important part of our civil justice system, which is why it is so important we have laws that help the courts deal with vexatious litigants in an appropriate manner," she said.

❖ **From an article appearing on line in ABC News**

**ANNEXURE 5**

You are logged in as **OVCR**
Go to eCourtroom

Lodgment Details

| | | | |
|---|---|---|---|
| **Lodgment ID:** | 1316107 | **Transmission Date:** | 5/05/2024 1:47:42 PM AEST |
| **Lodgment Date:** | 5/05/2024 1:47:42 PM AEST | **Your File Reference:** | NOTICE OF ENFORCEMENT |

Cause of Action Details

| | | | |
|---|---|---|---|
| **Filing:** | Existing | **Jurisdiction:** | Federal Court of Australia (FCA) |
| **Filing Registry:** | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA | **File Number:** | NSD741/2023 |
| | | **File Title:** | AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY v ANDREW MORTON GARRETT |
| **Cause of Action:** | MISCELLANEOUS ACTION filed by AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY(A) on 20-JUL-2023 | | |

Lodged Documents

| Original Document | Document Type | Document Status | Fee | Requests |
|---|---|---|---|---|
| NSD-741-2023 THE KING v AUSTRALIA NOTICE OF ENFORCEMENT In the Matter of the Crown (Liquidator and Managing Controller Appointed) 05.05.2024.pdf | Application for an Order Relating to the Procedure to be Followed in a Representative Proceeding - Form 22 - Rule 9.35(1) | Supporting Document | AUD$ 0.00 | |
| AMG 8013 NSD 721 of 2023 Affidavit of Andrew Morton Garrett dated 30th April 2024.pdf | Affidavit - Form 59 - Rule 29.02(1) | Supporting Document | AUD$ 0.00 | |

Total Cost ($AUD): AUD$ 0.00

Parties for this Action

| Sequence | Representative | Name | Matter Role Type | Lodged on behalf of | Corporate Type |
|---|---|---|---|---|---|
| 1 | | OENOVIVA CAPITAL RESOURCES | Cross-Claimant | | other |
| 1 | OENOVIVA CAPITAL RESOURCES | GARRETT, ANDREW MORTON | Respondent | | other |

Contact for the File

| | | | |
|---|---|---|---|
| **Surname:** | ANDREW MORTON GARRETT PERSONALLY, AND AS TRUSTEE OF THE ANDREW GARRETT FAMILY TRUST NO 4 ABN 42 388 204 496 TRADING AS OENOVIVA CAPITAL RESOURCES | **Given Names:** | |

# Form 3 INTERLOCUTORY PROCESS RE ENFORCEMENT OF NOTICE OF REVIEW OF DECISIONS AND CONDUCT OF LEE J. AND ORS. RE BREACHES OF SEPARATION OF POWERS.

(Corporations Rules; 2.1,2.2 14.1, Division 15, 15A.4, 15A.8, 15A.9)

Federal Court of Australia No. 741 of 2023

District Registry: NSW

Division: MIXED PROCEEDING; CRIMINAL/ EQUITY/ CORPORATIONS.

IN THE MATTER OF THE CROWN (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)

ABN 50 785 365 455

**THE KING**

First Plaintiff and those named in the Schedule[1].

**COMMONWEALTH OF AUSTRALIA CIK; 0000805157 (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)**

First Defendant and those named in the Schedule[2].

## A. DETAILS OF APPLICATION

This application is made under s61 of *the Commonwealth of Australia Constitution Act* 1900 (UK) and the Laws applicable under Judicial Notice.

On the facts stated in the supporting affidavits filed in these proceedings and DCCRM-0073-2019, the applicants, The King and ors applies for the following relief:

1. That the title of these proceedings is changed to reflect the Cross Claim and Addendum to the Cross Claim.
2. Enforcement [3] of Recapitalisation of the First Defendant, Judicial Reviews and Writs of Ouster of Office/ Quo Warranto published by Andrew Morton Garrett of the Decisions and Conduct of Lee J and all Public Officials purportedly exercising Judicial and/or Quasi-Judicial Discretionary Public Powers Conferred under Enactments presiding in any hearing in the Jurisdictions of related to Andrew Morton Garrett in any capacity.[4]
3. Such other orders as the Crown Attorney General deems fit upon advice from the Court.

[1] Attached to AMG 7377 NSD-741-2023 SEALED Filed TAGFILT to ATO, CDPP, AUSTRALIA, PRIME MINISTER 19.09.2023 RE TAX JURISDICTION

[2] AMG 7765 NSD-741-2022 Indictment Mark Dreyfus and Ors 03.02.2024; AMG 7766 NSD-741-2022 Indictment Information Notice Mark Dreyfus and Ors 03.02.2024

[3] section 440B, 440F, 440J, 459A, 459B, 459C, 459D, 459F, 459H, 459J, 459L, 459M, 459N, 459P, 459Q, 459R, 459S, 459T, 461, 462, 464, 465B, 465C, 466, 467, 467A and 467B of *Corprations Act* 2001 (AU)

[4] Disclosed in Public Interest Disclosure Drive at the address disclosed in the affidavits.


| | | | |
|---|---|---|---|
| Filed on behalf of (name & role of party) | The Respondent | | |
| Prepared by (name of person/lawyer) | Andrew Garrett | | |
| Law firm (if applicable) | | | |
| Tel | 0450 831 708 | Fax | 02 9617 7125 |
| Email | amg@betterworldfuturefund.org | | |

**Address for service**
(include state and postcode) Unit 3/ 11 Harvey Street, Nailsworth, South Australia, 5083

Date: 5th May 2024

RESERVE BANK
OF AUSTRALIA

. . . . . . . . . . . . . . . . . . . . . .

*Signature of applicant making this application*

This application will be heard by . . . . . . . . . . . . . . . . . . . . . . . . . . at the South Australian Registry, 3 Angas Street, Adelaide, 5000 at . . . . . . . . *am/*pm on . . . . . . . . ..

**B. NOTICE TO RESPONDENTS**

TO: ANDREW MORTON GARRETT,TRUSTEE IN BANKRUPTCY, LIQUIDATOR AND MANAGING CONTROLLER and others as named in the Schedule.

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence.

Before appearing before the Court, you must, except if you have already done so or you are the plaintiff in this proceeding, file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff in the originating process.

| |
|---|
| *Note* Unless the Court otherwise orders, a respondent that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave. |

**C. FILING**

This interlocutory process is filed by The Crown Attorney General for the applicant.

**D. SERVICE**

The applicant's address for service is Unit 3/ 11 Harvey Street,

It is intended to serve a copy of this interlocutory process on each respondent and on any person listed in the Schedule Care of:

Mark Dreyfus; Care of the Australian Government Solicitor's Office, Level 10, 60 Martin Place Sydney, NSW 2000

Email; processservice@ags.gov.au

**Schedule**

Federal Court of Australia No. 741 of 2023

District Registry: NSW

Division: MIXED PROCEEDING; CRIMINAL/ EQUITY/ CORPORATIONS.

IN THE MATTER OF THE CROWN (LIQUIDATOR AND MANAGING CONTROLLER APPOINTED)

ABN 50 785 365 455

**Plaintiffs**

Named in Schedule attached to AMG 7377 NSD-741-2023 SEALED Filed TAGFILT to ATO, CDPP, AUSTRALIA, PRIME MINISTER 19.09.2023 RE TAX JURISDICTION

**Defendants**

NAMED IN THE EXHIBITS PRODUCED AND MARKED AS;

- AMG 6776.
- AMG 6867.
- AMG 6793.
- AMG 7015.
- AMG 7765; NSD-741-2022 Indictment Mark Dreyfus and Ors 03.02.2024.
- AMG 7766; NSD-741-2022 Indictment Information Notice Mark Dreyfus and Ors 03.02.2024

Date: 5th May 2024.

TAB 2

Page 213 of 234

22 JUL 2026

ANNEXURE 3

FOR ANNEXURE TO AFFIDAVIT
This is the Annexure marked....JTB2
Referred to in the Affidavit of....Andrew Garrett
Sword/Affirmed before me at Prospect, South Australia.
On this....22nd....day of....July....2026

RALPH DESMOND CLARKE
A Justice of the Peace
for South Australia
ID No: 21952

128 Prospect Road
PROSPECT SA 5082

vadasz lawyers
BARRISTERS & SOLICITORS

Our ref: NV:lt:8168

4 September 2020

Mr Andrew Garrett
3/11 Harvey Street
NAILSWORTH SA 5083

By Email:

Dear Mr Garrett

**RE: COURT MATTERS**

I write to remind you there is a hearing in the District Court at 9.30am on Monday 7 September 2020 to seek leave to issue a subpoena to the ATO. I **enclose** a copy of the subpoena and have made some minor modifications. I also **enclose** my draft outline of argument on the subpoena issue.

I note your letter of 23 August 2020 in which you instruct you wish subpoenas to be issued to all witnesses mentioned on the back of the Information. There is no prospect of obtaining permission to issue such a subpoena and I do not understand why it is necessary.

However, I ask you to identify specific witnesses who you believe may be able to produce documents that have not yet been disclosed and I will seek disclosure and, if necessary, seek leave to issue a subpoena. I ask you to also identify the documents you wish to be produced by the witness.

I also add that if you are of the view that I am not acting in your best interest then I consider that it is in your best interest to find alternative representation. I suggest that if you intend taking this step you do so as soon as possible.

Yours faithfully,

NM

**NICHOLAS VADASZ**
**VADASZ LAWYERS**

Enc: Draft Subpoena
Draft Submissions

201 - 205 Currie St Adelaide SA 5000 T 8231 4646 F 8410 2221 adelaide@vadaszlawyers.com.au

ABN 56 537 627 232

- This Letter was received by me after the hearing of the 7th September 2020 in which regard the Court record received by me on the 13th May 2024 from the court (AMG 8055) evidences that I was in attendance on that day but there is no reference to the argument for leave to issue subpoena. A Copy of certificate of court record obtained on the 21st November 2022 (AMG 6528) also makes no reference to the Subpoena Argument; I do not recall the Subpoena argument though the Subpoena was certainly issued by the Court and subsequently dismissed (AMG 2597) by the same judge who issued it on the 26th October 2020 after Vadasz had retired from the court file.



Garrett

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

*The Queen*

v

Andrew Garrett

---

**DEFENCE OUTLINE OF ARGUMENT RE: SUBPOENA**

---

| | |
|---|---|
| Date: | 2 September 2020 |
| Filed on behalf of the applicant by | Vadasz Lawyers<br>Barristers & Solicitors<br>201-205 Currie Street<br>ADELAIDE SA 5000<br>Telephone: 8231 4646<br>Mobile: 0407 733 000<br>Facsimile: 8410 2221<br>L696<br>P2854 |
| Prepared by | Nicholas Vadasz<br>Vadasz Lawyers |

## DEFENCE OUTLINE OF ARGUMENT RE: SUBPOENA

1. The applicant seeks production by way of a subpoena duces tecum of documents from the Australian Taxation Office. The District Court *"… may, …issue a summons requiring a person…to produce evidentiary material".*[1]

2. Under the District Court rules an applicant first must obtain permission to issue a summons from a Judge of the District Court.

3. As Brennan J pointed out in Alister v The Queen;[2]

> *The right of an accused person to compulsory process to secure the attendance of witnesses is a right of some antiquity.*

Further, Justice Brennan, at 451, described the right as;

> *"…so basic and important an aspect of our criminal procedure that a trial in which the right is denied cannot be, in my opinion, a trial according to law. There is no distinction to be drawn in this respect between a subpoena ad testificandum and a subpoena duces tecum."*[3]

> *"A subpoena may be set aside if it is vexatious, offensive or otherwise an abuse of the process of the court which include if it is fishing."*[4]

4. In Alister v The Queen, Justice Brennan went on to say, at 451, that:

> *"In the present case, if the applicants were entitled by subpoena to compel ASIO to produce to the court documents answering the description in the subpoena, it could not be said that their trial was according to law."*[5]

5. The test for setting aside a subpoena was discussed in Alister v The Queen by Gibs CJ at 414 where it was said that the court;

> "must have some concrete ground for belief which takes the case beyond mere "fishing expedition".

---

[1] Section 25 District Court Act 1991
[2] (1983-84) CLR 410 at [450]
[3] Ibid at 451
[4] Per Mulligan J, R v Polley (1997) 68 SASR 227 at [241]
[5] (1983-84) CLR 410 at [451]

Furthermore:-

> *"Although a mere "fshing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done."*[6]

6. In Polley Justice Mulligan noted that;

> *"The documents are produced to the court if they are relevant to the proceedings in the sense discussed in Carter v Hayes unless the subpoena is set aside. The court then decides whether the party issuing the subpoena, or both, or all, parties should be at liberty to inspect the documents."*[7]

7. Justice Mulligan went on to describe the process thus;

> *"This procedure is simple to describe but it is not always easy to apply. Issues may arise as to whether the subpoena is too wide, is fishing, compliance would be oppressive, the documents are embraced by any immunity or privilege and when, if at all, they can or should be inspected by the judge to resolve any issue. The inability of an accused person to describe with precision in the subpoena the document sought may be significant and could be indicative of a fishing expedition. Common sense must prevail and the judge may inspect the documents to decide any issue which arises."*[8]

8. The term "a legitimate forensic purpose" was discussed by Justice Grey in *Hirst v Police (No2)*[9] at paragraphs 19 to 22.

