

AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court
Division	Common Law
List	General
Registry	Sydney
Case number	<u>2013/377410</u>

TITLE OF PROCEEDINGS

Plaintiffs	Median Nazar Ibrahim and the other parties named in the schedule
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<u>Number of Plaintiffs (if more than two)</u>	3
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Defendant	Commonwealth of Australia
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FILING DETAILS

Filed for	Plaintiffs
Legal representative	<u>George Newhouse, Shine Lawyers</u>
Legal representative reference	<u>9334740</u>
Contact name and telephone	<u>George Newhouse, 02 8754 7222</u>
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TYPE OF CLAIM

Common Law Negligence

RELIEF CLAIMED

- 1 Damages;
- 2 Interest;
- 3 Costs

PLEADINGS AND PARTICULARS

Summary

- 1 The Defendants is liable in negligence and/or breach of statutory duty for:
 - a. failure to have any, or alternatively, adequate search and rescue capabilities or capacity, including adequate systems, personnel and/or equipment to assess, detect, detain or rescue maritime arrivals at Christmas Island, as required;
 - b. failure to have adequate systems, including chain of command, personnel and/or equipment to avert the disaster or effect a rescue of persons on SIEV 221 in a timely manner; and/or
 - c. failure in its duty(s) as owner of the vessel, SIEV 221, arising by way of automatic ownership of the vessel upon entry into Australian territorial waters.
- 2 The Plaintiffs are survivors who were passengers on board the vessel, SIEV221 and relatives of the deceased who were passengers on board the vessel, SIEV 221, whom have suffered personal injury, loss and damage as a result of the negligence and/or breach of statutory duty of the Defendant.

Representative Nature of the Proceedings

- 3 This proceeding was commenced by the Plaintiffs as a representative proceeding pursuant to Rule 7.4 of the *Uniform Civil Procedure Rules 2005* (NSW) and is continued by the Plaintiffs pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) on their own behalf and on behalf of the group members who include the Plaintiffs.
- 4 The Plaintiffs belongs to a group of persons (the Plaintiffs and "represented persons") who have suffered loss or damage (whether material, physical or

psychological) by reason of the events surrounding the loss of SIEV 221 and include:

- a. Passengers on board SIEV 221 who suffered physical and/or psychological injury as a result of the events surrounding the loss of the SIEV 221;
- b. Persons who were not passengers on board SIEV 221 but who suffered psychological injury, as a result of the events surrounding the loss of the SIEV 221;
- c. The representatives or estates of passengers on board SIEV 221 who died or otherwise suffered physical and/or psychological injury as a result of the events surrounding the loss of the SIEV 221;
- d. Persons who suffered a material loss or have lost a benefit or tangible advantage because they were dependent for financial support or personal support or both on a person who died by reason of having been a passenger on board the SIEV 221 as a result of the events surrounding the loss of the SIEV 221;
- e. Passengers on board SIEV 221 who lost material possessions as a result of the events surrounding the loss of the SIEV 221.

5 The common questions of fact or law that arise in relation to the "Represented Persons" include whether the Defendant is liable in negligence and/or breach of statutory duty, in relation to the matters pleaded below, for:

- a. failure to have any, or alternatively, adequate search and rescue capabilities or capacity, including adequate systems, personnel and/or equipment to assess, detect, detain or rescue maritime arrivals at Christmas Island, as required;
- b. failure to have adequate systems, including chain of command, personnel and/or equipment to avert the disaster or effect a rescue of persons on SIEV 221 in a timely manner: and/or
- c. failure in its duty(s) as owner of the vessel, SIEV 221, arising by way of automatic ownership of the vessel upon entry into Australian territorial waters.

The Defendant

6 The Defendant is capable of being sued pursuant to section 56 of the *Judiciary Act 1903*(Cth).

- 7 At all material times the Defendant had the care, custody and responsibility for administering the *Migration Act 1958* (Cth) in the area, being the land mass known as Australia as well as its external islands and/or territories, and which included:
- (i) between the baseline of its territorial sea as defined in the *Seas and Submerged Lands Act 1973* and:
 - (a) The contiguous zone; or
 - (b) alternatively, the territorial waters; and
 - (ii) any waters on the land side of the baseline of its territorial sea as defined in the *Seas and Submerged Lands Act 1973*.
(hereinafter referred to as "**Australian territory**").
- 8 Pursuant to section 5 of the *Christmas Island Act 1958* (Cth) (**Christmas Island Act**), Christmas Island is declared to be accepted by the Defendant as a Territory under the authority of the Defendant.
- 9 Pursuant to section 15B of the *Acts Interpretation Act 1901* (Cth) the territory of Christmas Island is extended to include its land mass and its territorial and inland sea ("**Christmas Island**").
- 10 At all material times, the provisions of the law of Western Australia, as in force in Western Australia, apply pursuant to section 7 and/or section 8A of the *Christmas Island Act-1958*(Cth).

The Defendant's agencies and services

- 11 At all material times:
- (a) the Attorney-General's Department was a department of the Defendant;
 - (b) the Australian Federal Police ("**AFP**") and the Australian Customs and Border Protection Service ("**ACBPS**") were agencies of the Attorney-General's Department;
 - (c) The People Smuggling Intelligence Analysis Team ("**PSIAT**") is an agency of the ACBPS or alternatively the Defendant.
 - (d) the AFP was responsible for marine search and rescue operations for persons or vessels in waters within:
 - (i) the territorial waters;
 - (ii) in the alternative, coastal waters; and/or
 - (iii) in the alternative, inland waters

of Christmas Island;

(e) the Defendant:

- (i) had the care, management, control and/or responsibility of; and/or
- (ii) was liable for the acts and/or omissions of employees of, and/or persons working at:

the Attorney-General's Department, the AFP and the ACBPS and/or agent(s)/agency(s) under the care, management, control and/or responsibility, thereof.

12 At all material times:

(a) The Department of Regional Australia was a department of the Defendant;

(b) the Department of Infrastructure and Transport was a department of the Defendant;

(c) the Australian Maritime Safety Authority ("**AMSA**"):

- (i) was established pursuant to section 5 of the *Australian Maritime Safety Authority Act 1990 ("**AMSA Act**")*;
- (ii) was subject to directions from the Defendant as to its operations;
- (iii) operated as an agency under the direction of the Department of Infrastructure and Transport;

(d) the Department of Prime Minister and Cabinet was a department of the Defendant;

(e) the Defendant:

- (i) had the care, management, control and/or responsibility of; and
- (ii) was liable for the acts and/or omissions of:

employees of the Department of Regional Australia, the Department of Infrastructure and Transport, the AMSA, the Department of Prime Minister and Cabinet and/or its agents/agency(s) under the care, management, control and/or responsibility, thereof.

13 At all material times:

(a) The Australian Defence Force ("*ADF*") was constituted under the *Defence Act 1903* (Cth);

(b) The ADF consisted of three Services, being the Australian Army, the Royal Australian Air Force and the Royal Australian Navy;

- (c) The Department of Defence was a department of the Defendant;
- (d) the Defence Science and Technology Organisation was a service of the Department of Defence;
- (e) the Defendant:
 - (i) had the care, management, control and responsibility of; and
 - (ii) was liable for the acts and/or omissions of
 employees of the Australian Defence Force, the Department of Defence, and its Services and/or agents/agency(s) under the care, management, control and/or responsibility, thereof.

14 At all material times:

- (a) Border Protection Command ("**BPC**") was a multi-faceted joint command of ACPBS and the ADF;
- (b) BPC was responsible for intercepting suspect illegal entry vessels entering any of Australia's contiguous zones;
- (c) BPC was allocated various assets including, HMAS Pirie and ACV Triton;
- (d) The Australian Maritime Security Organisation Command ("**AMSOC**") is an agency of BPC;
- (e) the Defendant, by the Minister for Justice and Customs and the Minister for Defence:
 - (i) had the care, management, control and responsibility of; and
 - (ii) was liable for the acts and/or omissions of employees of
 the BPC and/or persons assigned thereto and/or agents/agency(s) under the care, management, control and/or responsibility, thereof.

