

ref: 10017 5

FILED
KB

23 SEP 2014



DEFENCE



COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2013/377410

TITLE OF PROCEEDINGS

First plaintiff	Median Nazar Ibrahim
Number of plaintiffs (if more than two)	3

Defendant	Commonwealth of Australia
-----------	----------------------------------

FILING DETAILS

Filed for	Commonwealth of Australia, Defendant
Legal representative	Australian Government Solicitor Level 42, MLC Centre 19 Martin Place SYDNEY NSW 2000 GPO Box 2727 SYDNEY
Legal representative reference	14106717
Contact name and telephone	Greg Kathner - (02) 9581 7568
Contact email	greg.kathner@ags.gov.au

PLEADINGS AND PARTICULARS

The following defence is made by the Defendant in response to the Plaintiffs' Statement of Claim (Claim) filed on 16 December 2013. The defence is filed in accordance with order 5 made by Garling J on 29 August 2014, which requires the Defendant to file and serve a defence joining issue with the allegations in the Claim only by 19 September 2014.

Summary

1 The Defendant denies the matters alleged in paragraph 1 of the Claim.

2 In answer to paragraph 2 of the Claim, the Defendant:

- a. admits that the first plaintiff, Median Nazar Ibrahim, is a relative of deceased passengers of SIEV 221;
- b. admits that Syed Hossain Hossaini was a passenger of SIEV 221 and is a relative of deceased passengers of SIEV 221;
- c. admits that Ramin Khorshidi is a relative of deceased passengers of SIEV 221;
- d. admits that Hossain Abdullahi Mehr was a passenger of SIEV 221 and is a relative of deceased passengers of SIEV 221;
- e. admits that Hossain Shahvari was a passenger of SIEV 221 and is a relative of deceased passengers of SIEV 221;
- f. admits that Mitra Shahvari is a relative of deceased passengers of SIEV 221;
- g. admits that Mina Shahvari is a relative of deceased passengers of SIEV 221; and
- h. denies the Plaintiffs suffered personal injury, loss and damage as a result of the negligence and/or breach of statutory duty of the Defendant.

The Defendant

3 The Defendant admits the matters alleged in paragraph 3 of the Claim.

4 In answer to paragraph 4 of the Claim, the Defendant:

- a. says that as at 15 December 2010, under the *Administrative Arrangements Order* made by the Governor-General of the Defendant on 14 October 2010:
 - i. the Minister for Immigration and Citizenship was responsible for administering the *Migration Act 1958* (Migration Act); and
 - ii. the Department of Immigration and Citizenship, a Department of State of the Defendant, was responsible for dealing with matters arising under the Migration Act; and
- b. otherwise does not admit the matters alleged in paragraph 4 of the Claim.

5 The Defendant admits the matters alleged in paragraph 5 of the Claim.

6 In answer to paragraph 6 of the Claim, the Defendant:

- a. says that on 15 December 2010, by s 15B(2)(a) of the *Acts Interpretation Act 1901* (AI Act), the provisions of an Act that were in force in an external Territory was to be taken to have effect in and in relation to the coastal sea of the Territory as if the coastal sea of the Territory were part of the Territory;

- b. says that on 15 December 2010, by s 15B(2)(b) of the AI Act, any reference in an Act to all or any of the external Territories was to be read as including a reference to the coastal sea of any Territory to which the reference related;
- c. says that on 15 December 2010, by s 15B(4)(b) of the AI Act, 'coastal sea' in relation to an external Territory meant:
 - i. the territorial sea adjacent to the Territory; and
 - ii. the sea on the landward side of the territorial sea adjacent to the Territory and not within the limits of the Territory;
 and included the airspace over, and the sea-bed and subsoil beneath, any such sea;
- d. says that on 15 December 2010, by s 17(pd) of the AI Act, 'External Territory' meant a Territory, not being an internal Territory, for the government of which as a Territory provision is made by any Act;
- e. says that the *Christmas Island Act 1958* (CI Act) makes provision for the government of Christmas Island as a Territory;
- f. says that Christmas Island is an 'external Territory'; and
- g. otherwise does not admit the matters alleged in paragraph 6 of the Claim.