> *A "legitimate forensic purpose" was considered in All Țastan where Barr AJ observed:*
>
> > *A subpoena to produce documents will have a legitimate forensic purpose if it appears to be "on the cards" that the documents will materially assist the person at whose request the subpoena is issued. ... On the other hand, there will be no legitimate forensic purpose if all the party is doing is trying to get hold of the documents to see whether they may assist him at all in his case.*

[6] Ibid at [413-414]
[7] Ibid at [241]
[8] Ibid at [241]
[9] 243 LSJS 84

> *The "on the cards" test is not treated as onerous in a criminal proceeding where significant weight must be given to a subpoena that seeks documents that may support the defence of an accused. In the present case, however, the subpoena has not been issued in the course of a trial. The subpoena has been issued in an attempt to find fresh evidence that may then be sought to be adduced on appeal.*
> *The principles underlying the reception of fresh evidence on appeal were considered in Van Beelan where the Court of Criminal Appeal observed....Subpoenaed documents at trial and on appeal will have legitimate forensic purpose if it is "on the cards" that they will materially assist the defendant's case...."*

9. Justice Gray noted in Hirst[10], at paragraph 29;

> *"Furthermore a subpoena would not be deemed oppressive simply because it requires the recipient to collate a large number of documents."*

10. The previous audits, particularly the information gained by the ATO as the result of the use of coercive powers, are relevant to the courts consideration of the application for a permanent stay of proceedings. It is relevant, as some of the investigators who were involved in previous audits were also involved in the audit of the case at bar. Further, the matter at bar is the only prosecution out of over 100 audits in which a prosecution was not laid.

11. The ATO, under *Operation Winebar* conducted some 95 audits, 84 of which were of Andrew Garrett, Andrew Garrett related entities, or entities that were involved in a transaction with Andrew Garrett, 60 of these were either Andrew Garret or entities controlled by Andrew Garrett (see attached table 'Winebar Audit cases');

12. Subsequent to *Operation Winebar* and prior to the referral of, presumably the current matter, to the Commonwealth Director of Public Prosecutions which was 6 June 2017, the ATO conducted a further 12 audits, one of which is the audit that forms the background to the case at bar.

13. Trevor Coulter is employed by the Australian Taxation Office as an Audit Leader within the Tax Evasion Program ('TEP'), and is responsible for carrying out audits and overseeing a team of auditors.[11]

14. Trevor Coulter was the contact officer for the audit in relation to the case at bar, and was named as such in the notice issued under Section 353-10 of the *Taxation Administration Act 1953*. Further, Mr Andrew Garrett was directed to provide the

---

[10] Ibid

[11] Statement of Trevor James COULTER dated 6th February 2020 p273 at [3]

documentation demanded under the notice to Trevor Coulter. The team leader was identified in this documentation as Siobhann Heilbronn.[12]

15. The Trustee for the Andrew Garrett Family Trust No 4 was audited and the results finalised on the 8th September 2016.[13] The contact officer for that audit was Trevor Coulter. The notification of the results of the audit, outline 3 previous audits on the same entity. This audit refers to material provided by Andrew Garrett, but is silent as to whether this was as the result of the use of the ATO of coercive powers.

16. There was an interview with Andrew Garrett by Chris Barlow and Katrina Martin of the Australian Taxation Office on the 29th July 2013. The reason for the interview, or the basis on which it was conducted, nor the use the ATO wished to make of it are unclear.[14]

17. The Tier 3 closure report of *Operation Winebar* that was obtained by Andrew Garrett under the Freedom of Information redacted the ATO staff members names, this information would be produced under subpoeana obligations.[15] *Operation Winebar* was commenced to investigate GST risk activities and prevent GST revenue leakage 'orchestrated' by Andrew Garrett.

18. A previous audit of 'The Trustee for the Holy Grail Property Trust No 4', an Andrew Garrett related entity, for the period 1 January 2010 to 31 December 2012 was conducted by the ATO, the contact officer was Damian Channell.[16] A letter sent by the ATO to the Trustee setting out the result of the audit and advising that the decision was based, in part, on the documents provided to the ATO following a 'request' to provide documents.[17] This letter also referred to a meeting between Andrew Garrett and ATO representatives on 18 April 2013.[18] It also refers to documents that were provided.[19] This letter also refers to 'taking access on the residence of Andrew Morton Garrett on the 26 June 2012'.[20] It is unclear the basis for this access, under what power the ATO purported to act, or what if anything was seized.

19. Sanctuary Australasia Pty Ltd was audited and the results finalised on the 26 April 2013.[21] The contact officer was Damien Channell. This audit refers to material

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[12] Annexure C to above, p293
[13] First brief GAR.501.000.0053-2
[14] First brief GAR.703.030.0056 (in previous list provided titled 'Statement and Exhibit references')
[15] First brief GAR.703.037.0002 at p 146 - 164
[16] First brief GAR.501.000.0010-1
[17] Ibid, 'Facts relevant to all decisions' p5 at [4] & [6]
[18] Ibid at [7]
[19] Ibid at [9]
[20] Ibid at p18
[21] First brief GAR.703.014.0003

provided by Andrew Garrett, but is silent as to whether this was as the result of the use of the ATO of coercive powers.

20. This shows that it is reasonable to expect that it is commonplace that the ATO would use its coercive powers under section 353-10 of Schedule 1 of the Taxation Administration Act 1953 when conducting audits.

21. It also shows that Trevor Coulter was involved in the investigations involving Andrew Garrett in 2016. There were 12 audits post Operation Winebar and prior to referral of the matter to the Commonwealth Director of Public Prosecutions in 2016 – 2017. It is unclear when he first became involved in investigations involving Andrew Garrett. Further, there is a real possibility that additional audits have occurred after this period. This information is relevant to the application to permanently stay the proceedings at bar.

vadasz lawyers

BARRISTERS & SOLICITORS

Our ref: NV:lt:8168

Rec'd ≃ 3.30pm
23 September 2020
By Jessica McBride
Jess McBride

23 September 2020

General Counsel
Australian Taxation Office
26 Franklin Street Adelaide 5000
GPO Box 2934 Adelaide SA 5000

Dear Sir/Madam

**RE: ANDREW GARRETT - DCCRM-19-73**

By way of service, please find **enclosed** a subpoena filed with the District Court on 22 September 2020.

Please note that the last day to produce materials is **28 September 2020**.

Please do not hesitate to contact the writer if you wish to discuss any aspect of the subpoena.

Yours faithfully,

**NICHOLAS VADASZ**
**VADASZ LAWYERS**

Enc: Subpoena

201 - 205 Currie St Adelaide SA 5000 T 8231 4646 F 8410 2221 adelaide@vadaszlawyers.com.au

ABN 56 537 627 220

Form 26B

**Rule 68(1)**
Subpoena

DCCRM-19-73

**SUBPOENA**

TO: General Counsel
Australian Taxation Office
26 Franklin Street Adelaide SA 5000
GPO Box 2934 ADELAIDE SA 5000

**You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule – see below for details.**

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.**

Please read Notes 1 to 15 at the end of this subpoena.

The last date for service of this subpoena is **23 September 2020 at 5.00pm**.

The last date for service was fixed by order made by Judge Chapman dated 22 September 2020.

FILED:

RECEIVED 22 SEP 2020 HIGHER COURTS REGISTRY

DISTRICT COURT SOUTH AUSTRALIA

(Registry to place seal)

Issued at the request of Defence, (*name*) whose address for service is: C/- Vadasz Lawyers

Place: 201-205 Currie Street Adelaide SA

Email: adelaide@vadaszlawyers.com.au



Garrett

**Details of subpoena**

You must comply with this subpoena:

(a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or

(b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (see Notes 5-11)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things unless you receive notice of a later date or time from the issuing party, in which case the later date or time is substituted:

**Date: 28 September 2020**

**Time: before close of business**

Place: District Court, Sir Samuel Way Building, 241-259 Victoria Square Adelaide

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

District Court Criminal Registry
Lower Ground Floor
Sir Samuel Way Building
241- 259 Victoria Square
Adelaide, South Australia, 5000

**Schedule of documents**

The documents and things you must produce are as follows;

1. Copies of all directions by the Australian Taxation Office ('ATO') to Mr Andrew Garrett (or an Andrew Garrett related entity) to produce documents and other material including attendances under the coercive powers under the *Taxation Administration Act 1953* Division 353 between the dates of 1st June 2011 – and 1st July 2020.

2. Copies of all information or material received or obtained by the ATO as a result of the exercise of the abovementioned coercive powers under the *Taxation Administration Act 1953* Division 353 as a result of the requests under [1].

3. Copies of all Seibel notes, or otherwise that identify the ATO employees that had access to any of the information as outlined in [1] and [2].

4. Copies of all interviews, including transcripts and recordings, between the ATO and Mr Andrew Garrett between the dates of 1st June 2011 – 1st July 2020, and any documents preceding the interview that outline the basis of the interviews, including identification of the ATO officers involved.



Garrett

NOTES

**Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

**Informal service**

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

**Addressee a corporation**

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

4. Deleted by Amendment No. 4.

**Production of subpoena or copy of it and documents or things by delivery or post**

5. In so far as this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:

   (a) at the address specified in the subpoena for the purpose; or

   (b) if more than one address is so specified, at any one of those addresses;

   so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production or, if you receive notice of a later date or time from the issuing party, before that later date or time.

6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.

7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

**Production of copy instead of original**

9. Unless the subpoena specifically requires you to produce an original, you may produce

a copy of any document that the subpoena requires you to produce. If you are producing copies, you are encouraged to produce them in electronic form.

9AA. Electronic copies of documents can be provided on a memory card or stick in any of the formats referred to in paragraph 9A below.

9A. A copy of a document may be:
- (a) a photocopy; or
- (b) in any of the following electronic formats:
  - .doc and .docx – Microsoft Word documents
  - .pdf – Adobe Acrobat documents
  - .xls and .xlsx – Microsoft Excel spreadsheets
  - .jpg – image files
  - .rtf – rich text format
  - .gif – graphics interchange format
  - .tif – tagged image format.

10. Deleted by Amendment No. 4.

11. Deleted by Amendment No. 4.

**Applications in relation to subpoena**

12. You have the right to apply to the Court:
    - (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
    - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

**Loss or expense of compliance**

13. You may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

**Contempt of court – arrest**

14. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.

15. Note 14 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

For more information regarding attending Court, Court services and translation services visit www.courts.sa.gov.au

**Rules 76(3) and 76(4)**

Form 27 Subpoena – notice and declaration by addressee of subpoena

**DCCRM-19-73**

## NOTICE AND DECLARATION BY ADDRESSEE OF SUBPOENA

TO: General Counsel
Australian Taxation Office
26 Franklin Street Adelaide SA 5000
GPO Box 2934 ADELAIDE SA 5000

**Notice to Addressee**

The ***Addressee*** is the person to whom the subpoena is addressed and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

(a) a photocopy; or

(b) in any of the following electronic formats:
.doc and .docx – Microsoft Word documents
.pdf – Adobe Acrobat documents
.xls and .xlsx – Microsoft Excel spreadsheets
.jpg – image files
.rtf – rich text format
.gif – graphics interchange format
.tif – tagged image format

**You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena, and return them with the documents or things you provide to the Court under the subpoena.**

If you declare that the material you produce are copies of documents, the Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes an original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

**DECLARATION BY ADDRESSEE (SUBPOENA RECIPIENT)**

*(tick the relevant option below, provide your address as appropriate, sign and date)*

☐ **All** of the material I am providing to the Court in compliance with the attached subpoena are **copies of documents**. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some or all** of the material I am providing to the Court in compliance with the attached subpoena is an **original** document. Once the material is no longer required, all of the material should be returned to me at the following address:

..........................................................................................

..........................................................................................

*(signature of addressee)* ......................................

*(name of addressee)* ......................................

*(date)* ......................................

**TAB 3**

FOR ANNEXURE TO AFFIDAVIT
This is the Annexure marked TAB 3
Referred to in the Affidavit of Andrew Garrett
Sworn/Affirmed before me at Prospect, South Australia
On this 22nd day of July 2026

128 Prospect Road
PROSPECT SA 508

RALPH DESMOND CLARKE
A Justice of the Peace
for South Australia
ID No: 21952

**Vadasz Lawyers**

| | |
|---|---|
| **From:** | Julia Davey <julia.davey@wrightchambers.com.au> |
| **Sent:** | Sunday, 19 April 2020 3:09 PM |
| **To:** | Vadasz Lawyers |
| **Subject:** | Andrew Garrett Rule 49 draft |
| **Attachments:** | Rule 49 draft.docx |

Nick

Please find attached a draft Rule 49 for the matter of Andrew Garrett that is due Tuesday 21st April.

There are some matters that we may want to be lead, if there is a need to highlight his mental state at the time, for example the ASIC document removing officeholders at the NAB.

The other issue that needs some thought is the reference in the statement of Trevor Coulter to documents prepared and sent or served by others. (Currently para 7 & 8 of the rule 49) The letters he refers to are letters sent by the ATO so I expect that will be able to be lead (on the basis that it seems that Trevor may have directed them to be written by the others and he is listed as the contact officer), however he states that "he is aware" that they were sent or served. It may be that might be admissible with further information, or it could be based on hearsay - eg he was told by his underling that it was sent. This issue may be easily rectified by prosecution and may not be worth including, particular given that it seems from the brief that Mr Garrett accepts that he has received these letters.