SIEV

15 SIEV is an acronym for "suspect illegal entry vessel" assigned by the Defendant to a vessel suspected of proposing to enter, or entering, Australian territory in contravention of the *Migration Act 1958* (Cth) involving:

- (a) The bringing or coming to Australia of one or more persons who, upon entry into Australia became, unlawful non-citizens; or
- (b) The entry or proposed entry into Australia of one or more such persons.

- 16 From 2001, but more importantly from 2008, in increasing numbers, the Defendant knew SIEVs left various locations around the world, but more predominantly Indonesia, and:
- (a) Arrived in Australian territory; or
 - (b) Failed to arrive in Australian territory.
- 17 Between on or about 15 June 2010 and 14 December 2010, inclusive, the Defendant had knowledge that:
- (a) 59 SIEVs entered Australian Territory; and
 - (b) 36 of the 59 SIEVs travelled to Christmas Island.
- 18 Further, the Defendant knew or ought to have known the fact, or alternatively the probability, that:
- (a) the SIEVs entering Australian territory were crewed by persons who were not competent and/or licensed to operate the vessel;
 - (b) passengers on board SIEV(s) suffered a danger to their health and safety whilst on that vessel;
 - (c) the SIEVs entering Australian territory were not seaworthy, as defined in section 207 of the *Navigation Act 1912* or otherwise ("**not seaworthy**").

SIEV 221

- 19 On or about 11 December 2010 a vessel, carrying non-citizens of Australia, left an Indonesian port intent on entering Australia.
- 20 The vessel referred to in the preceding paragraph, hereof, was subsequently identified by the Defendant as SIEV 221.
- 21 The passage of SIEV 221 into Australia territory, at or about, included the following:
- (a) 9 p.m. on 14 December 2010 entered the contiguous zone;
 - (b) 2 a.m. on 15 December 2010 entered territorial waters;
 - (c) 5 a.m. on 15 December 2010 entered coastal waters;
 - (d) 6:40 am on 15 December 2010 entered Flying Fish Cove, Christmas Island, being internal waters;
 - (e) 7:10 a.m. on 15 December 2010 broke apart after smashing into rocks at Flying Fish Cove, Christmas Island.

- 22 At all material times SIEV 221 was not seaworthy.
- 23 The Defendant knew, or ought to have known, that SIEV 221 was not seaworthy when it entered Australian territory's:
- (a) Contiguous zone;
 - (b) Territorial waters;
 - (c) Coastal waters; or alternatively
 - (d) Internal waters.

The Defendant's duty as a designated search and rescue authority

- 24 At all material times, the Defendant was a signatory to international conventions to maintain "search and rescue" capabilities.

Particulars

- (a) *International Convention for the Safety of Life at Sea, 1974* ("**the Safety Convention**")
 - (b) *International Convention on Maritime Search and Rescue, 1979*
- 25 The Defendant incorporated complying with the obligations of the *Safety Convention* into Australian law by the *Navigation Amendment Act 1979* (Cth), Section 93 and Schedule 3 incorporating it in the *Navigation Act 1912* (Cth) (**Navigation Act**), and:
- (a) Requiring compliance with specific provisions in the *Navigation Act 1912*; and
 - (b) Requiring general compliance with it through sections 6 (5) and 7 of the *AMSA Act*
- 26 The Defendant incorporated complying with the obligations of the *International Convention on Maritime Search and Rescue, 1979* into Australian law by requiring general compliance with it through sections 6 (5) and 7 of the *AMSA Act*.
- 27 At all material times AMSA was established, amongst other things, to:
- (a) promote maritime safety; and
 - (b) provide for a national search and rescue service
- 28 Further, AMSA was specifically tasked to:
- (a) provide a search and rescue service that was consistent with the Defendant's obligations under the *Safety Convention* (~~*International Convention for Safety of Life at Sea*~~ 1974) and the *International Convention on Maritime Search and Rescue* 1979;

(b) "perform its functions in a manner consistent with the obligations of Australia under any agreement between Australia and another country."

- 29 At all material times AMSA was subject to being given directions, to which it must comply, by the Defendant.
- 30 At all material times AMSA was subject to being given strategic directions, to which it must note, by the Defendant.
- 31 The Defendant assigned search and rescue, or rescue ("search and rescue"), operations around Christmas Island:
- (a) to the AFP within the territorial waters or alternatively within the coastal waters;
 - (b) otherwise, to BPC or alternatively no-one.
- 32 During the period:
- (a) the AMSA did not organise or formally arrange for any other person or body to plan for or carry out the search and rescue operations that otherwise would have been performed by the AFP at Christmas Island;
 - (b) the Defendant failed to give directions and/or strategic directions to AMSA to carry out the search and rescue operations that otherwise would have been performed by the AFP at Christmas Island;
- 33 During the period:
- (a) AMSA failed to assess, plan for or provide a search and rescue service that was consistent with the Defendant's obligations under the *International Convention on Maritime Search and Rescue 1979*;
 - (b) the Defendant failed to give directions and/or strategic directions to AMSA to assess, plan for or provide a search and rescue service that was consistent with the Defendant's obligations under the *International Convention on Maritime Search and Rescue 1979*;
- 34 The Defendant and/or the AFP was responsible for:
- (a) establishing protocols;
 - (b) providing personnel, equipment, facilities and assets
- for search and rescue operations at Christmas Island.
- 35 At all material times neither the AFP, AMSA, the Defendant nor any department or agency of the Defendant established a protocol or alternatively, an adequate

protocol for search and rescue operations at Christmas Island in coastal waters or otherwise.

36 At all material times neither the AFP, AMSA, the Defendant nor any department or agency of the Defendant:

- (a) provided an adequate number of or properly trained personnel;
- (b) adequate or sufficient equipment;
- (c) adequate or sufficient facilities;
- (d) adequate or sufficient assets

for search and rescue operations at Christmas Island.

37 In particular, the Defendant, AMSA and/or the AFP were/was responsible for providing vessels for use by the AFP, and at least one other organisation, in its/their search and rescue operations.

The "Colin Winchester

38 On or about 14 January 2008, the Defendant, represented by the AFP, entered into a contract with LeisureCat Australia Pty Ltd to provide a vessel to the AFP (**the Colin Winchester**).

39 The purpose of the Colin Winchester was for it to be used in marine operations, including search and rescue.

40 On or about 7 May 2008 and/or thereafter the AFP and/or the Defendant knew or ought to have known that the Colin Winchester was deficient for the purpose of conducting search and rescue operations at Christmas Island.

41 In or about July 2008, the Colin Winchester was delivered to Christmas Island.

42 At all material times, the Colin Winchester was

- (a) overweight;
- (b) out of survey;
- (c) unsuitable to be used in a sea state greater than level 1;
- (d) generally unsuited for use as a search and rescue boat at Christmas Island.

43 On or about 11 August 2010 the AMSA:

- (a) determined that the Colin Winchester was defective; and
- (b) required that the defects of the Colin Winchester be rectified by 11 November 2010.

44 In September 2010, AFP Management advised Sergeant Peter Swann, AFP Officer in Charge of the Christmas Island Police Station, that the AFP was not to use the Colin Winchester.

45 Between July 2008 and 15 December 2010:

- (a) the defects of the Colin Winchester were not rectified;
- (b) the Colin Winchester was out of survey and unsafe for use in bad weather;
- (c) neither the Defendant nor the AFP replaced the Colin Winchester with a working vessel;
- (d) the AFP had no vessel(s) reasonably capable of performing a search and rescue role in heavy seas, or at all;

The "Sea Eye"

46 At all material times, the Defendant and/or the AFP agreed to sponsor, or alternatively, assist to set up, a Volunteer Marine Rescue Service ("**VMRS**"), at Christmas Island.

47 The membership of the VMRS was made up of permanent residents of, or other persons living temporarily on, Christmas Island.