7

In answer to paragraph 7 of the Claim, the Defendant:

- a. says that by s 7 of the CI Act, the laws in force in Christmas Island from time to time on or after 1 July 1992 are:
 - i. Acts as in force from time to time in or in relation to Christmas Island on and after 1 July 1992;
 - ii. Ordinances made on or after 1 July 1992 as in force from time to time;
 - iii. laws in force in Christmas Island in accordance with s 8 of the CI Act;
 - iv. Western Australian laws as in force in Christmas Island in accordance with s 8A of the CI Act;
- b. says that by s 8A(1) of the CI Act, subject to s 8A, s 8G and Part IVA of the CI Act, the 'provisions of the law of Western Australia' (as that term is defined in s 8A of the CI Act) (whether made before or after the commencement of s 8A of the CI Act) as in force in Western Australia from time to time are in force in Christmas Island; and
- c. otherwise does not admit the matters alleged in paragraph 7 of the Claim.

The Defendant's agencies and services

- 8 In answer to paragraph 8 of the Claim, the Defendant:
- a. admits the matters alleged in paragraph 8(a);
 - b. says that the Australian Federal Police (AFP) and the Australian Customs and Border Protection Service were portfolio agencies of the Attorney-General's Department on 15 December 2010 and otherwise does not admit the matters alleged in paragraph 8(b);
 - c. denies the matters alleged in paragraph 8(c);
 - d. does not admit the matters alleged in paragraph 8(d); and
 - e. does not admit the matters alleged in paragraph 8(e).
- 9 In answer to paragraph 9 of the Claim, the Defendant:
- a. denies the matters alleged in paragraph 9(a) and says that the Department of Regional Development and Local Government was a Department of State of the Defendant as at 15 December 2010;
 - b. admits the matters alleged in paragraph 9(b);
 - c. admits the matters alleged in paragraph 9(c)(i);
 - d. denies the matters alleged in paragraph 9(c)(ii);
 - e. denies the matters alleged in paragraph 9(c)(iii);
 - f. admits the matters alleged in paragraph 9(d); and
 - g. does not admit the matters alleged in paragraph 9(e).
- 10 In answer to paragraph 10 of the Claim, the Defendant:
- a. admits the matters alleged in paragraph 10(a);
 - b. admits the matters alleged in paragraph 10(b);
 - c. admits the matters alleged in paragraph 10(c);
 - d. does not admit the matters alleged in paragraph 10(d); and
 - e. does not admit the matters alleged in paragraph 10(e).
- 11 In answer to paragraph 11 of the Claim, the Defendant:
- a. denies the matters alleged in paragraph 11(a);
 - b. denies the matters alleged in paragraph 11(b);
 - c. admits the matters alleged in paragraph 11(c);

- d. denies the matters alleged in paragraph 11(d); and
- e. does not admit the matters alleged in paragraph 11(e).

SIEV

12 In answer to paragraph 12 of the Claim, the Defendant:

- a. says that on 15 December 2010, SIEV was an acronym for 'suspected irregular entry vessel';
- b. says that SIEV is currently an acronym for 'suspect illegal entry vessel'; and
- c. otherwise does not admit the matters alleged in paragraph 12 of the Claim.

13 In answer to paragraph 13 of the Claim, the Defendant:

- a. says that from time to time in the period from 2001 until 2010 SIEVs left various locations and some arrived in Australian territory; and
- b. otherwise does not admit the matters alleged in paragraph 13 of the Claim.

14 The Defendant denies the matters alleged in paragraph 14 of the Claim.

15 The Defendant denies the matters alleged in paragraph 15 of the Claim.

SIEV 221

16 The Defendant does not admit the matters alleged in paragraph 16 of the Claim.

17 In answer to paragraph 17 of the Claim, the Defendant:

- a. says that a vessel that arrived at Christmas Island on or about 15 December 2010 was identified as SIEV 221; and
- b. otherwise does not admit the matters alleged in paragraph 17 of the Claim.