I have also listed the references to the documents in the brief by exhibit number and page number - you may not wish to include these in the document filed in court - I have left it in as it is a great reference if you need it (the list about the Tasmanian properties is a bit cumbersome though)

This draft document has taken some 9 hours to prepare. Usually, I spend an hour or two on preparing a rule 49 for a CDCC trial. Please request an extension of 7 hours junior counsel time to cover this.

I note that I currently have 200 hours reading time. This time is to cover reading the initial brief that is in excess of 20,000 pages. I note that the prosecution brief is now around 2000 pages. You have advised me that I need to be on top of the 20,000 pages as it is expected that Mr Garrett may wish to refer to some of that material in his defence. It is relevant if you proceed to make a stay of proceedings application.

I have begun to receive emails from Mr Garrett personally. In the last two weeks I have received 10 emails. One included some 46 attachments, leaving aside that one, they on average have up to 4 attachments. Whilst not all of them are relevant, I still must scan the emails to ascertain this. Others that are relevant, require follow up to determine if there is any basis to the argument proposed. If this stays at its current rate, then I expect I will receive approximately 150 emails prior to the trial listed in November. Please request a further 100 hours reading time to read these emails. This is clearly in excess of the usual instructions received in a District Court trial matter.

I am happy to start reading these emails, on the basis that the reading time that is unused for the original trial brief can be utilised, however further reading time will still be required to complete reading those documents.

In addition, it is apparent that more than the usual conference time will be required. I note that your client has already requested a conference of "up to days" to go through his instructions for the trial matter. This again, is in excess of what is usually expected in a two week District Court trial. Please request a further 50 hours counsel time to cover conferences with the client and yourself.

That along with the Rule 49 is a total of 57 extra counsel hours.

Please contact me to discuss the Rule 49 and any amendments thereto.

Kind Regards

Julia Davey
Barrister

A: Wright Chambers
Level 2, 366 King William St
Adelaide SA 5000

T:
8213 7000
M: 0402433446

julia.davey@wrightchambers.com.au

*Liability limited by a scheme approved under the Professional Standards Legislation*

**andrew.garrett@taggc.com.au**

| | |
|---|---|
| **From:** | andrew.garrett@taggc.com.au |
| **Sent:** | Friday, April 24, 2020 4:38 PM |
| **To:** | julia.davey@wrightchambers.com.au; 'Vadasz Lawyers' |
| **Cc:** | peter.kerin@australianpeoplefuturefund.org; matthew.galasso@oenoviva-capital-resources.com; michelle.scerri@australianpeoplefuturefund.org; 'Work- Michelle'; LegalTeam@australianpeoplefuturefund.org |
| **Subject:** | Apologies- My Error re Instructions not to consent to discontinuance |
| **Attachments:** | Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) HCA 11.rtf; Reasons of Layton J 19 02 09.pdf; Confirmation of Lodgement Interlocutory Application 21.10.2018 and Affidavits.pdf; NSD 1848 of 2018 Interloccutory Application dated 21.10.2018 Annexures.pdf |
| **Importance:** | High |
| **Expires:** | Wednesday, October 21, 2020 12:00 AM |

Dear Nick,

I thought I had sent an email to you **instructing you not** to consent to discontinuance of AMC-2020-2668; *Regina (Managing Controller Appointed) v Andrew Garrett (Managing Controller and otherwise).*

You will see that I did send the email but forgot to copy you and Julia.

As you know Chapman discussed my application dated 9th April 2020 filed and served in DCCRM-19-73 during the course of the hearing on the 23rd April 2020.

Please provide me with a copy of the transcripts at your earliest opportunity.

Her Honor is in error being a Fraud on the Court by the Court and is on Judicial Notice of the relevant law under the evidence act (SA).

I had been adjudged a vexatious litigant in a number of proceedings however on the 21st October 2018 (copy attached) I applied to set aside all Judicial and Quasi-Judicial decisions related to me on Grounds that they are in fact a Nullity in accordance with the views of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11.

Chapman J seems to be reliant on the attached reasons given in the actions referred to however is unable to do so for two reasons;

1. An Interlocutory Application is a Step in the Proceeding and not a "Proceeding" within the meaning of s39 of the Supreme Court Act, rather the applications apply to "Matters" arising within the proceeding ( *re Wakin ex parte McNally*) and does not require the leave of the court;

    "**matter**" includes every proceeding in the court not in a cause;

    ***Vexatious proceedings***

    ***39.*** *(1) If, on the application of the Attorney-General or any other interested person, the court is satisfied that a person has persistently instituted vexatious proceedings, the court may make either or both of the following orders:*

    *(a) an order prohibiting the person by whom the vexatious proceedings were instituted from instituting further proceedings, or further proceedings of a particular class, without leave of the court;*

    *(b) an order staying proceedings already instituted by that person.*

*(2) Where it appears to the Supreme Court or any other court of the State that there are proper grounds for an application under this section, it may refer the matter to the Attorney-General for consideration.*

*(3) An order under this section remains in force (subject to variation by the court)-*

*(a) if a period for the operation of the order is fixed-until the expiration of that period or the revocation of the order (whichever first occurs);*

*(b) if no such period is fixed-until revocation of the order.*

*(4) Where an order is made under this section, a copy of the order must be published in the Gazette.*
*(5) For the purposes of this section, proceedings are vexatious-*

*(a) if instituted to harass or annoy, to cause delay, or for any other ulterior purpose; or*

*(b) if instituted without reasonable ground.*

*(6) A reference in this section to proceedings extends to both civil and criminal proceedings whether instituted in the court or some other court of the State.*

2. The reasons of Layton J are a Nullity

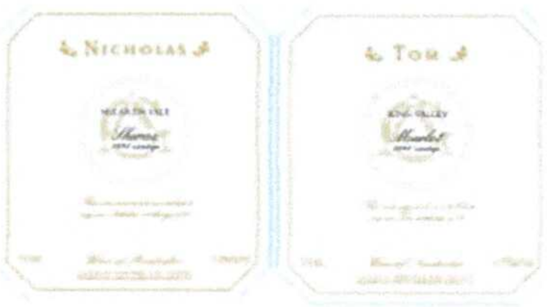
Chapman went to great lengths to explain the document was received not filed............irrelevant.

Notice to Agent is Notice to Principal and Vice Versa.

The Orders sought 21st October 2018 were made by silence and are settled without dispute of the parties the subject of the joinder applications in NSD 1848 of 2018.................extensive.

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


www.oenoviva-capital-recources.com



| Melbourne | Hobart | Hong Kong | Ho Chi Minh |
|---|---|---|---|
| Level 3, 2 Drewery Place | 10/15 Hunter Street | "The Desk" 511 Queens Road West,, | Suite 103, 140 Nguyen Van Thu Street, |
| Melbourne, Victoria, 3000 | Hobart, TAS, 7000 | Shek Tong Tsui, Hong Kong | District 1, HCM, Vietnam |

**M:** +61 450 831 708

**E:** andrew.garrett@taggc.com.au



---

**From:** Peter Kerin <peter.kerin@australianpeoplefuturefund.org>
**Sent:** Friday, April 24, 2020 11:43 AM
**To:** andrew.garrett@taggc.com.au; andrew.garrett@oenoviva-capital-resources.com
**Subject:** FW: A. Garrett - Court Matters
**Importance:** High

Hi Andrew,

As per your request this morning, following hereafter is the email (sent Tuesday 21/4/20 at 5:47 PM) pursuant to which you purportedly instructed Nick to the effect that you ***do not*** consent to the discontinuance of the matter that's currently in the Magistrates' Court of South Australia ......... however, it appears that the email was ***not*** sent to Nick Vadasz or anyone at his office.

If you have any questions in relation to the above, the following or any other related matters please feel free to call me at your convenience on my mobile phone number of **0419 223 556**.

Kind regards,

PETER KERIN
STRATEGY & BUSINESS ADVISER
AUSTRALIAN PEOPLE FUTURE FUND

PO Box 559
UNLEY SA 5061

MOBILE: 0419 223 556

FAX: 08 8125 5755

**andrew.garrett@taggc.com.au**

| | |
|---|---|
| **From:** | andrew.garrett@taggc.com.au |
| **Sent:** | Monday, April 27, 2020 10:35 AM |
| **To:** | 'Vadasz Lawyers'; julia.davey@wrightchambers.com.au |
| **Cc:** | peter.kerin@australianpeoplefuturefund.org; matthew.galasso@oenoviva-capital-resources.com; LegalTeam@australianpeoplefuturefund.org; michelle.scerri@australianpeoplefuturefund.org; 'Work- Michelle'; 'John Thomson'; scott.mitchell@oenoviva-capital-resources.com; peter.tran@oenoviva-capital-resources.com; robert.nowak@oenoviva-capital-resources.com; cbalab@freemail.gr |
| **Subject:** | Instructions regarding Search Warrants and materials obtained in respect to DCCRM-2019-73 & AMC-2020-2668 |
| **Attachments:** | UStoreit Contract 15112016.pdf; U-Store-It-Ashford_Invoice-Detailed__20161206_668.pdf; 2017-Independent-Intelligence-Review.pdf; 190729 LETTER - ASD Response to Mr Andrew Garrett.pdf |
| **Importance:** | High |

**Instructions regarding Search Warrants and materials obtained in respect to DCCRM-2019-73 & AMC-2020-2668**

Good Morning Nick and Julia,

I provide these my instructions in respect to the Search Warrants referred to in the Prosecution Brief and advise that it is my view that the Search Warrants were obtained by Fraud and are therefore Invalid, consequently the materials that the Crown seeks to rely upon are not available to the Crown.

The only way the Crown could be aware of the Storage Lockers at "U-Store-It" at Ashford is by interception of correspondence between me and "U-Store-It" as attached.

The aforementioned Interception was a result of unlawful surveillance and interception by the Australian Signals Directorate and the Australian Centre for Cyber Security as an abuse of the Power of the State.

Please see attached details.

The Crown has engineered a case that is an abuse of process when considering all of the evidence.

I instruct you to bring all of the materials from the storage lockers and otherwise available by subpoena as per my earlier instructions into the Court File.

This is a Rule 49 matter

Kind Regards

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


www.oenoviva-capital-recources.com



On the 29th June 2020 the court made orders to hear the Rule 49 matter for two days commencing 12th October 2020 which application was never heard because Vadasz retired from the Court file on the 9th October 2020 for reasons that are not known to me. I later made a complaint to the South Australian Judicial Commissioner that Kudelka J had not listed or made Judgement on the Rule 49 Application.

vadasz lawyers

BARRISTERS & SOLICITORS

Our ref: NV:lt:8168

28 May 2020

Mr Andrew Garrett
3/11 Harvey Street
NAILSWORTH SA 5083

By Email:

Dear Mr Garrett

**RE: COURT MATTERS**

Please find **enclosed** a copy of the rule 49 application in your matter together with self explanatory correspondence forwarded to the CDPP on 27 May 2020.

Yours faithfully,

**NICHOLAS VADASZ**
**VADASZ LAWYERS**

Enc: CDPP ltr
Rule 49

201 - 205 Currie St Adelaide SA 5000 T 8231 4646 F 8410 2221 adelaide@vadaszlawyers.com.au

ABN 56 537 627 220

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

*The Queen*

v

Andrew Morton Garrett

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**DRAFT APPLICATION PURSUANT TO RULE 49(1)(d)**

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| | |
|---|---|
| Date: | 25 May 2020 |
| Filed on behalf of the applicant by | Vadasz Lawyers<br>Barristers & Solicitors<br>201-205 Currie Street<br>ADELAIDE SA 5000<br>Telephone: 8231 4646<br>Mobile: 0407 733 000<br>Facsimile: 8410 2221<br>L696<br>P2854 |
| Prepared by | Julia Davey<br>Wright Chambers |

**Rules 49(1)**

Form 13 Application for directions

## DRAFT APPLICATION FOR DIRECTIONS

TO THE PROSECUTION: Director of Public Prosecutions (Commonwealth)

**Application**

The Defendant, **Andrew Morton GARRETT** seeks the following further order(s):

17. A stay of proceedings in the prosecution of the charge of attempt to dishonestly obtain a financial advantage.

**Ground**

The grounds relied upon are as follows:

The prosecution is an abuse of process.

**Particulars**

a. The Australian Taxation Office (ATO) exercised its coercive powers to obtain information from the applicant pursuant to division 353 of Schedule 1 of the *Taxation Administration Act 1953* (see exhibit GAR.501.000.0007 and GAR.501.000.0008 attached to the statement of Trevor Coulter at pages 294 – 299). A failure to comply with a direction to provide information is an offence, and the applicant was advised as such, under s 8C or 8D of the *Taxation Administration Act 1953*.

b. The applicant provided information in response to the abovementioned direction.

c. Some, but not all, material obtained by the ATO in response to the abovementioned demand constitutes part of the second brief (trial brief) provided by the prosecution in March 2020.

d. As a result of the exercise of the ATO's power to demand production of documents, and the subsequent dissemination of those documents to others, including the Commonwealth Director of Public Prosecutions Office, the applicant's right to silence has been abrogated and the accusatorial judicial process has been fundamentally altered.[1]

e. Should the material in question be removed, the prosecution has still obtained a forensic advantage.[2] Both lead investigators in this matter, Trevor Coulter and Gina Bradley, have accessed the quarantined material. The quarantined material has further been disseminated to others. The precise identity of personnel within the ATO, CDPP and the AFP who have had access to the quarantined material has not yet been disclosed by the CDPP.

f. Such further particular which will be added when the prosecution make full disclosure.