48 The purpose of the VMRS was to undertake maritime search and rescue operations around Christmas Island.

49 The VMRS was autonomous from the Defendant and the AFP although it relied entirely, predominantly, or in the alternative, significantly, on the Defendant and/or the AFP to fund its operations.

50 The Defendant and/or the AFP were/was responsible for providing, or in the alternative agreed to provide, a vessel for use by the VMRS, for its operations.

51 On or about 14 January 2008, the Defendant, represented by the AFP, entered into a contract with LeisureCat Australia Pty Ltd to provide a vessel to the VMRS (the "**Sea Eye**").

52 The Sea Eye was the identical type of vessel as the Colin Winchester.

53 On or about 7 May 2008, Mr Paul Kimber, the Western Australian State Manager of the VMRS, advised Mr Julian Yates, the First Assistant Secretary, Territories Division in the Department of Regional Australia, that the Sea Eye was deficient for the purpose of conducting search and rescue operations at Christmas Island.

- 54 In or about July 2008, the Defendant delivered the Sea Eye to the VMRS, at Christmas Island.
- 55 Upon the arrival of the Sea Eye at Christmas Island it was:
- (a) damaged;
 - (b) overweight;
 - (c) not in survey;
 - (d) unsuited to be used in a sea state greater than level 1;
 - (e) generally unsuited for use as a search and rescue boat at Christmas Island.
- 56 Upon the arrival of the Sea Eye at Christmas Island Mr David Robertson, the Harbour Master of Flying Fish Cove:
- (i) Identified deficiencies with the Sea Eye;
 - (ii) Was concerned that the Sea Eye was not built according to United Shipping Laws Code; and
 - (iii) Immediately placed the Sea Eye into quarantine.
- 57 On or about 12 August 2010 the AMSA:
- (a) determined that the Sea Eye was defective;
 - (b) required that the defects of the Sea Eye be rectified by the Defendant by 12 November 2010.
- 58 Between July 2008 and 15 December 2010:
- (a) the defects of the Sea Eye were not rectified, or alternatively agreed to be rectified, by the AFP, or alternatively the Defendant;
 - (b) the Sea Eye was out of survey and/or unsafe for use in bad weather;
 - (c) unsuitable to be used, safely, in a sea state of greater than level 1;
 - (d) unsuited for use as a search and rescue boat at Christmas Island;
 - (e) the Defendant did not replace the Sea Eye with a working vessel and/or a more suitable vessel.
- 59 Furthermore, on or about 1 December 2010, Mr Riley, Commander of the VMRS, advised Sergeant Swann that:
- (a) The Sea Eye was out of survey, with none of the required major works having been commenced;
 - (b) The VMRS boat crews had been unable to train on the Sea Eye;
 - (c) He was not confident in sending VMRS boat crews to sea in the Sea Eye;

- (d) the Christmas Island Volunteer Marine Rescue Service was unable to provide a dedicated, viable marine rescue service;

BPC

60 At all material times:

- (a) BPC acted as directed by its Commanding Officer;
- (b) BPC's Commanding Officer was under the direction of others in general or at specific times, including the Defendant, the ADF, ABPCS and the Department of Prime Minister and Cabinet.

61 The purposes of BPC included:

- (a) To protect the Australian borders from entry by "illegal immigrants";
- (b) To act as a deterrent to "people smugglers";
- (c) To monitor SIEVs' passages;
- (d) To detain SIEVs, its passengers and crew;
- (e) To assist occupants of SIEVs if the vessel got into difficulty;
- (f) To attempt to eliminate, or alternatively, reduce the loss of life or injury to persons travelling on a SIEV;
- (g) To bring passengers and crew of a detained or stranded SIEV(s) to Christmas Island for immigration "processing";
- (h) To protect Australian assets in its field(s) of operation.

62 To carry out its purposes the Defendant and/or BPC developed protocols for BPC to request and/or be provided with information, what to do with that information and how to conduct its operations.

63 In assisting with its operations BPC was provided with various assets which included those present at Christmas Island at all material times HMAS Pirie and ACV Triton.

HMAS Pirie and ACV Triton

64 At all material times HMAS Pirie was:

- (a) a ship commissioned by, and part of, the Royal Australian Navy;
- (b) assigned by the ADF to the care, management, control and responsibility of the BPC;

- (c) was assigned by BPC to monitor SIEV arrivals in Australian territory near and away from Christmas Island;
- (d) was required to intercept and detain a SIEV arriving in Australian territory;
- (e) had personnel on board capable of boarding, detaining and/or monitoring a SIEV.

65 At all material times ACV Triton was:

- (a) owned by Gardline Marine Sciences Pty Ltd and Gardline Australia Pty Ltd ;
- (b) leased to provide services to the Defendant;
- (c) assigned by the Defendant to the care, management, control and responsibility of the BPC;
- (d) primarily utilised by BPC to transport persons arriving on a SIEV in Australian territory to a place to be "processed" by the Department of Immigration;
- (e) had recently travelled to Christmas Island transporting 108 detainees from the vicinity of Ashmore Reef;
- (f) had personnel on board capable of boarding and/or monitoring a SIEV.

Alternate search and rescue

66 For a period, of up to 2 ½ years, prior to 15 December 2010 ("the period") the AFP lacked search and rescue capabilities or alternatively, lacked search and rescue capabilities in a sea greater than grade 1.

67 During the period:

- (a) the Defendant did not organise or formally arrange for any other person or body to carry out the search and rescue operations that otherwise would have been performed by the AFP at Christmas Island;
- (b) any search and rescue operations at Christmas Island were either not done or were performed by the asset(s) assigned to Christmas Island by BPC ("the assumed arrangement").

68 In such circumstances, the Defendant failed to:

- (a) Put in place and/or formalise the assumed arrangement, properly or at all, with BPC or any other party, department or agency;
- (b) Provide directions, including planning and risk assessment or sufficient assets, equipment and/or personnel for the assumed arrangement to be carried out properly, or at all;

- (c) Otherwise make any arrangement for search and rescue operations to be monitored or carried out.

Further alternate search and rescue

69 During the period:

- (a) the AMSA did not organise or formally arrange for any other person or body to carry out, or have the capacity to carry out, the search and rescue operations that otherwise would have been performed by the AFP at Christmas Island;
- (b) the Defendant failed to give directions and/or strategic directions to AMSA to carry out, or have the capacity to carry out, the search and rescue operations that otherwise would have been performed by the AFP at Christmas Island;

70 During the period:

- (a) AMSA failed to assess, plan for or provide a search and rescue service that was consistent with the Defendant's obligations under the *Safety Convention* and/or *International Convention on Maritime Search and Rescue 1979*;
- (b) the Defendant failed to give directions and/or strategic directions to AMSA to assess, plan for or provide a search and rescue service that was consistent with the Defendant's obligations under the *International Convention on Maritime Search and Rescue 1979*;

Surveillance, Facilities & Equipment

71 At all material times the Defendant anticipated the probability, or in the alternative the possibility, of a SIEV:

- (a) leaving a port from an Indonesian Island; and/or
- (b) entering the Australian territory; and
- (c) at all material times of its journey being unseaworthy.

72 From 2001, but more importantly from 2008, in increasing numbers, the Defendant knew SIEVs left various locations around the world, but more predominantly Indonesia, and:

- (a) Arrived in Australian territory; or
- (b) Failed to arrive in Australian territory.

73 As a consequence, the Defendant maintained the deployment of persons overseas, particularly in Indonesia, and assigned BPC with assets, including HMAS Pirie, as well as spotter planes, to monitor/survey vessels leaving Indonesian ports and the waters between Indonesia and Australia, including between Indonesia and Christmas Island ("the surveillance").

74 The Defendant had at its disposal to assist with, arrange, undertake and/or monitor the surveillance whatever arrangements, task force(s), department(s), agencies and/or groups that could interact with departments/other agency(s) of the Defendant, including the AFP; ADF; AMSA; AMSOC; PSIAT; ACBPS; Department of Prime Minister and Cabinet and its other Departments and/or Agencies as the Defendant, or each task force(s), department(s), agencies and/or group(s), was instructed by the Defendant and/or as it/they considered appropriate.