18 In answer to paragraph 18 of the Claim, the Defendant:

- a. does not admit the matters alleged in paragraph 18(a);
- b. does not admit the matters alleged in paragraph 18(b);
- c. does not admit the matters alleged in paragraph 18(c);
- d. denies the matters alleged in paragraph 18(d); and
- e. says that SIEV 221 broke apart after smashing into rocks and otherwise denies the matters alleged in paragraph 18(e).

19 The Defendant does not admit the matters alleged in paragraph 19 of the Claim.

20 The Defendant denies the matters alleged in paragraph 20 of the Claim.

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

- 21 In answer to paragraph 21 of the Claim, the Defendant:
- a. admits it was a signatory to the *International Convention for the Safety of Life at Sea, 1974* and the *International Convention on Maritime Search and Rescue, 1979*; and
 - b. otherwise denies the matters alleged in paragraph 21 of the Claim.
- 22 The Defendant denies the matters alleged in paragraph 22 of the Claim.
- 23 The Defendant denies the matters alleged in paragraph 23 of the Claim.
- 24 In answer to paragraph 24 of the Claim, the Defendant:
- a. says that under ss 2A(a) and 2A(ba) of the *Australian Maritime Safety Authority Act 1990* (AMSA Act), 2 of the main objects of the AMSA Act are to promote maritime safety and to provide for a national search and rescue service; and
 - b. otherwise does not admit the matters alleged in paragraph 24 of the Claim.
- 25 In answer to paragraph 25 of the Claim, the Defendant:
- a. says that the functions of the Australian Maritime Safety Authority (AMSA) are stated in s 6 of the AMSA Act;
 - b. relies on the AMSA Act for its full force and effect;
 - c. says that one of AMSA's statutory functions under s 6(1)(b) of the AMSA Act is to provide a search and rescue service;
 - d. says that under ss 6(5)(a), (b) and (c) of the AMSA Act, the provision of a search and rescue service must be in a manner that is consistent with Australia's obligations under the Convention on International Civil Aviation done at Chicago on 7 December 1944, the International Convention for the Safety of Life at Sea, 1974 and the International Convention on Maritime Search and Rescue 1979 done at Hamburg on 27 April 1979;
 - e. says that s 7 of the AMSA Act provides that AMSA must perform its functions in a manner consistent with the obligations of Australia under any agreement between Australia and another country; and
 - f. otherwise does not admit the matters alleged in paragraph 25 of the Claim.
- 26 In answer to paragraph 26 of the Claim, the Defendant:
- a. says that under s 8(1) of the AMSA Act, the Minister may give AMSA written directions as to the performance of its functions; and
 - b. otherwise does not admit the matters alleged in paragraph 26 of the Claim.

27 In answer to paragraph 27 of the Claim, the Defendant:

- a. says that under s 9A(1) of the AMSA Act, the Minister may, from time to time, by notice in writing to AMSA, advise AMSA of his or her views in relation to the following matters:
 - i. the appropriate strategic directions of AMSA; and
 - ii. the manner in which AMSA should perform its functions;
- b. says that under s 9A(2) of the AMSA Act, AMSA must, in performing its functions, take account of notices given to it under s 9A(1); and
- c. otherwise does not admit the matters alleged in paragraph 27 of the Claim.

28 The Defendant denies the matters alleged in paragraph 28 of the Claim.

29 The Defendant does not admit the matters alleged in paragraph 29 of the Claim.

30 In answer to paragraph 30 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 30(a) of the Claim; and
- b. does not admit the matters alleged in paragraph 30(b) of the Claim.

31 The Defendant denies the matters alleged in paragraph 31 of the Claim.

32 The Defendant denies the matters alleged in paragraph 32 of the Claim.

33 The Defendant denies the matters alleged in paragraph 33 of the Claim.

34 The Defendant denies the matters alleged in paragraph 34 of the Claim.

The 'Colin Winchester'

35 The Defendant admits the matters alleged in paragraph 35 of the Claim.

36 In answer to paragraph 36 of the Claim, the Defendant:

- a. says that the primary purpose of the Colin Winchester was use as a patrol vessel;
- b. says that a secondary purpose of the Colin Winchester was use as a search and rescue vessel, within the AFP's role and responsibilities on Christmas Island; and
- c. otherwise does not admit the matters alleged in paragraph 36 of the Claim.