**Endorsements**

Application made pursuant to rule 49 (d) of the *District Court Criminal Rules 2014*

**Date**: 27. 5. 2020

(*signed*) ..........................................................

Solicitor for the defendant

---

[1] *R v Strickland v DPP (Cth)* (2018) 93 ALJR 1 at [76]

[2] Ibid at [77] and [80]

**Hearing**

*(When the application is to be given a separate listing date, the following will be completed by the Registry)*

This application will be heard before.................................in the District Court at ........................................................................... on ............ at .......... or so soon afterwards as the business of the Court allows.

The courtroom in which the application will be heard will be published:

- on the Courts Administration Authority website the day before;
- in the Advertiser on the day; and
- on the notice board at the Courts Building.

The parties and all persons served with this application are required then to attend if they wish to be heard on the application and, in their absence, the Court may make such order as it sees fit.

**Date**:

*(signed)* ..............................

Registrar

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

*The Queen*

v

Andrew Garrett

## STATEMENT AND EXHIBIT REFERENCES

| | |
|---|---|
| Date: | 11 May 2020 |
| Filed on behalf of the applicant by | Vadasz Lawyers<br>Barristers & Solicitors<br>201-205 Currie Street<br>ADELAIDE SA 5000<br>Telephone: 8231 4646<br>Mobile: 0407 733 000<br>Facsimile: 8410 2221<br>L696<br>P2854 |
| Prepared by | Julia Davey<br>Wright Chambers |

## Statement and Exhibit References (first brief)

GAR.703.030.0051

GAR.703.030.0056

GAR.703.030.0057

GAR.703.030.0048

GAR.703.030.0047

GAR.703.030.0049

GAR.703.037.0002 at p140, 146, & Operation Winebar report dated 15 August 2014 beginning at p151

GAR.501.000.0010-1

GAR.501.000.0053-2

GAR.703.014.0003

GAR.703.014.0005

GAR.703.054.0028

GAR.703.054.0036

Statement of Jane Maree Ferry dated 29th June 2017

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

*The Queen*

v

Andrew Garrett

---

**DEFENCE OUTLINE**

---

| | |
|---|---|
| Date: | 11 May 2020 |
| Filed on behalf of the applicant by | Vadasz Lawyers<br>Barristers & Solicitors<br>201-205 Currie Street<br>ADELAIDE SA 5000<br>Telephone: 8231 4646<br>Mobile: 0407 733 000<br>Facsimile: 8410 2221<br>L696<br>P2854 |
| Prepared by | Julia Davey<br>Wright Chambers |

## A Introduction

1. It is clear that Australian courts possess an inherent jurisdiction to stay proceedings which are an abuse of process.[1]

2. The inherent jurisdiction to stay proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.[2]

3. The question whether criminal proceedings should be permanently stayed on abuse of process grounds requires the balancing of a variety of factors including fairness to the accused, legitimate public interest in the disposition of charges of serious offences, and the conviction of those guilty of crime and the need to maintain public confidence in the administration of justice.[3]

4. His Honour Chief Justice Mason quoted His Honour Justice Richardson with agreement:

   "It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."[4]

5. In the current matter there are two grounds that are interrelated, but are also independent grounds, in the application for a stay for an abuse of process.

6. The first is that, an abuse of process can occur when the prosecution is for an ulterior purpose. That is when the process of the court is used for a purpose, which it is not intended to serve.[5] There is no additional requirement here that the trial be found to be unfair.[6]

---

[1] *Jago v The District Court of NSW and Ors* (1989) 168 CLR 23 at 25
[2] *Walton v Gardiner* (1993) 112 ALR 289 at 392 -393
[3] *Walton v Gardiner* (1993) 112 ALR 289 at 395-396
[4] *Jago v The District Court of NSW and Ors* (1989) 168 CLR 23 at 30 the quote being from *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481
[5] *Walton v Gardiner* (1993) 112 ALR 289 as per Brennan, J at 410 referring to *Jago v The District Court of NSW and Ors* (1989) 168 CLR 23 at 47
[6] *Williams v Spautz* (1992) 174 CLR 509 at 521

15. The ATO is required to formally respond to his complaints according to the Taxpayers' Charter.[14]

16. The accused regularly makes freedom of information requests to the ATO.[15]

17. The accused is highly litigious and has been involved in numerous court actions, including the Federal court, Supreme Court and High Court, against the Commissioner of Taxation, individually and together with a number of his entities.[16]

18. The accused often seeks review of administrative decisions by the ATO, both through internal processes and through the Administrative Appeals Tribunal.

19. The Deputy Commissioner of Taxation joined as an applicant in an application for a sequestration order resulting in bankruptcy for the accused on two occasions.[17] On the 15 May 2015 the debt outlined by the ATO owed by the accused was $8,288,930.31.

20. Operation Winebar commenced in November 2011 when a GST claim of $750,000 was referred to the serious evasion section for actioning.[18] It included raids on six premises on 26 June 2012. It included formal information gathering notices on the same date. All of the information obtained was then stored, managed and analysed by various ATO staff and divisions.[19]

21. It was noted by the ATO that the accused's behaviour did not change as a consequence of the audit activity (during Operation Winebar) and the behaviour escalated throughout the audits and continues to do so. The accused told the ATO that he will not change his behaviour and that he and the ATO will never agree on his view of his business operations.[20]

22. Further the ATO concluded at the completion of Operation Winebar that the accused constantly challenges the integrity of the tax system. The ATO is constrained by legislative frameworks and can only operate their audits under those parameters. The ATO pondered whether a whole of government approach at the outset may have reduced the length in time that Operation Winebar has been in existence.[21]

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[14] GAR.703.030.0047 letter from ATO to the accused dated 21 May 2013 in response to a complaint and request to meet with the Commissioner Mr Chris Jordan.
[15] GAR.703.030.0049 ATO letter responding to FOI request dated 8 January 2013, GAR.703.037.0002 at p140 is a letter from the ATO dated 8 January 2013 referring to a FOI request dated 20 November 2012, p146 letter from the ATO dated 18 December 2014 in relation to a FOI request dated 6 December 2014
[16] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 which lists current court actions at p157-159
[17] *Cahill & Ors v Garrett* [2015] FCCA 1627 (15 May 2015) and by order of the Registrar on 24th September 2004
[18] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 beginning at p151
[19] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 at p155
[20] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 at p162
[21] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 at p162

7. The second is, that the prosecution is unfair to the accused, in circumstances where both the Australian Tax Office ("ATO") and the accused were aware that funds were never going to be released to the accused. The completed offence was impossible to commit, and in the circumstances, in the exercise of the discretion, it is unfair to prosecute him.[7]

**B Prosecution for an Ulterior Purpose**

8. When proceedings are commenced for an improper purpose, a court does not need to be satisfied that a trial would be unfair. The abuse of process by conducting proceedings for an improper purpose is an adequate basis for ordering a stay.[8]

9. The accused does not need to demonstrate that the proceedings were commenced without reasonable grounds. A stay is available to prevent an abuse of process even if the prosecutor has a prima facie case.[9]

10. The accused must show that the prosecutor's predominant purpose is improper. It is not necessary to show that the improper purpose is the prosecutor's sole purpose.[10]

11. The accused's relationship and ongoing dealings with the ATO have been beyond strained. The accused regularly emails, objects and complains about the processes, people and decisions over a period of years. This includes internally, and through external processes including the Ombudsman, the Administrative Appeals Tribunal and actions across various jurisdictions in courts.

12. The accused objects to nearly all of the decisions that the ATO has made under audits, as noted below there have been 97 audits.[11]

13. Chris Barlow from the ATO stated that he received 150 emails over a couple of months in July 2013.[12]

14. The accused has regularly sought compensation from the ATO as evidenced by the ATO response in a 28 page decision dated 1 August 2013 to his claim dated 21 October 2012.[13]

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[7] *Walton v Gardiner* (1993) 177 CLR 378 at 398 and *Ridgeway v R* (1995) 184 CLR 19
[8] *Williams v Spautz* (1992) 174 CLR 509 at 521
[9] *Williams v Spautz* (1992) 174 CLR 509 at 522
[10] *Williams v Spautz* (1992) 174 CLR 509 at 527 & 529
[11] One such objection is found in GAR.703.030.0051 an email from the accused sent 27 May 2013 to the ATO outlining his objections to an ATO audit letter dated 26 April 2013, also noting that his emails have been blocked to certain recipients
[12] Australian Taxation Office Record of Interview transcript dated 29th July 2013 contained within GAR.703.030.0056 (first brief) at p5
[13] GAR.703.030.0057 letter from ATO & GAR.703.030.0048 email from accused

23. During Operation Winebar, the ATO expended significant resources defending complaints, claims of policy abuse, maladministration and constant legislative challenges all of which were considered to be frivolous.[22]

24. On the other hand, during Operation Winebar, the accused contended and still contends, he was acting as required by the taxation legislation and that the Commissioner of Taxation was acting unlawfully.

25. The essence of the conduct in the earlier transactions involved the same modus operandi as employed in the allegation at bar. Whilst the ATO made a number of attempts to stop the applicant from filing BAS statements, it did not dispute he had a duty to file BAS statements and it never advised him that his actions in filing the same were illegal. At the same time, it did not accept the validity of some of his business activities.

26. It is submitted that the prosecution has been instituted to bring about an end to that dispute in circumstances where, in the past, the ATO has never disputed the accused's assertion that he is legally required to file BAS. The ATO is constrained by its legislation and charter in the way in which it can deal with the accused. In launching a prosecution the ATO is attempting to achieve a result which it cannot otherwise achieve under its own guidelines.

**C Impossibility of the Completed Offence**

27. The concept of abuse of process is not confined to cases in which the purpose of the moving party is to achieve some foreign or ulterior motive. The circumstances in which an abuse of process may arise are varied and it has been held that it is unwise to limit those circumstances to fixed categories.[23]

28. The complete offence under s 134.2(1) of the *Criminal Code (Cth)* could not have been committed. It was impossible for the accused to receive the monies from the business activity statement due to the procedures set in place by the ATO in relation to any activity by the accused or related entities. The prosecution of an attempted fraud, in circumstances where the completed offence was impossible to commit, and moreover, known to be impossible to commit by both parties, is inherently unfair to the accused.

29. This is due to the following facts, in addition to those outlined above in section B:

    a. Mr Andrew Morton Garrett was well known to the ATO. He was the subject of a previous operation completed in 2014 'Operation Winebar' which involved 97 audits and $550 million stopped from being released in GST refunds. According to the ATO, he had a history of incorrectly reporting business

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[22] GAR.703.037.0002 includes an Operation Winebar report dated 15 August 2014 at p162

[23] *Rogers v the Queen* (1994) 181 CLR 251 at 255

activities on multiple entities.[24] Attached in Appendix 1 are details of some audits.

b. On or about 20 April 2016 steps were implemented to identify all emails originating from the accused to the ATO and divert them to a specified email inbox held and managed by the General Counsel, they were then examined by Jane Ferry and forwarded onto the relevant ATO officer.[25]

c. The accused was told by ATO staff on the 29th July 2013, particularly Chris Barlow and Katrina Martin, that the ATO has formed the view that they do not accept the transactions that he was putting forward. He was further informed that if the transactions are similar or "on all fours" with the transactions that the ATO have already seen then they would not be releasing the refunds and adjusting the activity statements to knock out the input tax credits and adjusting the liabilities to zero.[26]

30. The accused stated that he is required to lodge a business activity statement and a failure to do so can lead to criminal sanctions.[27] This is related to the ongoing core dispute between the ATO and the accused. The nature of this dispute, along with the impossibility of the completed offence, are both well known to the ATO and the accused. The prosecution for an attempted offence in these circumstances is inherently unfair to the accused.

## D Conclusion

31. The other factors the court must consider are the public interest in the disposition of charges of serious offences, and the conviction of those guilty of crime and the need to maintain public confidence in the administration of justice.

32. Fraud against the Commonwealth is a serious matter. However, the seriousness of the offence needs to be considered in light of the fact that the completed offence could never be committed. The funds were not ever going to be released to the accused.