75 The purpose of the surveillance included those purposes of BPC detailed, above.

76 As a consequence of SIEVs consistently leaving Indonesia, heading for Australian territory and/or arriving in Australian territory near Christmas Island, BPC assigned, at the material time, for surveillance at Christmas Island to be monitored by HMAS Pirie and spotter planes.

77 That surveillance was primarily carried out to the north/north west of Christmas Island from where most SIEVs arrived in the vicinity of the Island.

78 At no material time was surveillance carried out by the Defendant by:

- (a) land based radar, situated on Christmas Island;
- (b) human observation, stationed on Christmas Island.

79 At all material times the Defendant, including the AFP and BPC, knew that:

- (a) aerial surveillance was limited by weather conditions;
- (b) any possessed surveillance capabilities were limited by sea state conditions.

80 Further, at all material times the Defendant, including the AFP and BPC, knew or ought to have known that, as weather conditions worsened:

- (a) the risk to any vessel at sea increased, particularly if the vessel was not seaworthy;
- (b) the risk of search and rescue being required increased;

- (c) the limitations on its allocated personnel, equipment, facilities and assets increased;
- (d) the potential to land a boat at Christmas Island diminished.

81 At all material times the Defendant, including the AFP and BPC, knew or ought to have known that the weather conditions and sea state, as existed on 14 and 15 December 2010, had occurred and/or were possible at Christmas Island and yet in the years leading up to those dates, it/they failed to:

- (a) Carry out any or any adequate risk assessment to assist with search and rescue;
- (b) Specifically, carry out any risk assessment as to immediate dangers to a vessel and/or not seaworthy vessel entering Flying Fish Cove in a sea state grades 2 - 4, and above;
- (c) Provide additional facilities at Flying Fish Cove, Ethel Beach or otherwise on or around the island to assist with search and rescue, including having:
 - i. a sea wall at Ethel Beach or Flying Fish Cove
 - ii. a boat ramp or alternatively, a better boat ramp at Ethel Beach;
 - iii. rescue boats stationed at Ethel Beach;
 - iv. boat launching facilities at Flying Fish Cove;
 - iv. better/more readily available mooring facilities at Flying Fish Cove;
 - v. land based radar;
 - v. better sea based radar.
- (d) Provide additional equipment;
- (e) Provide additional personnel;
- (f) Devise and/or implement a plan dealing with:
 - i. communication;
 - ii. search and rescue operation;
- (g) Have very limited, if any, search and rescue capacity readily available; or
- (h) Have any search and rescue capacity if BPC assets were unavailable or otherwise engaged.

Arrest/Detention

- 82 Further, prior to, and since 15 June 2010 the Defendant knew, or ought to have known, that immediately upon a SIEV's entry into Australian territory:
- (a) the SIEV was automatically forfeited to the Defendant, pursuant to section 261A *Migration Act 1958* (Cth);
 - (b) the Defendant was mandated to arrest, or take into detention, pursuant to section 189 (3) of the *Migration Act*:
 - i. the vessel;
 - ii. the crew of the vessel;
 - iii. the passengers on the vessel ("the arrest").
- 83 The Defendant knew that in the days immediately preceding 15 December 2010:
- (a) There was no aerial surveillance of the area between Indonesia and Christmas Island;
 - (b) HMAS Pirie carried out surveillance North/North West of Christmas Island;
 - (c) Intelligence confirmed a SIEV was due to arrive in Australian territory from Indonesia;
 - (d) The expected travel time of a SIEV from Indonesia to Christmas Island was 3-4 days; and
 - (e) Where HMAS Pirie was carrying out its surveillance was the most likely route of a SIEV leaving Indonesia and entering into Australian territory.
- 84 At all material times, the Defendant knew or ought to have known that:
- (a) the "radar systems" used on HMAS Pirie and ACV Triton may have difficulty detecting wooden hulled SIEVs in heavy seas;
 - (b) there were available, at the time, radar systems that would have materially less difficulty detecting wooden hulled SIEVs in heavy seas ("other radar");
 - (c) other radar could be utilised on land and/or on HMAS Pirie or ACV Triton, if installed;
 - (d) the radar systems used or other radar would assist in the early detection of an incoming SIEV;
 - (e) early detection of an incoming SIEV would assist the Defendant to carry out the obligations imposed, or arising, under its international treaty obligations and/or pursuant to section 189 (3) of the *Migration Act*
- 85 At all material times, the Defendant knew or ought to have known that, in a grade 2, or above, sea state or otherwise:

- (a) transferring passengers off a SIEV in close proximity to Christmas Island materially increased the risk of injury to the passenger(s);
- (b) transferring passengers off a SIEV in, or towing a SIEV out of, Flying Fish Cove at Christmas Island materially increased the risk of injury to the passenger(s);
- (c) the earlier the presence of a SIEV was detected the risk of injury to passengers was materially reduced;
- (d) the sooner the passengers on the SIEV were transferred off the SIEV, this materially reduced the risk of injury to the passenger(s).

86 At all material times BPC refused to accept any duty or to instruct persons working under its command, to intercept or detain a SIEV when entering Australian territory.

87 By failing to intercept or detain a SIEV when entering Australian territory BPC materially increased the risk of injury to persons travelling on a SIEV and that risk came to pass.

14 December 2010

88 On 14 December 2010 BPC was on "high" alert for the probable arrival of a SIEV at Christmas Island.

89 At approximately early morning on 14 December 2010 an unidentified vessel, later to be known as SIEV 220, arrived off the shoreline of Christmas Island.

90 Shortly thereafter HMAS Pirie left its surveillance position north/north west of Christmas Island and detained SIEV 220.

91 HMAS Pirie escorted SIEV 220 to the eastern side of Christmas Island.

92 At or about 1:47 pm on 14 December 2010 crew of HMAS Pirie board SIEV 220.

93 HMAS Pirie monitored SIEV 220 because its Commander, BPC or the Defendant assessed the weather/seas to be sufficiently significant to prevent:

- (a) Passengers from SIEV 220 being taken ashore, immediately;
- (b) SIEV 220 being destroyed at sea with safety.

94 At all material times, whilst HMAS Pirie monitored SIEV 220 on the eastern side of Christmas Island the Defendant, the Commanders of HMAS Pirie and ACV Triton, BPC, ADF, AFP, AMSA and Departments and other agencies of the defendant knew or ought to have known:

- (a) ACV Triton patrolled one kilometre south of HMAS Pirie;

- (b) Four crew were placed on SIEV 220 from HMAS Pirie;
- (c) There was no protocol in place, and no arrangement made, for crew of ACV Triton to be used to monitor SIEV 220;
- (d) There was no other method utilised or otherwise available to monitor/anchor SIEV 220;
- (e) There was no communication between HMAS Pirie, ACV Triton, BPC, AFP, AMSA or any other Department or agency of the Defendant as to any alternate method of monitoring SIEV 220 than that adopted;
- (f) By adopting (b), above, HMAS Pirie was deemed, by its Commander, unable to return to surveillance north/north west of Christmas Island;
- (g) No aerial surveillance at or beyond Christmas Island had been carried out for at least 3 days;
- (h) Any radar surveillance, by HMAS Pirie or ACV Triton, of the north/north west approaches to Christmas Island was blocked by the island;
- (i) No surveillance around Christmas Island, particularly to the north/north west, was carried out from the land, sea or by air;
- (j) The weather and sea state around Christmas Island was dangerous and presented a threat to any SIEV arriving;
- (k) Whilst ACV Triton patrolled one kilometre south of HMAS Pirie and HMAS Pirie monitored SIEV 220, in the manner adopted, neither vessel had immediate rescue capability;
- (l) There were no other maritime rescue capabilities available on or at Christmas Island.

95 At no time on 14 December 2010 did the Defendant confirm:

- (a) The departure point of SIEV 220;
- (b) Whether SIEV 220 was the vessel it held intelligence about as arriving in Australian territory on or about that time.