37 The Defendant denies the matters alleged in paragraph 37 of the Claim.

38 The Defendant does not admit the matters alleged in paragraph 38 of the Claim.

- 39 In answer to paragraph 39 of the Claim, the Defendant:
- a. does not admit the matters alleged in paragraph 39(a) of the Claim;
 - b. denies the matters alleged in paragraph 39(b) of the Claim;
 - c. denies the matters alleged in paragraph 39(c) of the Claim; and
 - d. denies the matters alleged in paragraph 39(d) of the Claim.
- 40 In answer to paragraph 40 of the Claim, the Defendant:
- a. says that on or about 11 August 2010, following the annual survey of the Colin Winchester, AMSA issued a Marine Surveyor's Report of Deficiencies which identified a number of deficiencies in the Colin Winchester which were required to be rectified as soon as possible but no later than by 11 November 2010; and
 - b. otherwise does not admit the matters alleged in paragraph 40 of the Claim.
- 41 In answer to paragraph 41 of the Claim, the Defendant:
- a. says that by email sent to Sergeant Swann (and others) on 2 December 2010 by the AFP National Coordinator, OHS, Sergeant Swann was told 'the [LeisureCat] vessels should not be used until AMSA revoked their notification';
 - b. says that by email sent on 7 December 2010, the AFP Manager, International Deployment Group, issued a direction that 'the use of the Leisurecat vessels is to cease with immediate effect with the exception where the vessel is required to operate in an emergency situation (SOLAS), in partially smooth seas and where the wave heights do not exceed 1.5 metres from the crest to trough'; and
 - c. otherwise does not admit the matters alleged in paragraph 41 of the Claim.
- 42 In answer to paragraph 42 of the Claim, the Defendant:
- a. says that the deficiencies in the Colin Winchester identified in the AMSA Marine Surveyor's Report of Deficiencies on or about 11 August 2010 were not rectified by 15 December 2010 and otherwise does not admit the matters alleged in paragraph 42(a);
 - b. says that from on or about 11 November 2010, the certificate of survey for the Colin Winchester issued by AMSA on 15 July 2009 was deemed to be suspended and otherwise denies the matters alleged in paragraph 42(b);
 - c. says that the Colin Winchester was not replaced and otherwise does not admit the matters alleged in paragraph 42(c) of the Claim; and

d. denies the matters alleged in paragraph 42(d) of the Claim.

The 'Sea Eye'

43 The Defendant denies the matters alleged in paragraph 43 of the Claim.

44 The Defendant admits the matters alleged in paragraph 44 of the Claim.

45 The Defendant admits the matters alleged in paragraph 45 of the Claim.

46 The Defendant does not admit the matters alleged in paragraph 46 of the Claim.

47 In answer to paragraph 47 of the Claim, the Defendant:

a. admits the Defendant agreed to provide a vessel for use by the Volunteer Marine Rescue Service (VMRS) for its operations; and

b. otherwise denies the matters alleged in paragraph 47.

48 The Defendant admits the matters alleged in paragraph 48 of the Claim.

49 The Defendant does not admit the matters alleged in paragraph 49 of the Claim.

50 The Defendant denies the matters alleged in paragraph 50 of the Claim.

51 The Defendant does not admit the matters alleged in paragraph 51 of the Claim.

52 In answer to paragraph 52 of the Claim, the Defendant:

a. admits the matters alleged in paragraph 52(a);

b. does not admit the matters alleged in paragraph 52(b);

c. does not admit the matters alleged in paragraph 52(c);

d. does not admit the matters alleged in paragraph 52(d); and

e. does not admit the matters alleged in paragraph 52(e).

53 In answer to paragraph 53 of the Claim, the Defendant:

a. says that upon the arrival of the Sea Eye at Christmas Island, Mr David Robertson, the Port Manager and Harbour Master for Christmas and Cocos Islands, identified problems with the Sea Eye and otherwise does not admit the matters alleged in paragraph 53(i) of the Claim;

b. says that upon the arrival of the Sea Eye at Christmas Island, Mr Robertson was concerned that the Sea Eye was not built according to the Uniform Shipping Laws Code and the Australian Federal Police Specifications and otherwise does not admit the matters alleged in paragraph 53(ii); and

c. admits the matters alleged in paragraph 53(iii).