33. In light of the various factors the application by the accused for a permanent stay should be granted.

[24] Statement of Trevor James Coulter dated 6th February 2020 paragraph 15-16

[25] Statement of Jane Maree Ferry dated 29th June 2017 (first brief) and Trevor James Coulter dated 6th February 2020 paragraph 16

[26] Australian Taxation Office Record of Interview transcript dated 29th July 2013 contained within GAR.703.030.0056 (first brief) at p3 reiterated at p5

[27] Failure to comply with requirements under taxation law is an offence under s8C of the *Taxation Administration Act 1953*

Appendix 1: ATO Audits

| Exhibit No | Audit period | Entity | | Administrative Penalty |
|---|---|---|---|---|
| GAR.501.000.0010-1 | 1 January 2010 – 31 December 2012 (9 quarters) | The Trustee for the Holy Grail Property Trust No 4 (Trustees are Andrew Morton Garrett and Sanctuary Australasia Pty Ltd) | Activity statement liability: - $3,904,000 Reduced activity statement credits: $29,075 | $31,985.40 |
| GAR.501.000.0053-2 | 1 April 2016 – 30 June 2016 | The Trustee for the Andrew Garrett Family Trust No 4 | Decreased activity statement $3,475,595,327,841 | $25,920 |
| Above refers to 3 other audits | 1 July 2015 – 31 March 2016 | As above | Decreased Activity Statement $113,393,714 | $38,880 |
| | 1 April 2013 – 30 June 2013 | As above | Decreased Activity Statement $2,176,773,281 | $12,240 |
| | 1 July 2011 – 30 September 2012 | As above | $323,547,618 | $46,948.50 |
| GAR.703.014.0003 | 1 April 2011 – 30 June 2011 | Sanctuary Australasia Pty Ltd | $35,312 | $31,780.80 |
| GAR.703.014.0005 | 1 July 2012- 31 July 2012 and 1 March 2013 – 31 March 2013 | The Trustee for Shed 5 (South Wharf) Unit Trust | Letter notifying of audit not result | |
| GAR.703.054.0028 | 1 March 2013 – 31 March 2013 | The Trustee for Oenoviva (Victoria) Trust | Assessed net amount of refund reduced by $3,900,000 | $3,510,000 |

| | | | | |
|---|---|---|---|---|
| GAR.703.054.0036 | 1 Jan 2013 – 31 March 2013 | The Spare Room – South Wharf Pty Ltd | Assessed net amount of refund reduced by $35,000 | $31,500 |

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

*The Queen*

v

Andrew Garrett

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## LIST OF AUTHORITIES

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| | |
|---|---|
| Date: | 11 May 2020 |
| Filed on behalf of the applicant by | Vadasz Lawyers<br>Barristers & Solicitors<br>201-205 Currie Street<br>ADELAIDE SA 5000<br>Telephone: 8231 4646<br>Mobile: 0407 733 000<br>Facsimile: 8410 2221<br>L696<br>P2854 |
| Prepared by | Julia Davey<br>Wright Chambers |

## List of Authorities

Cases

*Jago v The District Court of NSW and Ors* (1989) 168 CLR 23

*Walton v Gardiner* (1993) 112 ALR 289

*Williams v Spautz* (1992) 174 CLR 509

*Ridgeway v R* (1995) 184 CLR 19

*Cahill & Ors v Garrett* [2015] FCCA 1627 (15 May 2015)

*Rogers v the Queen* (1994) 181 CLR 251

Legislation

s8C of the *Taxation Administration Act 1953*

Form 2 Front Sheet

**IN THE DISTRICT COURT OF SOUTH AUSTRALIA**
**IN THE CRIMINAL JURISDICTION**

**DCCRM-19-73**

**R**

v

**Andrew Morton GARRETT**
Defendant

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**CROWN SUBMISSIONS OPPOSING APPLICATION FOR DIRECTIONS SEEKING A PERMANENT STAY AND GROUND 17 EXCLUSIONS**

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| | |
|---|---|
| Filed by the Director of Public Prosecutions (Cth) | Level 12, 211 Victoria Square<br>ADELAIDE SA 5000 |
| | Phone: (08) 8238 2600<br>Facsimile: (08) 8231 8257<br>Email: adelaide@cdpp.gov.au |
| Settled by: | Nicholas Robinson QC and Susan Borg |

**Rule 49**

**CROWN SUBMISSIONS OPPOSING**
**APPLICATION FOR DIRECTIONS SEEKING A PERMANET STAY AND GROUND 17 EXCLUSION**

**Application for a permanent stay:**

1. To the extent that the applicant seeks a stay of the proceedings on the grounds of abuse of process by reason of use of coercive powers, the respondent says as follows:

    a. The statutory s353-10 notice served on the applicant had the result that the compulsory provision of information and documents[1] was lawful under the *Taxation Administration Act 1953* ('TAA').[2]

    b. The derivative use of the information provided by the applicant (in response to the notice) in seeking three search warrants was lawful as the TAA gives statutory permission to use the compulsorily acquired information for the extended criminal purposes as listed in the TAA.[3]

    c. If and to the extent the applicant asserts documents[4] provided in accordance give rise to a basis for a stay, it is submitted documents under the notice are lawfully admissible being seized under statutory power. Further and in any event, corporations have no privilege against self-incrimination and no unfairness arises.

    d. In the alternative for (b) and (c) the evidence ought be admitted on the principles in *Bunning v Cross*.

    e. As to the production by the Australian Tax Office ('ATO') to the Commonwealth Director of Public Prosecutions ('CDPP') of the compulsory acquired information (but not so for documents) it is conceded it was unlawful, however, any forensic disadvantage caused to the applicant can and has been ameliorated by steps taken to remedy any unfairness such that a

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[1] An e-mail of 10 August 2016 and attachments.
[2] The relevant provisions are attached and marked 'Annexure B'.
[3] See s355-50 and s355-70 and the accompanying table.
[4] Applicant's Ground 1 (h)

permanent stay should be refused.

2. To the extent that the applicant seeks a stay of the proceedings on the grounds of abuse of process by reason of alleged improper purpose the applicant has advised he no longer presses the ground[5].

*Background:*

3. On 20 April 2016, the applicant and Oenoviv (North America), as joint trustees of Oenoviva (Australia and New Zealand) Property Trust, entered into a contract for the purchase of the property situated at 19 Hercules Street, Hamilton 4007 Qld. The purchase was in the amount of $60,000,000 (not including GST), with GST payable in the amount of $6,000,000.

4. On 22 April 2016, the property transaction was terminated prior to settlement by the vendor for breach of contract. The applicant was aware of the termination on that day.

5. On 25 July 2016, the applicant electronically lodged a BAS statement for the Trust for the period 1 April 2016 to 30 June 2016. The lodgement reported the capital purchases amount to be $75,500.00 with GST of $6,000,000.[6]

6. On 2 August 2016 the ATO commenced an audit of the BAS for this transaction. Trevor James Coulter ('Coulter'), auditor with the ATO, was assigned the case for audit and was the primary case officer responsible for the audit.[7]

7. On 5 August 2016, the ATO sent a letter to the Trust, which stated that a decision had been made to retain the refund under section 8AAZLGA of the *Taxation Administration Act 1953 (Cth)*.[8]

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[5] By e-mail of 17 July 2020 from the applicant's legal representatives, the respondent was informed that the applicant would not be providing further and better particulars in relation to the 'ulterior purpose'. The Crown reserves the right to file submissions if leave is given to the Applicant to pursue the Ground.
[6] Statement of Trevor James Coulter 2 June 2017 at [5].
[7] Statement of Trevor James Coulter 2 June 2017 at [9].
[8] Statement of Trevor James Coulter 2 June 2017 at [18].

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[6] Statement of Trevor James Coulter 2 June 2017 at [5].
[7] Statement of Trevor James Coulter 2 June 2017 at [9].
[8] Statement of Trevor James Coulter 2 June 2017 at [18].

8. On 5 August 2016, the ATO issued a notice to the applicant pursuant to S353-10 of Schedule 1 to the TAA. S353-10 relevantly provides

**Commissioner's power**

(1) The Commissioner may by notice in writing require you to do all or any of the following:

(a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a *taxation law;

(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.

9. The notice required the applicant to provide information[9] and documents to the ATO by schedule A and B of the notice, in respect of the Trust by no later than 2 September 2016.[10]

The notice sought the following information:

Schedule A

1) the names of all current trustees

2) A list of all bank accounts used by this entity including name, account number, current balance and BSB.

Schedule B

1) Original trust deed and all subsequent amendments and resolutions

2) Quarterly GST transaction report from 1 April 2016 to 30 June 2016

3) All agreements relating to the above requested invoices.

10. On 10 of August, the applicant responded to the notice by way of an e-mail containing information and attached documents[11] and explanations regarding the BAS statement and unrelated proceedings. It and further e-mails were addressed to Coulter.

[9] By ss 355-10 (2) thereof directed the information be given in writing

[10] See GAR.501.000.0007 and GAR.501.000.0008

[11] Described in Annexure "A" to these submissions.

11. In the e-mail dated 10 August 2016 (hereafter the explanation e-mail), the applicant disclosed to Coulter the following:[12]

> 'I note that the contract *[for sale of Hercules Street]* was allegedly terminated (which is denied) on the 22nd April 2016 please see the attached e-mail chain ending 22042016 which termination was subsequently rejected by me on behalf of the Trust.
> On the 4th May 2016 Mahoneys Lawyers endorsed the aforementioned Bill back to the Trustee of the Trust, subsequently I endorsed the Bill to the Mahoney lawyers Trust Account by personal delivery to Simon Illsley of National Australia Bank Limited, Level 10, 21 King William Street, Adelaide, SA, 5000.
> There is no evidence before me of dishonour/non-payment of the Bill following my endorsement back To the Mahoneys Lawyers Trust Account. The Bill is mature, and consideration has passed with settlement in full. Relevantly please note attached Notice of Crystallisation of Charge and Notice of Seizure of Assets issued to the Drawee of the Bill of Exchange attached.'

12. The information provided in the explanation e-mail of 10 August 2016 is also conceded by the Crown to disclose an asserted defence to the indictment[13] before the court.

13. Coulter received a variety of information and documents from the applicant and other sources throughout the audit. The explanation e-mail is the only e-mail sent by the applicant to Coulter which discloses a defence ('the compelled information'). The applicant was at no time interviewed by the ATO in respect to the notice.

14. On 7 October 2016, as a result of the ATO's audit, the BAS was amended by the ATO, such that 'Capital purchases' and GST on purchases' were zero. As a result, the refund was not paid to the Trust and a letter to Garret advising that the Audit was finalised and an administrative penalty of $5,400,000 had been applied.[14]

<u>Use of Coercive Powers:</u>

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[12] See GAR.501.000.0010.
[13] DCCRM-19-73
[14] Statement of Trevor James Coulter 2 June 2017 at [51].

15. The notice was lawful under s. S353-10. The TAA by s. 8C creates an absolute liability offence if a person is able to comply but fails to comply with the requirements under taxation law. Accordingly, the Defendant's right to silence was abrogated by the TAA and he was therefore required to provide the information sought in the notice.[15] No relevant unfairness flows to the applicant by statutory abrogation of his right to silence[16].

16. During the period of the audit, no charges had been filed against the applicant and he was not suspected of committing a crime, therefore neither the fundamental principle and the companion principle had been engaged.[17] In so far as the privilege against self-incrimination does apply from when a person is suspected and thus applies before charge, by reason of the matters in paragraph [15], no such privilege was open to the Applicant in respect to the notice.

17. The s353-10 notice was lawful as authorised by statue and was issued in accord with the purpose of the power. Garrett was, by express statutory power, required to provide the information and documents sought. In respect to providing information he was by reason of the TAA s.8C unable to object on the grounds to provide information may incriminate him. The information was lawfully obtained under the TAA.

18. It follows from the grant of power to compel information or documents by notice, that the statute intends use of the provided material. In *Johns* v *Australian Securities Commission*[18], Brennan J said[19]

> A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains

[15] See *R v Leach* [2018] QCA 131 at [3] citing *Deputy Commissioner of Taxation v de Vonk* (1995) 61 FCR 564.

[16] *R v IBAC (**IBAC**)* (2016) 256 CLR 459, *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (***Strickland***) (2018) 93 ALJR 1

[17] In *R v IBAC (**IBAC**)* (2016) 256 CLR 459 at 473 [48] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), held that "the companion principle is not engaged because the appellants have not been charged; and there is no prosecution pending". Further in (***Strickland***) at 22 [95], Kiefel CJ, Bell and Nettle JJ said that "the companion rule is a principle which governs the conduct of curial criminal proceedings and is thus not engaged until and unless an accused is charged".

[18] (1993) 178 CLR 408

[19] Supra p424, cited with approval *Katsuno v The Queen* (1999) 199 CLR 40, [24] per Gaudron, Gummow and Callinan JJ

> information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.

19. For reasons detailed below, derivative use of the information and the documents provided under the notice, was permitted by the TAA, relevantly in particular in obtaining search warrants. Further, the TAA also permitted disclosure of provided documents to the CDPP for use in criminal proceedings related to a taxation law. Though the TAA permits use of compelled information against a third party, it does not permit direct use against the Applicant[20].

20. At the conclusion of the audit, the matter was then in accord with the TAA referred to taxation officer[21] Gina Lisa Bradley ('Bradley') an investigator, for a criminal investigation.

21. The applicant asserts that:
    a. it was unlawful for Bradley to use the coerced information in the affidavits in support of the three search warrants issued,[22] and
    b. as to documents which had been produced under the notice being provided to CDPP and others it was also unlawful as abrogating the right to silence and breaching the accusatorial process, and
    c. it was unlawful for Bradley to disclose the coerced information to the CDPP.

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[20] R v Leach [2018] QCA 131

[21] S355-15 notes that for the definition of 'taxation officer' see section 995-1 of the *Income Tax Assessment Act 1997*. S995-1 of the *Income Tax Assessment Act 1997* states that ''taxation officer' has the same meaning given by section 355-30 in schedule 1 of the *Taxation Administration Act 1953*'. S355-30 of the *Taxation Administration Act 1953* defines a 'taxation officer' as meaning '(a) the commissioner or a Second Commissioner or (b) an individual appointed or engaged under the Public Service Act 1999 and performing duties in the Australian Taxation Office.' *The Public Service Act 1999*, states at 'section 6(1) All persons engaged on behalf of the Commonwealth as employees to perform functions in a Department or Executive Agency must be engaged under this Act, or under the authority of another Act.' Gina Bradley is an employee of the Taxation Office pursuant to S6(1) of The Public Service Act 1999.