96 At 6:00 pm on 14 December 2010:

- (a) the possibility a further immediate arrival of a SIEV at Christmas Island was rumoured/came to the attention of Sonja Radanovic ("the rumour");
- (b) JORN radar system turned off.

97 Neither BPC, AFP nor the Defendant reacted in response to the rumour.

15 December 2010

- 98 On 15 December 2010 BPC was on "medium" alert for the probable arrival of a SIEV at Christmas Island.
- 99 Initial observations of SIEV 221 from on shore on 15 December 2010 include:
- (a) Nicola Tassone observes SIEV 221 at 5:10 am
 - (b) Beverly Orchard observes SIEV 221 400 metres from shore at 5:15 am and 100 metres off shore at 5:20 am;
 - (c) Brian Key photographs SIEV 221 at 5:35 am;
 - (d) Ross Martin observes SIEV 221 100 metres from shore at 5:40 am and telephones Customs Officer William Jardine at 5:43 am to advise.
- 100 At 5:49 am on 15 December 2010 William Jardine telephones CNOOC to advise what he was informed by Ross Martin.
- 101 At or about 5:51 am William Jardine attempts to telephone three different telephone numbers, including ACV Triton without getting through.
- 102 At 5:55 am Amy Leutch telephones 000 and at 5:56 am telephones Paul Stewart of the AFP to report observation of SIEV 221.
- 103 At 5:55 am Mr Saunders, on ACV Triton, was telephoned by AMSOC.
- 104 All observations of SIEV 221 include that there is yelling and screaming coming from the people onboard.
- 105 At 6:01 Commander Stammers of ACV Triton telephones HMAS Pirie to advise of observations of SIEV 221.
- 106 At 6:10 am Commander Livingstone of HMAS Pirie receives a telephone call from NORCOM and Commander Livingstone makes wake up call to HMAS Pirie.
- 107 At approximately 6:10 a.m. the engine of SIEV 221 stopped.
- 108 As a consequence of the engine failing SIEV 221 drifted off the shoreline of Christmas Island, in Flying Fish Cove.
- 109 At 6:18 am HMAS Pirie sets out for Flying Fish Cove from eastern leeward side of the island.
- 110 At 6:23 am HMAS Pirie turns around to collect additional RHIB rescue boat and resumes journey to Flying Fish Cove at 6:32 am.
- 111 At 6:30 am JORN radar system due to be turned back on.

- 112 Between 6:30 and 6:35 am Commander Livingstone advised of mass SOLAS with SIEV 221 smashed on rocks with 50 people in the water.
- 113 At approximately 6:40 am SIEV 221 first smashed onto the rocks of Christmas Island, in Flying Fish Cove and commences to disintegrate by 6:58 am. Spine of hull of SIEV 221 last observed at 7:12 am.
- 114 HMAS Pirie launches two RHIB rescue boats which proceed to accident scene, arriving at 7:05 am
- 115 As a consequence of being smashed onto the rocks of Christmas Island, SIEV 221 was smashed to pieces and its passengers and crew ended up in the water ("the accident").
- 116 As a result of the accident 48 persons died and other persons suffered injury.

Duty of Care and Breach

- 117 At all material times, the Defendant owed the Plaintiff(s) or those foreseeably in the class of persons, being passengers on SIEVs and their relatives, a duty of care to have in place, in accordance with its statutory and international obligations, a search and rescue capability and/or capacity to undertake search and rescue and to take reasonable care to avoid acts or omissions, which the Defendant could reasonably foresee, would
- (a) be likely to cause; and/or
 - (b) materially lessen the likelihood of injury to persons on a SIEV, including the Plaintiffs.
- 118 The Defendant was negligent, or alternatively in light of its knowledge, was negligent, in failing to take precautions against a risk of harm as:
- (a) The risks of injury and/or death to persons requiring search and rescue, or alternatively rescue or other assistance, from:
 - (i) Failing to delegate, or properly delegate search and rescue responsibilities to the AFP, BPC or any other department or agency under its control within territorial waters and ensuring it was capable of responding as and when required;
 - (ii) Failing to delegate, or properly delegate search and rescue responsibilities to the AFP, BPC or any other department or agency

under its control, within its coastal waters and ensuring it was capable of responding as and when required;

- (iii) Failure to delegate, or properly delegate responsibility for the provision of surveillance for the purpose of safety monitoring of vessels in the territory or seas around Christmas Island to the AFP, BPC or any other department or agency under its control;
- (iv) Failure to delegate search and rescue and/or surveillance, referred to in (i) to (iii), above to another Department or agency in the event the AFP or any other department or agency of the Defendant was unable to perform its delegated tasks;
- (v) Failure of AMSA to arrange, carry out and/or co-ordinate search and rescue and/or surveillance, referred to in (i) to (iii), as required, particularly in the event the AFP was unable to perform its delegated tasks;
- (vi) Failure to direct and otherwise ensure AMSA arranged, carried out and/or co-ordinated search and rescue and/or surveillance, referred to in (i) to (iii), as required, particularly in the event the AFP, BPC or any other department or agency of the Defendant was unable to perform its delegated tasks;
- (vii) Failure to have in place an adequate risk assessment of the island and/or plan to rescue persons at sea;
- (viii) The failure of the AFP, BPC or the Defendant or any other department or agency under its control, to:
 - i. order; or
 - ii. provide a suitable boat; and
 - iii. repair;
 - iv. replace; and/or
 - v. have in survey

a suitable boat or alternatively the Colin Winchester and/or the Sea Eye or otherwise have an appropriate search and rescue capability;
- (ix) A failure to heed the rumour, the medium rating for probable arrival of a SIEV on 15 December 2010 or determine another SIEV was not expected or have in place an alternate arrangement for search and

rescue whilst BPC undertook non-core tasks preventing an immediate response to any SOLAS or search and rescue emergency;

- (x) A systems failure in having no, or at best, a poor:
- i. chain of command;
 - ii. decision making;
 - iii. risk assessment;
 - iv. response strategy;
 - vi. equipment
 - vii. facilities on and off Christmas Island;
 - viii. communication/lines of communication between the Defendant departments and/or agencies

was foreseeable.

- (b) The risks of not being able to provide an adequate search and rescue or alternatively a rescue service in an emergency carried grave risks of death and serious injury, and was therefore highly significant;
- (c) A reasonable person in the Defendant's position would have taken precautions against the risk of harm, as :
- (i) The probability that the harm would occur if care were not taken was high, as:
 - i. persons on Christmas Island engaged often in maritime activities;
 - ii. many other persons sailed within Australia's search and rescue zone, including in the territorial waters around Christmas Island;
 - iii. the attempted entry of SIEVs from the north of Christmas Island was a common occurrence;
 - iv. an attempted entry by a SIEV was actually anticipated;
 - v. the shores of Christmas Island were largely comprised of jagged cliffs; and/or
 - vi. there were very few locations where a rescue boat could launch safely and/or off-load passengers to the shore;

- vii. there were (often) rough weather conditions near Christmas Island;
 - viii. rough weather conditions increased the risk of a search and rescue or rescue being required;
 - ix. the chance of a SIEV being unseaworthy was high.
- (ii) The potential harm was very serious, as the absence of any adequate rescue service in the event of an emergency can, and did, result in death or serious injury;
 - (iii) There was no impracticality in taking precautions to rectify the Colin Winchester or Sea Eye;
 - (iv) There was no social utility in failing to take precautions to:
 - i. order boats capable of carrying out the requisite task for which they were to be purchased;
 - ii. rectify the Colin Winchester or Sea Eye, or alternatively to replace the Colin Winchester and Sea Eye with seaworthy vessels;
 - iii. have in place an appropriate risk assessment, plan or back-up plan;
 - iv. utilising available assets more appropriately;
 - v. allowing HMAS Pirie to undertake a non-core task in the circumstances as they existed at the time.

as all measures necessary for the provision of safety services should be provided in order to avoid the loss of life or injury;

- (v) To comply with its own statutory dictates and international obligations;
- (vi) To comply with its own common law duty of care.