54 In answer to paragraph 54 of the Claim, the Defendant:

- a. says that on or about 12 August 2010, following the annual survey of the Sea Eye, AMSA issued a Marine Surveyor's Report of Deficiencies which identified a number of deficiencies in the Sea Eye which were required to be rectified as soon as possible but no later than by 12 November 2010; and
- b. otherwise does not admit the matters alleged in paragraph 54 of the Claim.

55 In answer to paragraph 55 of the Claim, the Defendant:

- a. says that the deficiencies in the Sea Eye identified during the annual survey of the Sea Eye on or about 12 August 2010 were not remedied by 15 December 2010 and otherwise does not admit the matters alleged in paragraph 55(a);
- b. denies the matters alleged in paragraph 55(b);
- c. denies the matters alleged in paragraph 55(c);
- d. denies the matters alleged in paragraph 55(d); and
- e. says that the Sea Eye was not replaced and otherwise does not admit the matters alleged in paragraph 55(e).

56 In answer to paragraph 56 of the Claim, the Defendant:

- a. says that by letter dated 1 December 2010 from Mr Riley to Sergeant Swann, Mr Riley stated to the effect that:
 - i. the Sea Eye was out of survey with none of the major works having been commenced;
 - ii. with the vessel out of survey he was unable to authorise any of the VMRS boat crews to conduct on water training and therefore he limited his confidence in sending them to sea; and
 - iii. until such time as the issues outstanding with the Sea Eye were resolved and the rescue crews could recommence training, the VMRS group was unable to provide a dedicated, viable marine rescue service; and
- b. otherwise does not admit the matters alleged in paragraph 56 of the Claim.

BPC

57 The Defendant denies the matters alleged in paragraph 57 of the Claim.

58 The Defendant denies the matters alleged in paragraph 58 of the Claim.

59 The Defendant does not admit the matters alleged in paragraph 59 of the Claim.

60 The Defendant admits the matters alleged in paragraph 60 of the Claim.

HMAS Pirie and ACV Triton

61 In answer to paragraph 61 of the Claim, the Defendant:

- a. admits the matters alleged in paragraph 61(a) of the Claim;
- b. does not admit the matters alleged in paragraph 61(b) of the Claim;
- c. denies the matters alleged in paragraph 61(c) of the Claim;
- d. says that as the Christmas Island response vessel on 15 December 2010, HMAS Pirie's mission was to detect and intercept illegal and/or irregular vessels prior to their achieving a landing on Australian territory;
- e. does not admit the matters alleged in paragraph 61(d) of the Claim; and
- f. admits the matters alleged in paragraph 61(e) of the Claim.

62 In answer to paragraph 62 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 62(a) of the Claim;
- b. denies the matters alleged in paragraph 62(b) of the Claim;
- c. denies the matters alleged in paragraph 62(c) of the Claim;
- d. denies the matters alleged in paragraph 62(d) of the Claim;
- e. admits the matters alleged in paragraph 62(e) of the Claim; and
- f. admits the matters alleged in paragraph 62(f) of the Claim.

Alternate search and rescue

63 The Defendant does not admit the matters alleged in paragraph 63 of the Claim.

64 In answer to paragraph 64 of the Claim, the Defendant:

- a. does not admit the matters alleged in paragraph 64(a) of the Claim; and
- b. denies the matters alleged in paragraph 64(b) of the Claim.

65 The Defendant does not admit the matters alleged in paragraph 65 of the Claim.

Further alternate search and rescue

66 The Defendant does not admit the matters alleged in paragraph 66 of the Claim.

67 In answer to paragraph 67 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 67(a) of the Claim; and
- b. does not admit the matters alleged in paragraph 67(b) of the Claim.

Surveillance, Facilities & Equipment

68 The Defendant does not admit the matters alleged in paragraph 68 of the Claim.

69 In answer to paragraph 69 of the Claim, the Defendant repeats and relies upon its answer to paragraph 13 of the Claim.