[22] The search warrants were issued on 3 February 2017, 1 June 2017 and 1 June 2018 respectively.

22. As to (a) and (b) in paragraph 19 they are addressed below when responding to the applicant's paragraph 17[23] of his application. In short it is submitted the use was lawful, in the alternative, the evidence ought be admitted in accord with the principles in *Bunning v Cross*.

The lawfulness of the disclosure by Bradley

23. By s.355-10 of the TAA the objects of Division 355A are said to include both (a) protection of confidentiality of taxpayer's affairs and by ss. (b) *to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.*

24. The lawful purpose of acquiring the information by the ATO included in addition to assessing if a payment of a refund GST on the BAS lodged by the applicant was required, relevant government administration and law enforcement. Bradley was lawfully in possession of the documents and information.

25. By Division 355 the TAA provides for confidentiality of taxpayer information. The TAA limits the use and disclosure of *protected information*, that is information disclosed or obtained for a taxation law and which relates to the affairs of an entity and from which it may be reasonably capable to identify that entity. By s355-25 TAA disclosure of protected information is prohibited, the section however excludes from *protected information, information already available to the public*[24].

26. For reasons expanded below, it is submitted that both s.355-70 and 355-50 TAA permit the provision of protected information to AFP for use in obtaining search warrants. By s.355-70 for investigation of all serious offences (more than 12 months maximum penalty) and s.355-50 for, in particular, criminal proceedings related to a taxation law. The case at Bar is a *criminal proceedings* which is related to a taxation

[23] Which states – all materials that were received as a result of coercive powers be excluded, including the items seized as a result of the search warrants that utilised the information received as a result of the coercive powers, namely the Westpac and the National Australia Bank.
[24] TAA s.355-45

law, the offence for which is a serious offence.

27. If contrary the submission, s.355-50 does not permit use for a search warrant, the power in s.355-70 applied to authorise the provision protected information.

28. By s.355-40 TAA it is provided that except as provided by s.355-60 each section is to be read generally so as not to be limited by the other provisions in the subdivision. It follows that the statutory construction maxim the particular governs the general,[25] does not apply to limit the wider operation of s.355-50 by the particular operation provided in the wording of s.355-70. Accordingly, the full operation of s.355-50 on its text is not to be limited by an implied intention of parliament to do so by the more particular provision of s.355-70.

<u>S355-50 – Administration and enforcement of taxation law:</u>

29. S.355-50 TAA applies to provide exceptions to the prohibition of disclosure in s355-25 for taxation officers when performing their duties. It has as its object authorising lawful making of a record or disclosure of protected information. The purposes for making a record or disclosure, set out in column two of the table to the section, repeats in items 1- 7 a purpose in respect to a taxation law. Whilst it is not surprising, given the duties of taxation officers are in respect to the administration and enforcement of taxation law, it provides a clear indication of the object and purpose of the exception and a clear separation of purpose from s.355-70.

30. By s355-50 of the TAA[26], protected information may be disclosed in the course of a taxation officer performing duties. The accompanying table lists the circumstances in which and the organisations to which a 'taxation officer' is permitted to disclose information. By item 3 Bradley was permitted to disclose the information to *any entity,* accordingly relevantly to a Magistrate, an AFP officer or the CDPP, for a *purpose of criminal proceedings that are related to a taxation law.* The offence at bar

[25] *Generalibus specialia derogant* – 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision.' See Statutory interpretation by Francis Bennion, Butterworths, 1984 at p378.

[26] By s. 355-40 TAA, the various provisions are to be read generally, to apply the 'Generality of subdivision not limited'

is such a proceedings.

31. It is submitted that disclosure to a magistrate as a persona designata or an AFP officer of compelled information for the purpose of criminal proceedings, includes all purposes which are sufficiently connected in purpose or effect that they advance or assist such proceedings. Whatever may be the limits of such, provision of information to obtain a warrant which is intended to obtain evidence for a criminal proceedings, related to a taxation law, falls within the purpose column of item 3. The terms of the warrant itself reflect it is for criminal proceedings related to a taxation offence.

32. To construe the provision s.355-50 in such a way accords with the text and the underlying purpose as apparent from such, such a construction is to be preferred to one which does not: s.15AA *Acts Interpretation Act* 1901.

33. It is submitted that whilst information compelled by the notice served on Garrett was not permitted to be provided to the CDPP, as in so doing the accusatorial principle and companion rule were infringed, as the legislation does not, when read with the construction rule, the principle of legality, permit such disclosure[27]; derivative use is permitted. *Leach* said nothing as to derivative use and the TAA makes clear that protected information may be used for law enforcement[28] and expressly for uses as specified by the tables in s355-50 and s355-70. In the circumstances the purpose as expressed in the legislation and the express reference to uses of protected information (which includes that compelled under notice) permits derivative use[29].

34. The provision by Bradley to the CDPP of information and documents not provided by Garrett under the notice and documents provided under notice, was lawful under s.355-50. If any document given by Garrett under the notice, contrary the crown's submission, was not lawfully provided to the CDPP that also falls to be decided under ground 17, below.

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[27] *R v Leach* [2018] QCA 131
[28] TAA s.355-10
[29] *A v Boulton and Others* (2004) 136 FCR 420

35. If contrary the above, s.355-50 does not permit disclosure to an AFP officer to obtain a search warrant, s.355-70 does.

S355-70 – Law enforcement in respect to serious offences:

36. It is submitted that pursuant to s.355-70 the TAA provides for law enforcement in respect to serious offences. The power permits a taxation officer to provide information, in the instant case to AFP, for the purpose of investigation of a serious offence. Relevantly a necessary function of investigation of such offences includes the obtaining of search warrants under s.3E of the *Crimes Act*. By serious offence the TAA provision is wider than merely offences against taxation laws and includes offences against all Federal law. It includes within that class investigation of offences against taxation laws.

37. By S355-70 of the TAA[30] protected information[31] may be disclosed for law enforcement and related purposes, its accompanying table lists the circumstances in which and the organisations to which a 'taxation officer' is permitted to disclose information. It is submitted that use of information provided under notice in applying for search warrants, was accordingly lawful both under (a) and (b) of column two of item 1.

38. By s.355-70 (1) an exception to disclosure prohibition is provided. Relevantly ss(1)(a) applies it to a taxation officer and (b) requires the disclosure falls under the table to the section and by (c) permission by superior officer must be granted. However, by ss(2A) a taxation officer is entitled to rely on ss (1) even if (c) is not met. It follows that lawful authority to disclose protected information is given by the section to taxation officers who disclose the information in accord with the table. Further that the authority to disclose applies even if there is no conscious advertence to the section by the taxation officer, so much follows from ss (2A). Ss (1) (c) is directed at the provision of agreement by a superior ATO officer. The clothing of disclosure with authority even where no permission and advertence has occurred, is express in the provision. The lawfulness of an action by a person granted power to so act, even if

[30] See Annexure B attached.
[31] s.355-30 TAA

unaware of the power, is a recognised principle of law.

39. It is a proposition of general application that in the exercise of a power, as to the source of the power does not render the exercise invalid, as validity simply depends upon the existence of the power[32]. In confirming the principle, the plurality[33] in *Australian Education Union v Department of Education*[34]cited with approval[35] from Heydon J's reasons in *Eastman*[36], where his Honour said[37]

> If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power.

40. In the instant case Bradley, as a taxation officer, was by both s.355-50 and 333-70 authorised to disclose protected information in accord with those provisions. Erroneous belief by Bradley, if it occurred, as to her disclosure being under one did not preclude it being authorised under the other. Upon the conditions antecedent to valid exercise being met, the disclosure was authorised by the provision which in fact granted the power. It is submitted all necessary conditions precent under each s.355-50 and s.355-70 were met by Bradley.

41. If, however, contrary the above submission, the provision of information was not lawful under s.355-50 and /or s.355-70, the admission of material seized under warrant falls to be dealt with under the applicant's ground 17, below.

42. In the instant case, the information is a single e-mail with attachments which are stand-alone documents most of which were already available and obtained through other sources.[38] In the preparation of these submissions the Crown discovered the

[32] *Johns v Australian Securities Commission* (1993) 178 CLR 408 p 426 Brennan J, p469 McHugh J.
[33] French CJ, Hayne, Kiefel and Bell JJ
[34] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1
[35] Supra at [34]
[36] *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318
[37] *Supra* p 124
[38] See Attachment C – the explanation e-mail by the applicant and other sources.

explanation email was included as the last email in an email chain[39] in the quarantined brief. Only the first two emails in the email chain[40] were meant to be included in the quarantined brief, the third email in the chain (the explanation e-mail) was to be redacted, in error this did not occur. The crown is examining all documents in the quarantined brief to ensure no other document contains the explanation e-mail information. New counsel and solicitors are to be briefed to receive the further checked quarantined brief as the brief currently filed in these proceedings however with the third email in exhibit GAR.501.000.0023 redacted.

43. It is accepted that Bradley, at the conclusion of her investigation was not permitted to include in the brief to the CDPP, the information[41] in the e-mail of 10 August 2016, and the attachments which disclosed the information. She should only have provided the stand-alone documents to the CDPP, most of which were in the public domain along with the balance of the file, being diligent so as to redact any reference to the information of asserted defence in the e-mail.

Principle of Permanent stay- only in exceptional circumstances:

44. In *X7 (No 2)*[42], Bathurst[43] CJ after examining a number of authorities dealing with the Court's power to stay a trial, said:[44]

> [91] These authorities demonstrate three matters. First, the power to grant a permanent stay is one that rarely will be exercised. That is unsurprising as in criminal proceedings there are significant countervailing considerations, namely, the interests of the community and the victims of crime in the enforcement of the criminal law: see, for example, *Jago* at 54; 329-330 per Brennan J.
> [92] Second, a stay will be ordered where there is a fundamental defect of such a nature that there is nothing a judge can do in the conduct of the trial to relieve against its unfair consequences. Implicit in that proposition is that it is necessary to identify both the fundamental defect and the unfair consequences. In that context, it is important to bear in mind that in considering what was

[39] GAR.501.000.0023.
[40] The first email from Jane Ferry to Trevor Coulter sent 15 August 2016 which said, 'Trevor, Further attachment received from Mr Garrett over the weekend. Sincerely Jane. The second email from Andrew Garrett to Trevor Coulter and others, subject heading 'Part 3', with no text just attachments and sent on 13 August 2016.
[41] R v Leach [2018] QCA 131
[42] (2014) 246 A Crim R 402
[43] Beazley P and Hidden, Fullerton and R A Hulme JJ agreeing.
[44] Supra at 419-420 [91]-[93].

said in *Walton v Gardiner* , the Court in *R v Edwards* emphasised at [22]-[23] the use of the words "would" be unfairly or unjustifiably oppressive as distinct from "could" be unfairly or unjustifiably oppressive. In each of the cases to which I have referred, the nature of the prejudice was identified to be either that there was delay in the bringing of the proceedings, adverse pre-trial publicity or the proceedings were brought for an improper purpose. That is not to say the categories where such a stay is granted are closed, but merely that in each case particular prejudice to the applicant for a stay was sought to be demonstrated.
[93] Third, irrespective of whether or not unfairness is demonstrated, a stay may be granted if the proceedings in question are an abuse of process in the sense that the use of the court proceedings brings the administration of justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 286; 74 A Crim R 462 at 488-489 and *Moti v The Queen* at [10].

45. It follows that the applicant must show there would (not could) be a fundamental defect in the conduct of the trial such that the trial judge can do nothing to relieve against the unfair consequences. The grant of a permanent stay is recognised as rare and exceptional. The plurality in *Strickland* whilst distinguishing *X7 (No2)* accepted it was correct[45].

46. The applicant has not demonstrated any fundamental defect such that the trial would be unfair. Nor has he indicated why directions and rulings would not effectively remove any unfairness asserted.

47. In the instant case, given the nature and circumstances of the information unlawfully disclosed to CDPP, it may properly be described as follows:

a. The information subject of the breach was small in volume and easily identifiable, consisting of the contents of an e-mail with attachments.

b. The attachments to the e-mail can be considered as stand-alone documents that were in the public domain.[46]

c. There is no evidence that the breach was for an improper purpose.

d. That while the breach was significant, there is no suggestion that it was deliberate, rather the e-mail and documents were part of the long list of documents that formed part of the Seibel case file.

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[45] **Strickland** (2018) 93 ALJR 1 at 23 [98], [102].

[46] See s355-45 of the TAA.

48. The asserted defence is hollow in its effect, as it appears to claim that there was no evidence of dishonour/non-payment of the Bill of exchange following Garrett's endorsement back to the Mahoneys Lawyers Trust Account. Further, to claim that the Bill was mature, and consideration was passed with settlement in full, while a permissible defence, on all the facts and circumstances cannot be sustained. While the veracity of the defence is not something dealt with in the cases, the disclosure of an unsustainable defence, it is submitted is a matter weighing in favour of trial where steps can and have removed the information from the prosecution.

49. The CDPP in preparation for the instant case, was alive to the issues raised through the possible unlawful disclosure by Bradley to the CDPP. The CDPP took steps to quarantine the information by writing to the ATO on 24 January 2020 and advising that certain materials should be quarantined from the brief.