119 The negligence of the Defendant caused harm to the Plaintiffs as:

- (a) The negligence was a necessary condition of the occurrence of the harm; and
- (b) It is appropriate for the scope of the Defendant's liability to extend to the harm so caused.

120 The Plaintiff's injuries were caused by the negligence of the Defendant.

Particulars of negligence

- (a) Failure to have in place proper search and rescue or rescue capabilities, as the Defendant did not have in place a proper search and rescue or alternatively a rescue plan, including:
 - (i) BPC did not accept it had a duty to undertake search and rescue, except in certain circumstances;
 - (ii) The AFP did not have a dedicated and viable marine service, equipment, facilities and could not undertake a search and rescue, as required;
- (b) In relation to the AFP:
 - (i) Failure to provide seaworthy vessels or vessels fit for purpose to the AFP search and rescue team;
 - (ii) Failure to ensure that the AFP search and rescue team were able to operate and be prepared for rough seas;
 - (iii) Failure to have access to suitable vessels on Christmas Island which could be used in rescue response and operations in bad weather;
 - (iv) Failure to have any viable marine rescue service on Christmas Island;
 - (v) Allowing (i) and (ii) to exist for over four months leading up to 15 December 2010 and afterwards at a time when the monsoon season was approaching and during monsoon season;
 - (vi) Failure to be equipped for a search and rescue mission;
- (c) In relation to the VMRS:
 - (i) Failure to provide VMRS with a suitable vessel which could be used in rescue operations in bad weather;
 - (ii) Failure to replace the Sea Eye;
- (d) In relation to the purchase of the Colin Winchester and/or the Sea Eye:
 - (i) Failure to heed the views of expert(s) or the VMRS prior to acquisition of either vessel;
 - (ii) Failure to provide itself or the VMRS with a vessel which was familiar to most persons to use it, including volunteers, and which would require a minimum of additional specific training, having knowledge of the high turnover of VMRS volunteers;

- (iii) Failure to provide a boat appropriate for the job for which it was required;
- (e) Failure to retain an expert to inspect the interior of the hulls of the Colin Winchester and the Sea Eye to determine the reason for the vessels being overweight;
- (f) Failure to rectify the defects of the Colin Winchester and the Sea Eye;
- (g) Alternatively, a failure to have a system in place whereby the VMRS could:
 - (i) effect repairs to the Defendant's vessels, including the Sea Eye;
 - (ii) maintain operational readiness of the Defendant's vessels, including the Sea Eye;
- (h) Failure to replace the Colin Winchester and the Sea Eye with capable vessels;
- (i) Alternatively, failure to provide a dedicated and viable marine service until the defects of the Colin Winchester and the Sea Eye were rectified;
- (j) Allowing the defects of the Colin Winchester and the Sea Eye to remain unresolved;
- (k) Materially increasing a risk of loss of life or injury in failing to rectify the defects of the Colin Winchester and the Sea Eye;
- (l) Failure to provide well-equipped, modern and suitable rescue vessels designed for rescue operations with powerful motors and well-trained crew at Christmas Island including, but not limited to:
 - (i) Providing the AFP, or any other designated search and rescue party, with a navy RHIB or civilian equivalent;
 - (ii) Alternatively, providing the AFP with a search and rescue vessel which was not suitable for the specific conditions of Christmas Island, particularly in "bad weather".
 - (iii) Providing a replacement vessel on Christmas Island capable of providing an emergency response in difficult sea conditions if the primary search and rescue vessel(s) were unavailable.

- (m) Failure to undertake a risk assessment or otherwise have in place a plan for rescue of persons at sea, including when:
 - i. HMAS Pirie and/or ACV Triton or other asset of BPC was otherwise engaged;
 - ii. Any "rescue boat" was out of order or unable to be used; and/or
 - iii. The seas were rough, very rough and/or extreme
- (n) Failure to ensure that there were vessels and crew on Christmas Island for the purpose of a search and rescue or alternatively, rescue;
- (o) Failure to provide appropriate training to AFP officers including, but not limited to training in relation to an immediate emergency response;
- (p) Failure to co-ordinate or have a plan to co-ordinate the Defendant's various departments, agencies and/or contractors prior to or during a search and rescue operation that included clear and precise:
 - i. chain of command;
 - ii. decision making;
 - iii. risk assessment;
 - iv. response strategy;
 - ix. equipment
 - x. facilities on and off Christmas Island;
 - xi. communication/lines of communication between the Defendant departments and/or agencies
- (q) In relation to Flying Fish Cove
 - i. A failure to have a seal wall or similar buffer;
 - ii. A failure to construct an appropriate facility to enable/allow means to deploy a vessel in adverse conditions;
 - iii. Failure to have a buoy or other structure to tie up to if entering the Cove, even in adverse conditions
- (r) In relation to the Ethel Beach Boat Ramp:
 - (i) A failure to significantly upgrade Ethel Beach Boat Ramp;
 - (ii) A failure to construct an appropriate boat ramp to launch a rescue vessel in adverse conditions;

- (iii) A failure to provide Ethel Beach Boat Ramp with shelter in the form of a sea wall, rock groyne or similar buffer;
 - (iv) A failure to ensure that persons would be capable of walking beside Ethel Beach Boat Ramp on a stable footing;
 - (v) Alternatively, a failure to take other action as was necessary to ensure there is a means of deploying a rescue vessel in adverse conditions;
- (s) Failure to store vessels at a location or in a manner which would allow for a quicker response in emergencies;
- (t) Failure to have any effective capability on Christmas Island to respond to an emergency at sea;
- (u) Alternatively, a Failure to have any effective capability on Christmas Island to respond to an emergency at sea when HMAS Pirie or other asset controlled by BPC was otherwise engaged;
- (v) Failure to establish an onshore AFP presence at Christmas Island whereby:
- (i) A military liaison officer would carry out background work for an immediate response to an emergency crisis more efficiently;
 - (ii) Appropriate facilities for a shore party would be provided;
 - (iii) A naval person on shore could liaise with HMAS Pirie in respect to the response to a crisis;
 - (iv) A presence on Christmas Island would assist or co-ordinate monitoring the arrival of otherwise undetected suspect illegal entry vessels.
- (w) Failure to have in place:
- (i) effective, organised surveillance for suspect illegal entry vessels arriving at Christmas Island;
 - (ii) radar surveillance, including use of a suitable radar system capable of detecting wooden vessels at sea;
 - (iii) a second response vessel allocated to Christmas Island which could continue surveillance whilst HMAS Pirie was otherwise occupied;

- (iv) more effective visual surveillance including, but not limited to, placing spotters at a number of locations on Christmas Island with binoculars or superior technological aids to sight;
- (v) keep the JORN radar system switched on either:
 - 1. at all times;
 - 2. during "bad weather"
- (x) Failure to establish a mooring buoy at Christmas Island to:
 - (i) enable SIEVs, including SIEV220, to be moored at Ethel Beach or otherwise; and
 - (ii) allow HMAS Pirie to resume ongoing surveillance activities
- (y) In relation to the relay of information from Christmas Island to AFP and/or BPC assets including HMAS Pirie and ACV Triton:
 - (i) Failure to have in place a system whereby comprehensive information would be communicated from the Island directly to/from BPC assets including HMAS Pirie and ACV Triton in a timely manner;
 - (ii) Causing an inordinate delay in communication of comprehensive information;
 - (iii) Failure to inform Lieutenant Commander Mitchell Livingstone, the Captain of HMAS Pirie, that the vessel was in serious danger earlier or at all;
 - (iv) Failure to communicate the content of emergency calls to 000 or the AFP between 5:43 am to 6:05 am on 15 December 2010 to Lieutenant Commander Mitchell Livingstone, HMAS Pirie and ACV Triton;
- (z) In relation to the BPC:
 - (i) Failure to reduce the risk of SIEVs arriving undetected;
 - (ii) Failure to heed the "rumour" and/or pay sufficient regard to the 'probable SIEV arrival rating' for 15 December 2010;
 - (iii) Failure to determine the port SIEV 220 left, whether it was the SIEV BPC held intelligence on as to its arrival;