70 The Defendant denies the matters alleged in paragraph 70 of the Claim.

71 The Defendant denies the matters alleged in paragraph 71 of the Claim.

72 The Defendant denies the matters alleged in paragraph 72 of the Claim.

73 The Defendant denies the matters alleged in paragraph 73 of the Claim.

74 In answer to paragraph 74 of the Claim, the Defendant:

- a. says that surveillance was carried out to the North / North West of Christmas Island; and
- b. otherwise does not admit the matters alleged in paragraph 74 of the Claim.

75 In answer to paragraph 75 of the Claim, the Defendant:

- a. admits the matters alleged in paragraph 75(a) of the Claim; and
- b. does not admit the matters alleged in paragraph 75(b) of the Claim.

76 The Defendant does not admit the matters alleged in paragraph 76 of the Claim.

77 The Defendant does not admit the matters alleged in paragraph 77 of the Claim.

78 The Defendant does not admit the matters alleged in paragraph 78 of the Claim.

Arrest/Detention

79 In answer to paragraph 79 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 79(a) of the Claim;
- b. in answer to paragraph 79(b) of the Claim:
 - i. denies the matters alleged in paragraph 79(b)(i) of the Claim;
 - ii. denies the matters alleged in paragraph 79(b)(ii) of the Claim;
 - iii. denies the matters alleged in paragraph 79(b)(iii) of the Claim; and
 - iv. says that under s 189(3) of the Migration Act, as at 15 December 2010, an officer (as defined in s 5(1) of the Migration Act) was permitted to detain a person who was in an excised offshore place if the officer knew or reasonably suspected that the person was an unlawful non-citizen.

80 In answer to paragraph 80 of the Claim, the Defendant:

- a. in answer to paragraph 80(a), admits that no aerial surveillance of the area between Indonesia and Christmas Island was conducted on 14 December 2010 and otherwise does not admit the allegations in paragraph 80(a) of the Claim;
- b. admits the matters alleged in paragraph 80(b);
- c. denies the matters alleged in paragraph 80(c);
- d. denies the matters alleged in paragraph 80(d); and
- e. admits the matters alleged in paragraph 80(e).

81 In answer to paragraph 81 of the Claim, the Defendant:

- a. admits the matters alleged in paragraph 81(a);
- b. does not admit the matters alleged in paragraph 81(b);
- c. denies the matters alleged in paragraph 81(c);
- d. denies the matters alleged in paragraph 81(d); and
- e. denies the matters alleged in paragraph 81(e).

82 The Defendant denies the matters alleged in paragraph 82 of the Claim.

83 In answer to paragraph 83 of the Claim, the Defendant:

- a. denies that at all material times, Border Protection Command (BPC) refused to instruct persons working under its command to intercept or detain a SIEV when entering Australian territory; and
- b. otherwise does not admit the matters alleged in paragraph 83 of the Claim.

84 The Defendant denies the matters alleged in paragraph 84 of the Claim.

14 December 2010

85 The Defendant admits the matters alleged in paragraph 85 of the Claim.

86 The Defendant admits the matters alleged in paragraph 86 of the Claim.

87 The Defendant denies the matters alleged in paragraph 87 of the Claim.

88 The Defendant admits the matters alleged in paragraph 88 of the Claim.

89 The Defendant admits the matters alleged in paragraph 89 of the Claim.

90 In answer to paragraph 90 of the Claim, the Defendant:

- a. says that the 11 passengers on board SIEV 220 were taken ashore at about 6:03pm;
- b. says that the destruction of vessels was required to take place, where possible, 10nm from Christmas Island and that the sunset and weather conditions prevented destruction of SIEV 220 on 14 December 2010;
- c. says that HMAS Pirie monitored SIEV 220 until it could be safely destroyed; and
- d. otherwise does not admit the matters alleged in paragraph 90 of the Claim.