50. The CDPP also sent a letter advising the defence that materials which had been removed from the brief 'comprise documents provided by the applicant to the Australian Taxation Office in response to a notice issued under s353-10 of the Taxation Administration Act 1953'.[47]

51. Two teams of counsel and solicitors are engaged by the CDPP in the instant case. One team of solicitors and counsel were engaged to look at disclosure issues, make submissions and appear in pre-trial issues involving the quarantined material. A second team of solicitors and counsel were engaged to argue pre-trial issues that do not involve quarantined material and to appear in the trial.

52. A trial brief index detailing all the material contained in the brief to the prosecuting team and a list of documents removed from the trial brief has been prepared.[48] The

[47] Dated 10 March 2020.
[48] This table has not been shown to the trial prosecuting team.

trial brief does not contain any quarantined material.

53. The current quarantining of the coerced material and the redacting of any information that discloses discussion or references to the applicant's defence returns the matter to a position where the applicant's information has not been disclosed to the trial prosecution team and therefore the unlawful disclosure has been remedied such that any trial will be a fair trial. In effect it returns to the status quo immediately prior to Bradley's disclosure to the CDPP of the compulsorily acquired information. Such a course accords with that in *Lee (No 2)*[49], *Seller*[50] and *Leach*[51].

54. For the reasons detailed above, there is no basis for a permanent stay, the quarantining of the materials as pursued by the CDPP is sufficient to protect the rights of the accused to a fair trial and the application to stay the proceedings on this basis ought to be dismissed.

Search Warrants:

55. The Rule 49 (1) application at paragraph 17 seeks that all materials received as a result of coercive powers be excluded including all items seized as a result of the search warrants issued including the information from Westpac and the National Australia Bank on the grounds argued as to abuse of process.

56. For reasons set out above, the notice was lawful and the information and documents provided were lawfully obtained by the ATO. Following the audit by Coulter the information and documents, *inter alia,* were lawfully provided to Bradley a taxation officer in accord with TAA. The passing of the information was, authorised for the purposes of the TAA, being *protected information* (s.355-30). That it went to Bradley was also authorised as she was, both a Taxation Officer (s.355-30 (2)) and authorised to receive the same to conduct the investigation.

[49] *Lee v The Queen* **(Lee No 2)** (2014) 253 CLR 455
[50] *R v Seller* (2013) 273 FLR 155
[51] *R v Leach* [2018] QCA 131

57. Bradley was a person covered by the authority in both s.355-50 (2) and s.355-70 (1) and thus may disclose the information safe from the prohibition found in s. 355-25 TAA and deal with it in accord with, *inter alia*, s 355-50 and s. 355-70.

58. For reasons set out above the applications for search warrants was lawfully authorised under TAA s 355-50 and/or 355-70.

59. On 11 January, 1 and 2 February 2017, in the period prior to the issuing of the first search warrant, Bradley e-mailed her affidavit to AFP, to liaise with AFP officers in regard to the content of the affidavit which would support the application seeking the issuing of the search warrant.[52]

60. On 24 May 2017 and 1 June 2017, prior to the issuing of the second search warrant, Bradley was in contact with the AFP in regard to the Westpac Bank warrant, with the AFP to schedule the bank warrant.[53]

61. On 31 May 2018 and 1 June 2018, prior to the issuing of the third search warrant, Bradley was in contact with the AFP in regard to the National Australia Bank warrant, with the AFP.[54]

62. Accordingly, Bradley by her affidavit was supplying the information to

    i. an entity, an AFP officer (item 3 column one) and the disclosure *was for the purpose of* criminal proceedings that are related to a taxation law. And or alternatively

    ii. an *authorised law enforcement agency* (item 1 column one) namely the AFP and the disclosure *was for the purposes of* investigating a *serious offence* by the AFP

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[52] Reference to these calls are contained in GAR.901.000.0068 (item 107 on page 14 and items 147.5 & 147.8 on page 20), which is annexure A to the affidavit of Gina Lisa Bradley of 29 June 2020.

[53] Reference contained in GAR.901.000.0068, (item 391 and 392 on page 54) which is annexure A to the affidavit of Gina Lisa Bradley of 29 June 2020.

[54] Reference contained in GAR.901.000.0068, (item 659 and 663 on page 84) which is annexure A to the affidavit of Gina Lisa Bradley of 29 June 2020.

the use was lawful as per the TAA.

63. In such circumstances, it would follow that the implied derivative use by AFP seizing evidence under the acquired search warrant, would be the correct construction of the provisions and facts and no illegality occurred. The affidavit sworn by Bradley was provided to AFP in order for the AFP to use in seeking the warrant. The warrant itself is issued to a named AFP officer who is the executing officer in relation to the warrant.

64. Given the coerced information was lawfully referenced in the affidavits in support of the three warrants issued, all items seized as a result of the search warrants were lawfully obtained and the application to exclude the information at trial be dismissed.

65. If contrary the crown's submission, unlawfulness has occurred in the use, the crown relies upon *Bunning v Cross*[55].

Documents provided under Notice

66. By paragraph 17 of the Rule 49 document, the applicant also seeks the *exclusion of all materials that were received as a result of coercive powers* be excluded, on the abuse grounds relied upon for a permanent stay.

67. The Crown refers to and repeats the submission in paragraph [41]. It follows that the requirement to provide the documents identified in the Notice was authorised by TAA. The effect of the statute is that production is required by law, as with a search warrant. Upon the lawful issuing of a notice, documents meeting it must be produced. The use such documents can be put to is described in the provisions of the TAA. Relevantly s.355-50 permits provision under item 3 to any *entity* for the purpose described in that item. The CDPP is an entity. The purpose for which the documents were provided to the CDPP was for criminal proceedings that are related to a taxation law. The proceedings at bar are such proceedings. The provision of the documents is lawful under the proper construction[56] of the TAA. As the documents are not

[55] (1978) 141 CLR 54
[56] As to manner of which - *MacDonald v The Queen* (2016) 93 NSWLR 736, Bathurst CJ at 757-758 [88]-[90].

compelled evidence of the Applicant, no question of the accusatorial principle or companion rule arises, there is no basis to exclude them from evidence.

68. Further or alternatively, to the extent documents provided were those of a corporation there is no unlawfulness infringing upon the accusatorial nature of the trial by asserted infringement of privilege against self-incrimination. Corporations have no such privilege[57]. In any event such privilege is otherwise abrogated by ss 8C and 8D of TAA.

69. The lawful seizure of evidence under statutory power does not give rise to any breach of the accusatorial principle nor the companion rule, as is apparent by the use of search warrant material seized from accused in criminal trials. The applicant refers to no authority to support his proposition.

70. If contrary the crown's submission unlawfulness has occurred in the use, the crown relies upon *Bunning v Cross.*

Bunning v Cross Submission:

62. In *Strickland,* Edelman J considered[58] that the exercise of the *Bunning v Cross* discretion was applicable where unlawfulness infringes on the accusatorial principle or companion rule, as it was authorised by the ground of "public policy", citing *Jago v District Court (NSW)* (***Jago***)[59]. His Honour said of Mason CJ and Toohey J in *Jago* that they:

> … treated the exclusion of evidence and the stay of proceedings, in cases of unfairness, as co-existing in the same armoury of remedies. That armoury responds to the concern to protect the integrity of the court generally. The exclusion of evidence based upon "public policy", sometimes called the *Bunning v Cross*[60] "discretion", has been described as the "principle of judicial

[57] *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477

[58] Keane J in *Strickland* whilst distinguishing *Bunning v Cross* in the instant case legislation, also accepted its application on other facts.

[59] (1989) 168 CLR 23 at 29 (Mason CJ), 77 (Gaudron J).

[60] (1978) 141 CLR 54.

> integrity"[61]. The exclusion occurs to avoid "the loss of respect that would befall the courts should they turn a blind eye to the abuse by those responsible for the investigation and prosecution of offences"[62] or should they give "the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law"[63].

63. It is submitted that if contrary the Crown's submissions above the Court finds unlawful use of the compelled material occurred in the obtaining of the warrants it would constitute the unlawfulness to enliven the discretion. Similarly, if it is found contrary the crown submissions, that documents were provided unlawfully to the CDPP, it similarly would enliven the discretion.

64. Accordingly, if the Court finds that documents were unlawfully provided to the CDPP or the search warrants (or one or more) are unlawfully obtained, the question of discretionary exclusion pursuant to *Bunning* v *Cross* will arise. The Crown submits that the neither evidence of the items seized under the warrants nor documents provided to the CDPP ought to be excluded in the exercise of the discretion.

65. It is submitted that the application of the principle in *Bunning v Cross* applies analogously to use of information compelled in applying for search warrants, or use of compelled documents, as with unlawfulness in executing a search warrant, as applied in *R v Golja*[64].

66. In *Golja*, Stanley J, citing his analysis of the *Bunning v Cross* in *R v Rockford*[65] said at [33]

> *Bunning v Cross*, confers upon a court a discretion to exclude relevant and admissible evidence based on public policy consideration which arise where the evidence has been obtained unfairly or illegally. The *Bunning v Cross* discretion has its roots in *R v Ireland* where Barwick CJ considered that a trial judge had a discretion to reject real evidence that was unlawfully obtained. He said: 'whenever such unlawfulness appears, the judge has a discretion to reject

[61] Zuckerman, "Illegally-Obtained Evidence – Discretion as a Guardian of Legitimacy", (1987) 40 *Current Legal Problems* 55 at 59.
[62] Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept", (1991) 15 *Criminal Law Journal* 315 at 341.
[63] *Police v Dunstall* (2015) 256 CLR 403 at 417 [26]. See also at 430 [63].
[64] [2017] SASFC 61
[65] [2015] SASCFC 51

> the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighted against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand, there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

67. In *R v Armistead*[66] Hinton J[67] said "*The rationale underpinning the public policy discretion is that convictions obtained relying on illegally or improperly obtained evidence "may be obtained at too high a price"*[68]*. In Bunning v Cross Stephen and Aickin JJ, with whom Barwick CJ agreed, explained*[69]:

> "The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be 'a less evil that some criminals should escape than that the Government should play an ignoble part' — per Holmes J. in *Olmstead v United States*. Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law. On the other hand it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law. (citations omitted)

68. The discretion is a discretion to exclude evidence. It follows that the Applicant has the onus of persuading the court that the discretion ought to be exercised to exclude the evidence.[70]

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[66] [2019] SASCFC 85
[67] With whom Kelly and Stanley JJ agreed.
[68] *R v Ireland* (1970) 126 CLR 321 at 335 (Barwick CJ).
[69] (1978) 141 CLR 54 at 77-78
[70] *Police v Owens* [2007] SASC 118 at [58] and [59].

69. In *Bunning v Cross* five factors[71] were identified as bearing upon the discretion, which is a discretion to exclude evidence. The factors were summarised[72] by Hidden J in *Armistead* as follows

- Whether the unlawfulness was deliberate or reckless, on the one hand, or the product of a mistaken belief on the other (how remote is the error from a deliberate or reckless decision to disregard the law by those whose duty is to enforce?)
- Whether the unlawfulness affects the cogency of the evidence obtained (but generally cogency has no role where the unlawfulness was deliberate or reckless; the availability of other cogent evidence that may be relied upon points to exclusion of the unlawfully or improperly obtained evidence);
- The ease with which the law might have been complied with (was there a deliberate cutting of corners?);
- The nature of the offence (a comparison of the seriousness of the charge and the unlawful conduct engaged in is required); and
- whether it was the legislature's intention narrowly to restrict the police in the exercise of the power conferred"

Search Warrants:

70. It is submitted that any unlawfulness in the use of compelled information in support of obtaining the search warrants was inadvertent. So much is apparent from the fact Bradley referred to the material in a sworn affidavit placed before the issuing officer. The conduct bespeaks a belief the use was permitted by law. Further the complexity of the Statute provides a ready and comprehensible basis for the mistake made by Bradley. If it is an error it is an error properly characterised as a technical breach.

71. Nothing in the unlawful recitation of the information in the affidavit bears upon the cogency of the evidence. The evidential effect of the seized material is unaffected by the content of the supporting affidavit for the issue of the warrant.

72. It is submitted that the reference to the compelled information (in each affidavit, though of different volume) was not in any sense the causative aspect of the grant of the warrant. It follows that the ease of compliance was as simple as not including that material. In such circumstances the warrant would have been issued in any event. This

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[71] Supra pp 78-80
[72] Armistead [104]

demonstrates both the inadvertence of the unlawfulness and the ease of avoidance. However, the avoidance did require understanding of the technical requirement, and it was that absence of understanding which gave rise to unlawfulness. It is clear that the breach involved no "cutting of corners" or endeavour to circumvent the proper exercise of power.

73. The offence is serious, the breach a technical failure, having no bearing upon the cogency of the evidence, which is necessary for prosecution of a serious matter. It accordingly tells against exclusion.

74. It is submitted the obvious purpose of the legislature was to allow some use, the legislature's intention was not to narrowly restrict police in the exercise of the power conferred, the use of ATO protected information is permitted, the compelled information was not.

75. In the exercise of discretion, the unlawfulness falls at the very lowest level and the importance of the evidence and the serious nature of the offending. However, if on balance the court refused to exercise its discretion and excluded the evidence seized under the warrants, it is submitted that the exclusion of the material seized under warrant, does not prevent a further warrant application made absent the compelled material, and it may be accepted, a warrant would be granted by the issuing officer. In such circumstances, the exercise of a discretion to exclude is to no real effect and ought therefore on that ground alone be refused.

76. The prosecution will make further submissions of fact, based upon such evidence as is put before the Court on the Application.