- (iv) Failure to implement a surveillance strategy which heightened its coverage at times when the weather and sea conditions were rough;
- (v) Failure to provide a clear chain of command and/or guidelines to be followed in specific circumstances, including communication/lines of communication between assets of BPC, BPC and/or other departments or agencies of the Defendant
- (aa) Failure to ensure that BPC and AFP worked closely, particularly at times when visual surveillance was considered appropriate to ensure that there was a reasonable coverage to the north/north west of the island;
- (bb) In relation to the search and rescue:
 - (i) A failure to ensure that the AFP, departments or other agencies of the Defendant on Christmas Island had access to the National Search and Rescue Council endorsed SARMAP program covering the Australian search and rescue region;
 - (ii) A failure to have in place a system which would have enabled a better targeted search;
 - (iii) A failure to direct the AFP to liaise with the WA Water Police and other parties to determine how access could be obtained to SARMAP;
- (cc) Failure to ensure the AFP on Christmas Island were appropriately trained, including, but not limited to:
 - (i) Completion of the National Police Search and Rescue Manager's Course;
 - (ii) Being suitably competent in search and rescue management;
 - (iii) Ongoing up skilling to establish a cadre of trained search and rescue personnel.
- (dd) Having in place no, a delinquent or poor chain of command to assess risk, plan for and/or carry out search and rescue;
- (ee) In relation to the acts and/or omissions of BPC and/or Lieutenant Commander Mitchell Livingstone, the Commanding Officer of HMAS Pirie:

- (i) A failure to:
 - i. Command four members of ACV Triton to take over surveillance of SIEV 220 earlier or at all; and
 - ii. Direct a surveillance crew to be stationed on Christmas Island on the night of 14 December 2010; or
 - iii. Have HMAS Pirie resume surveillance at sea just north of Christmas Island on the evening of 14 December 2010
- (ii) a failure to ensure there was a system in place to allow Lieutenant Commander Livingstone to communicate with ACV Triton in order to:
 - i. Command four members of ACV Triton to take over surveillance of SIEV 220; and
 - ii. Direct surveillance crew on Christmas Island on the night of 14 December 2010 from HMAS Pirie or ACV Triton; or
 - iii. Have HMAS Pirie resume surveillance at sea just north of Christmas Island on the evening of 14 December 2010
- (iii) a failure to acknowledge that looking after SIEV220 was not the prime responsibility of the asset at Christmas Island;
- (iv) failing to appreciate and/or respond to the risk of injury to persons requiring a maritime rescue increased in bad weather
- (v) have in place a line of command through BPC or other department or agency of the Defendant to direct what he should have done.
- (ff) Failure to ensure that specific procedures were developed, documented and exercised for dealing with SIEVs arriving directly at Christmas Island in severe weather conditions;
- (gg) Failure to ensure that appropriate inter-agency command and control capabilities were in place;

- (hh) Failure to ensure that appropriate communication protocols and procedures between Customs and Border Protection at Christmas Island and Border Protection Control response vessels were in place;
- (ii) Failure to proceed with greater speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected, in particular knowing
 - i. the weather/sea state conditions
 - ii. the lack of seaworthiness of a SIEV;
 - iii. the risk to injury/life Flying Fish Cove presented to a SIEV/disabled SIEV in such conditions
- (jj) Failure to promote the establishment, operation and maintenance of an adequate and effective search and rescue service;
- (kk) Failure to provide residents at Christmas Island with information advising what should be done in the event that a SIEV was detected;
- (ll) Materially increasing the risk of injury due to the failures referred to in (a) to (kk), above;
- (mm) In relation to AMSA:
 - a. AMSA failed to carry out its functions, at Christmas Island:
 - i. In accordance with the AMSA Act;
 - ii. As directed or strategically directed by the Defendant;
 - iii. To co-ordinate/take into account (a) to (ll), above
 - b. The Defendant failed to ensure AMSA carried out its functions, at Christmas Island:
 - i. In accordance with the AMSA Act;
 - ii. As directed or strategically directed by the Defendant;
 - iii. In light of the failings of the Defendant and/or its agent(s)/agency(s), referred to above;
 - iv. To co-ordinate/take into account (a) to (ll), above

Breach of International Conventions

121 Further, and/or in the alternative, the Defendant was a signatory to the following international conventions:

- (a) , 1944 Convention on International Civil Aviation:
- (b) , 1979 International Convention on Maritime Search and Rescue:
- (c) International Convention for the Safety of Life at Sea 1974:
- (d) International Convention on Salvage 1989:
- (e) , 1982 United Nations Convention for the Law of the Sea:

122 The Defendant breached its obligations under the international conventions by failing to have search and rescue or rescue capabilities or such available immediately able to respond, on 14 and 15 December 2010.

Particulars of breach of international convention

- (a) *Breach of Annex Chapter 2.1.10 of the 1979 International Convention on Maritime Search and Rescue;*
- (b) *Breach of Article 98 of the United Nations Convention on the Law of the Sea 1982.*

123 As a signatory to the *1944 Convention on International Civil Aviation*, the *Safety Convention* and the *1979 International Convention on Maritime Search and Rescue*:

- (a) the Defendant was responsible for search and rescue over the East Indian, South-west Pacific and Southern oceans, including the waters surrounding Christmas Island;
- (b) the AFP had the statutory authority to exercise a search and rescue mission on 15 December 2010;
- (c) in the alternative the Defendant was required to have search and rescue or rescue capabilities on 15 December 2010;
- (d) AMSA was specifically established to develop a national search and rescue capability, including at Christmas Island, and carry out same in accordance with the *Safety Convention* and the *1979 International Convention on Maritime Search and Rescue*, and pursuant to the Defendant's directions and strategy directions.

124 AMSA's statutory authority to develop a search and rescue service/national plan created a statutory duty to:

- (a) develop a plan;

- (b) have sufficient and/or appropriate facilities for a search and rescue mission to be carried out, as required, including on 15 December 2010;
 - (c) for the Defendant to be adequately and appropriately equipped for a search and rescue mission as required, including on 15 December 2010;
 - (d) exercise a search and rescue mission as required, including on 15 December 2010;
 - (e) for the Defendant to be able to exercise a search and rescue mission as required, including on 15 December 2010.
- 125 The AFP's statutory authority to undertake a search and rescue mission as required, including on 15 December 2010 created a statutory duty to:
- (f) develop a plan;
 - (g) have sufficient and/or appropriate facilities for a search and rescue mission to be carried out, as required, including on 15 December 2010;
 - (h) be adequately and appropriately equipped for a search and rescue mission as required, including on 15 December 2010;
 - (i) exercise a search and rescue mission as required, including on 15 December 2010.
- 126 The Defendant failed to exercise its statutory duty in that it failed to:
- (a) Develop a plan;
 - (b) have sufficient and/or appropriate facilities for a search and rescue mission to be carried out, as required, including on 15 December 2010;
 - (c) be adequately and appropriately equipped for a search and rescue mission as required, including on 15 December 2010;
 - (d) exercise a search and rescue mission as required, including on 15 December 2010.
- 127 The provisions and policy of the enactment in which the Defendant's statutory duty to:
- (a) Develop a plan;
 - (b) have sufficient and/or appropriate facilities for a search and rescue mission to be carried out, as required, including on 15 December 2010;
 - (c) be adequately and appropriately equipped for a search and rescue mission as required, including on 15 December 2010; and/or

(d) exercise a search and rescue mission as required, including on 15 December 2010

was created were compatible with the existence of that liability.

Particulars

The Plaintiffs repeats the particulars of negligence, as detailed above, as particulars of breach of statutory duty.

128 As a consequence of the negligence and/or breach of statutory duty(s) by the Defendant, the Plaintiffs suffered injury loss and damage.