<u>Documents Provided to CDPP:</u>

77. As to the unlawfulness of providing the documents to the CDPP, the provision of documents known to form part of the prosecution brief, where they would be open to the accused and Court, indicates belief in lawful entitlement to provide the documents. The crown refers to and repeats the submissions in paragraph [70].

78. The unlawfulness of provision of the documents has no bearing upon the cogency of the evidence. The evidential effect of the seized material is unaffected by the circumstances of release to the CDPP.

79. Subject to what documents may be found to have been unlawfully provided to the CDPP, it follows that the ease of compliance was as simple as not including those documents. However, as the evidence shows, the unlawfully provided documents were also in the possession of various witnesses to be called by the Crown. In such circumstances the documents are available other than by the ATO. This demonstrates both the inadvertence of the unlawfulness and the ease of avoidance. The crown further refers to and repeats the submissions in paragraph [72].

80. As to the balance of offence and unlawfulness, the crown refers to and repeats paragraph [73].

81. As to the legislative intent, the crown refers to and repeats paragraph [74].

82. By reason of the availability of the documents from other witnesses, the crown refers to and repeats its submissions in paragraph [75].

83. The prosecution will make further submissions of fact as to the documents provided to the CDPP, based upon such evidence as is put before the Court on the Application.

Nicholas Robinson QC

Susan Borg

Counsel for the Prosecution 7 August 2020

Annexure A

Attached documents to explanation e-mail

| | |
|---|---|
| **GAR.501.000.0010-1** | A letter from the ATO to the applicant dated 1 August 2013, as to the completion of the audit and the penalty decision. |
| **GAR.501.000.0010-2** | A deed of variation and name change dated 10 May 2014. The name change of the trust was from 'The Holy Grail Property Trust No 4' to 'The Oenoviva (Australian and New Zealand) Property Trust'. |
| **GAR.501.000.0010-3** | A covering letter from Mahoney's to the applicant dated 4 May 2016, enclosing the document described as 'the document you purported to be a bill of exchange.' |
| **GAR.501.000.0010-4** | Icon Hamilton documents. |
| **GAR.501.000.0010-5** | A letter from Mahoney's lawyers to the applicant dated 22 April 2016, confirming that the contract has been terminated on the basis that the NAB has not honoured and will not honour the bill Garrett sent Mahoney's. Therefore, the buyer is in breach, the deposit not being paid, and the breach not being remedied. |
| **GAR.501.000.0010-6** | Property report for 19 Hercules Street. |
| **GAR.501.000.0011-1** | REI Contract for 19 Hercules Street.[73] This document contains the vendor's solicitor's contact details (Mahoneys). |
| **GAR.501.000.0011-2** | The Bill of Exchange in the amount of AU$66,000,000 signed by the applicant and marked 'For Effect: 27th April, 2006'. |
| **GAR.501.000.0011-3** | E-mail dated 6 April 2016, from the applicant, to Luke Billau and Seb Turnbull of JLL, Sales and Investments regarding Icon Hamilton detailing the purchaser and purchase price and noting unconditional finance and settlement upon execution of contracts. The letter sent by e-mail was on Oenoviva letterhead. |
| **GAR.501.000.0011-4** | E-mail from Mahoney's Lawyers dated 22 April 2016, to the applicant regarding the basis for the termination of the contract. Mahoney forwards an e-mail the applicant previously sent him regarding the Bill of Exchange. |
| **GAR.501.000.0011-5** | The Notice of Crystallisation/ Notice seizure of property. |

[73] This is part 2 of the 10 August 2016 e-mail (GAR.501.000.0011).

**ANNEXURE B**

## Division 353—Powers to obtain information and evidence

### 353-10 Commissioner's power

(1) The Commissioner may by notice in writing require you to do all or any of the following:

(a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a *taxation law;

(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.

Note: Failing to comply with a requirement can be an offence under section 8C or 8D.

(2) The Commissioner may require the information or evidence:

(a) to be given on oath or affirmation; and

(b) to be given orally or in writing.

For that purpose, the Commissioner or the officer may administer an oath or affirmation.

(3) The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer.

......

## Division 355—Confidentiality of taxpayer information

### Table of Subdivisions



## Guide to Division 355

### 355-1 What this Division is about

The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances.

Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy.

Note: This Division contains the main circumstances in which protected tax information can be disclosed. A number of other Commonwealth laws also allow for the disclosure of, or access to, such information in limited circumstances. Some of these other laws are as follows:

- sections 32 and 33 of the *Auditor-General Act 1997*;
- section 9 of the *Ombudsman Act 1976*;
- section 44 of the *Privacy Act 1988*.

## Subdivision 355-A—Objects and application of Division

### Table of sections



### 355-10 Objects of Division

The objects of this Division are:

(a) to protect the confidentiality of taxpayers' affairs by imposing strict obligations on *taxation officers (and others who acquire protected tax information), and so encourage taxpayers to provide correct information to the Commissioner; and

(b) to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.

……

## Subdivision 355-B—Disclosure of protected information by taxation officers

### Guide to Subdivision 355-B

### 355-20 What this Subdivision is about

The main protection for taxpayer confidentiality is in this Subdivision. It is an offence for taxation officers to disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances.

### Table of sections

**Operative provisions**

## Operative provisions

### 355-25 Offence—disclosure of protected information by taxation officers

(1) An entity commits an offence if:

(a) the entity is or was a *taxation officer; and

(b) the entity:

(i) makes a record of information; or

(ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and

(c) the information is *protected information; and

(d) the information was acquired by the first-mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

(2) An entity (the ***covered entity***) is covered by this subsection in relation to *protected information that relates to another entity (the ***primary entity***) if:

(a) the covered entity is the primary entity's *registered tax agent or BAS agent; or

(b) the covered entity is a *legal practitioner representing the primary entity in relation to the primary entity's affairs relating to one or more *taxation laws; or

(ba) the covered entity is a public officer (within the meaning of section 252 or 252A of the *Income Tax Assessment Act 1936*) of the primary entity; or

(c) the primary entity is an *incapacitated entity and the covered entity is a *representative of the incapacitated entity; or

(d) the covered entity is the primary entity's *legal personal representative; or

(e) the covered entity is the primary entity's guardian where the primary entity is a minor or suffers from mental incapacity; or

(f) the covered entity and the primary entity are members of the same *consolidated group or *MEC group; or

(g) the covered entity is a representative of the primary entity who has been nominated by the primary entity in the *approved form to act on that entity's behalf with respect to protected information.

### 355-30 Meaning of *protected information* and *taxation officer*

(1) ***Protected information*** means information that:

(a) was disclosed or obtained under or for the purposes of a law that was a *taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; and

(b) relates to the affairs of an entity; and

(c) identifies, or is reasonably capable of being used to identify, the entity.

Note: Tax file numbers do not constitute protected information because they are not, by themselves, reasonably capable of being used to identify an entity. For offences relating to tax file numbers, see Subdivision BA of Division 2 of Part III.

(2) ***Taxation officer*** means:

(a) the Commissioner or a *Second Commissioner; or

(b) an individual appointed or engaged under the *Public Service Act 1999* and performing duties in the Australian Taxation Office.

Note: This Division applies to certain other entities as if they were taxation officers: see section 355-15.

....

### 355-45 Exception—disclosure of publicly available information

Section 355-25 does not apply if the information was already available to the public (otherwise than as a result of a contravention of section 355-25, 355-155 or 355-265).

Note: A defendant bears an evidential burden in relation to the matters in this section: see subsection 13.3(3) of the *Criminal Code*.

...

### 355-70 Exception—disclosure for law enforcement and related purposes

(1) Section 355-25 does not apply if:

(a) the entity is the Commissioner or a *taxation officer authorised by the Commissioner to make the record or disclosure; and

(b) an item in the table in this subsection covers the making of the record or the disclosure; and

(c) if the entity is not the Commissioner, a *Second Commissioner or an SES employee or acting SES employee of the Australian Taxation Office—one of the following has agreed that the record or disclosure is covered by the item:

(i) the Commissioner;

(ii) a Second Commissioner;

(iii) an SES employee or acting SES employee of the Australian Taxation Office who is not a direct supervisor of the taxation officer.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the *Criminal Code*.

Note 2: The Commissioner is required to include in an annual report information about disclosures made under this subsection: see section 3B.

**Records or disclosures for law enforcement and related purposes**

| Item | The record is made for or the disclosure is to ... | and the record or disclosure ... |
|---|---|---|

| | | |
|---|---|---|
| 1 | an *authorised law enforcement agency officer, or a court or tribunal | is for the purpose of:<br>(a) investigating a *serious offence; or<br>(b) enforcing a law, the contravention of which is a serious offence; or<br>(c) the making, or proposed or possible making, of a *proceeds of crime order; or<br>(d) supporting or enforcing a proceeds of crime order. |
| 2 | an *authorised ASIO officer | is for the purpose of performing ASIO's functions under subsection 17(1) of the *Australian Security Intelligence Organisation Act 1979*. |
| 3 | a *Project Wickenby officer, or a court or tribunal | (a) is for or in connection with a *purpose of the Project Wickenby taskforce; and<br>(b) is made before 1 July 2015, or a later prescribed day. |
| 4 | a *taskforce officer of a prescribed taskforce, or a court or tribunal | (a) is for or in connection with a purpose of the prescribed taskforce; and<br>(b) is made within the time limit, if any, prescribed by the regulations. |
| 5 | a Royal Commission in respect of which Letters Patent issued by the Governor-General declare that the Royal Commission is a Royal Commission to which this table item applies, or a member of such a Royal Commission | is for the purpose of the Royal Commission conducting its inquiry. |
| 6 | one or more of the following bodies:<br>(a) a Royal Commission of a State or a Territory prescribed by the regulations for the purposes of this table item;<br>(b) a commission of inquiry of a State or a Territory prescribed by the regulations for the purposes of this table item;<br>(c) a board of inquiry of a State or a Territory prescribed by the regulations for the purposes of this table item | is for the purpose of:<br>(a) investigating a *serious offence; or<br>(b) enforcing a law, the contravention of which is a serious offence; or<br>(c) the making, or proposed or possible making, of a *proceeds of crime order; or<br>(d) supporting or enforcing a proceeds of crime order. |

(2A) The *taxation officer is entitled to rely on the exception in subsection (1) even if the agreement referred to in paragraph (1)(c) has not been obtained in relation to the record or disclosure.

| Exhibit number | Description | Exhibit available from different source | In/out trial brief | Trial brief Page number |
|---|---|---|---|---|
| GAR.501.000.0010-2 | A deed of variation and name change dated 10 May 2014. The name change of the trust was from 'The Holy Grail Property Trust No 4' to 'The Oenoviva (Australian and New Zealand) Property Trust'. | GAR.501.000.0017 Duplicate created by Bradley. | Out | - |
| GAR.501.000.0010-3 | A covering letter from Mahoney's to the applicant dated 4 May 2016, enclosing the document described as 'the document you purported to be a bill of exchange.' | GAR.501.000.0015 Duplicate created by Bradley. | Out | - |
| GAR.501.000.0010-4 | Icon Hamilton documents. | GAR.501.000.0014 Duplicate created by Bradley. | Out | - |
| GAR.501.000.0010-5 | A letter from Mahoney's lawyers to the applicant dated 22 April 2016, confirming that the contract has been terminated on the basis that the NAB has not honoured and will not honour the bill Garrett sent Mahoney's. Therefore, the buyer is in breach, the deposit not being paid, and the breach not being remedied. | GAR.501.000.0013 Duplicate created by Bradley. | Out | - |
| GAR.501.000.0010-6 | Property report for 19 Hercules Street. | GAR.501.000.0012 Duplicate created by Bradley. | Out | - |
| GAR.501.000.0011 | Copy of explanation e-mail of 10 August 2016, however with second part of attachments. | | Out | - |

| Exhibit number | Description | Exhibit available from different source | In/out trial brief | Trial brief Page number |
|---|---|---|---|---|
| **GAR.501.000.0011-1** | REI Contract for 19 Hercules Street. This document contains the vendor's solicitor's contact details (Mahoneys). | | In | 0323-0345 |
| | | **GAR.501.000.0018** Duplicate created by Bradley. | Out | - |
| **GAR.501.000.0011-2** | The Bill of Exchange in the amount of AU$66,000,000 signed by the applicant and marked 'For Effect: 27th April, 2006'. | | In | 0346-0347 |
| | | **GAR.501.000.0021** Duplicate created by Bradley. | Out | - |
| **GAR.501.000.0011-3** | E-mail dated 6 April 2016, from the applicant, to Luke Billau and Seb Turnbull of JLL, Sales and Investments regarding Icon Hamilton detailing the purchaser and purchase price and noting unconditional finance and settlement upon execution of contracts. The letter sent by e-mail was on Oenoviva letterhead. | **GAR.501.000.0020** Duplicate created by Bradley. | Out | - |
| **GAR.501.000.0011-4** | E-mail from Mahoney's Lawyers dated 22 April 2016, to the applicant regarding the basis for the termination of the contract. Mahoney forwards an e-mail the applicant previously sent him regarding the Bill of Exchange. | **GAR.501.000.0019** Duplicate created by Bradley. | Out | - |
| **GAR.501.000.0011-5** | The Notice of Crystallisation/ Notice seizure of property. | | In | 0348-0358 |
| | | **GAR.501.000.0016** Duplicate created by Bradley. | Out | - |