Defendant as owner of SIEV 221

129 At approximately:

- (a) 9 p.m. on 14 December 2010 SIEV 221 entered Australia's contiguous zone;
- (b) 2 am on 15 December 2010 SIEV 221 entered Australian territorial waters;
- (c) 5 am on 15 December 2010 SIEV 221 entered Australian coastal waters;
- (d) 6:00 a.m. the person in control of SIEV 221 erred in the way he navigated the vessel;
- (e) 6:40 a.m. the engine of SIEV 221 failed.

130 As a consequence of the error of navigating SIEV 221 the vessel came within the vicinity of Flying Fish Cove;

131 The engine of SIEV 221 failed and stopped.

132 As a consequence of the engine of SIEV 221 failing, SIEV 221 drifted off the shoreline of Christmas Island, in Flying Fish Cove,

133 At approximately 7:10 am SIEV 221 was washed onto the rocks of Christmas Island.

134 As a consequence of being washed onto the rocks of Christmas Island SIEV 221 was smashed to pieces and its passengers and crew ended up in the water ("the accident").

135 As a result of the accident 48 persons died and other persons suffered injury.

136 At all material times:

- (a) The Defendant knew that SIEVs entering territorial waters around Christmas Island did so in contravention of the *Migration Act 1958*(Cth);

- (b) SIEV 221 was used in contravention of the *Migration Act 1958*(Cth);
 - (c) The contraventions of the *Migration Act 1958* (Cth) were continuing whilst SIEV 221 entered and remained in Australian territorial waters;
- 137 SIEV 221 was automatically forfeited to the Defendant upon its entry into Australia territory, or in the alternative, when it crossed into the territorial waters of Australian territory, pursuant to section 261A *Migration Act 1958*(Cth).
- 138 Upon automatic forfeiture, the Defendant became the fully vested legal owner of SIEV 221.
- 139 At all material times:
- (a) SIEV 221 was not a seaworthy vessel pursuant to section 23 of the *Navigation Act 1912*(Cth).
 - (b) The Defendant knew or ought to have known that SIEV 221 was not a seaworthy vessel.
- 140 On becoming owner of SIEV 221 the Defendant was vicariously liable for the acts and/or omissions of the crew, including the master or person acting in his place.

Signals of distress

- 141 At all material times SIEV 221 had inadequate or no "signals of distress" and/or the vessel was crewed by persons unable to utilise or use properly signals of distress.
- 142 As a result, in breach of section 228 *Navigation Act 1912* no signals of distress were provided or utilised appropriately or at all.

Radio and/or navigational aids

- 143 At all material times SIEV 221 had no or inadequate radio installations and radio or navigational aids and/or those on board were not maintained or able to be operated as required.
- 144 Further, the master of SIEV 221 failed to maintain radio installations and radio or navigational aids or had persons capably able to utilise same.

Compass

- 145 SIEV 221 failed to have been equipped with a compass in accordance with the regulations nor were the compasses on SIEV 221 adjusted in accordance with the regulations and as a result SIEV 221 was deemed to be unseaworthy.

Operation of SIEV 221

- 146 At all material times the Defendant owed the Plaintiffs, as owner of SIEV 221, a duty of care to provide a safe and/or seaworthy vessel that was crewed by appropriate number of appropriately trained crew.
- 147 The Defendant breached the duty of care owed to the Plaintiffs, in that SIEV 221 was:
- (a) not seaworthy;
 - (b) overloaded;
 - (c) crewed by not properly trained persons;
 - (d) crewed by an inadequate number of crew;
 - (e) managed/steered incorrectly;
 - (f) had a faulty engine which stopped and was not re-started
 - (g) inappropriately equipped in relation to life saving gear, a radio, other safety equipment and/or signals of distress;
 - (h) in breach of statutory requirements
- which gave rise to a risk of harm of personal injury to persons on board;
- 148 As a result of one or a combination of 144 (a) to (h), SIEV 221 was managed, crewed, steered or otherwise handled so that it ran aground and smashed into rocks in Flying Fish Cove at Christmas Island.
- 149 The risk of harm was known or ought to have been known by the Defendant and was foreseeable;
- 150 The risk of harm was not insignificant;
- 151 The harm was likely to be serious;
- 152 The burden of taking precautions included, but not limited to:
- (a) Taking measures to prevent the disaster were readily available, as referred to above;
 - (b) Arresting/detaining SIEV 221, as statutorily required;
 - (c) Arose through the Defendant's breach of its own legislation
- were necessary to protect the persons on board, and otherwise, from injury and death.
- 153 The risk of harm should have been avoided.

- 154 There was no social utility in failing to take such measures to prevent injury or death.
- 155 Due to the breach of the Defendant's duty of care, the Plaintiffs suffered injury.
- 156 The injury arose as a result of the negligence of the Defendant, as:
- (a) The negligence was a necessary condition and/or materially increased the risk of the occurrence of the harm suffered by the Plaintiffs; and
 - (b) It is appropriate that the scope of the Defendant's liability extends to the harm so caused.
- 157 A reasonable person in the position of the Defendant, as owner of SIEV 221, would have taken precautions against the risk of harm.
- 158 The Plaintiffs say the injuries suffered were caused by the negligence and/or breach of statutory duty of the Defendant.

Particulars

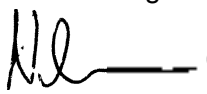
- (a) *Failure to ensure the Vessel was seaworthy*
 - (b) *Failure to provide sufficient and/or properly trained crew;*
 - (c) *Failure of the crew to manage/steer the vessel properly or with required skill;*
 - (d) *Failure to provide sufficient and/or proper life saving equipment;*
 - (e) *Failure to provide proper equipment;*
 - (f) *Failure to provide proper radio equipment;*
 - (g) *Failure to provide sufficient or proper rescue equipment;*
 - (h) *Failure to provide an engine that did not fail and/or persons able to re-start the engine;*
 - (i) *Breach of statutory duty:*
 - (a1) *Navigation Act 1912 sections 187C; 208; 227B; 228*
- 159 As a consequence of the negligence and/or breach of statutory duty(s) by the Defendant, the Plaintiffs suffered injury loss and damage.

This Amended Statement of Claim was settled by Shane Prince of Counsel.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature 
 Capacity *Solicitor*
 Date of signature *10/11/14*

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed, by:**
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.

- Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

REGISTRY ADDRESS

Street address	Law Courts Building, 184 Phillip Street, Sydney
Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

AFFIDAVIT VERIFYING

Name Median Nazar Ebrahimi
 Address Unit 11, 53 Alice Street
 Wiely Park NSW 2195
 Occupation Unemployed
 Date

I affirm:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
 #I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*
- 2 #I have known the deponent for at least 12 months. [OR delete whichever option is inapplicable]
 #I have confirmed the deponent's identity using the following identification document:

 Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

 [* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[(-"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.)]

FURTHER DETAILS ABOUT PLAINTIFFS**First Plaintiff**

Name Median Nazar Ibrahim
 Address Unit 11, 53 Alice Street
 Wiely Park NSW 2195

Other Plaintiffs

~~Name Syed Hossain Hossaini
 Address 11 Rearden Crescent
 Roxburgh Park VIC 3064~~

~~Name Ramin Khorshidi
 Address 53/3 Polding Place
 Telopea NSW 2117~~

~~Name Hossain Abdullahi Mohr
 Address 51 Cox Crocont
 Dundas NSW 2117~~

Name Hossain Shahvari
 Address 6/41-43 Bartley St
 Canley Vale NSW 2166

~~Name Mitra Shahvari
 Address 6/41-43 Bartley Street
 Canley Vale NSW 2166~~

~~Name Mina Shahvari
 Address 6/41-43 Bartley St
 Canley Vale NSW 2166~~

Name Afshin Noroozi
Address 504 Farler Road
Yenda NSW 2681

Legal representative for plaintiffs

Name George Newhouse
Practising certificate number 19904
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DX address 236 Sydney
Telephone 02 8754 7200
Fax 02 9267 5650
Email socialjustice@shine.com.au

DETAILS ABOUT DEFENDANT**Defendant**

Name Commonwealth of Australia
Address Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600
Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000