91 In answer to paragraph 91 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 91(a) of the Claim;
- b. does not admit the matters alleged in paragraph 91 (b) of the Claim;
- c. denies the matters alleged in paragraph 91(c) of the Claim and says that the crew of ACV Triton were unable to monitor SIEV 220 because ACV Triton already had 108 unlawful non-citizens on board;
- d. does not admit the matters alleged in paragraph 91(d) of the Claim;
- e. does not admit the matters alleged in paragraph 91(e) of the Claim;
- f. denies the matters alleged in paragraph 91(f) of the Claim;
- g. does not admit the matters alleged in paragraph 91(g) of the Claim;
- h. denies the matters alleged in paragraph 91(h) of the Claim;
- i. denies the matters alleged in paragraph 91 (i) of the Claim;
- j. denies the matters alleged in paragraph 91 (j) of the Claim;
- k. denies the matters alleged in paragraph 91 (k) of the Claim; and
- l. denies the matters alleged in paragraph 91(l) of the Claim.

92 The Defendant does not admit the matters alleged in paragraph 92 of the Claim.

93 In answer to paragraph 93 of the Claim, the Defendant:

- a. denies the matters alleged in paragraph 93(a) of the Claim; and
- b. admits the matters alleged in paragraph 93(b) of the Claim.

94 In answer to paragraph 94 of the Claim, the Defendant:

- a. repeats its answer to paragraph 93 of the Claim above;
- b. says that neither BPC, the AFP nor the Defendant knew of any 'rumour'; and

- c. does not admit the matters alleged in paragraph 94 of the Claim.

15 December 2010

95 In answer to paragraph 95 of the Claim, the Defendant:

- a. admits that on 15 December 2010 BPC was on 'medium' alert for the arrival of a SIEV at Christmas Island;
- b. says that 'medium' alert meant an imminent arrival of a SIEV was not likely; and
- c. otherwise denies the matters alleged in paragraph 95 of the Claim.

96 In answer to paragraph 96 of the Claim, the Defendant:

- a. does not admit the matters alleged in paragraph 96(a) of the Claim;
- b. says that Beverly Orchard observed SIEV 221 at 5:20am 400m from shore and otherwise denies the matters alleged in paragraph 96(b) of the Claim;
- c. says that Brian Key photographed SIEV 221 at 5:36am and otherwise denies the matters alleged in paragraph 96(c) of the Claim; and
- d. says that Ross Martin observed SIEV 221 at 5:40am and telephoned Customs Officer Leslie William Jardine at 5:43am to advise and otherwise denies the matters alleged in paragraph 96(d) of the Claim.

97 In answer to paragraph 97 of the Claim, the Defendant:

- a. says that on 15 December 2010, Leslie William Jardine telephoned CNOC to advise of what he was informed by Ross Martin;
- b. says Mr Jardine telephoned CNOC at 5:49am; and
- c. otherwise does not admit the matters alleged in paragraph 97 of the Claim.

98 In answer to paragraph 98 of the Claim, the Defendant:

- a. says that at about 5:51am Mr Jardine attempted to call ACV Triton, without getting through; and
- b. otherwise does not admit the matters alleged in paragraph 98 of the Claim.

99 In answer to paragraph 99 of the Claim, the Defendant:

- a. says that Amy Leutch telephoned 000 at 5:58am; and
- b. otherwise denies the matters alleged in paragraph 99 of the Claim.

- 100 In answer to paragraph 100 of the Claim, the Defendant:
- a. says that Mr Saunders, on ACV Triton, was telephoned by AMSOC at 6:00am; and
 - b. otherwise denies the matters alleged in paragraph 100 of the Claim.
- 101 In answer to paragraph 101 of the Claim, the Defendant:
- a. says that yelling and screaming came from SIEV 221; and
 - b. does not admit the matters alleged in paragraph 101 of the Claim.
- 102 The Defendant admits the matters alleged in paragraph 102 of the Claim.
- 103 In answer to paragraph 103 of the Claim, the Defendant:
- a. says that Commander Livingstone of HMAS Pirie received a telephone call from HQJTF639 at about 6:05am;
 - b. says that Commander Livingstone made a wakeup call to HMAS Pirie at about 6:10am; and
 - c. otherwise denies the matters alleged in paragraph 103 of the Claim.
- 104 The Defendant denies the matters alleged in paragraph 104 of the Claim.
- 105 The Defendant denies the matters alleged in paragraph 105 of the Claim.
- 106 In answer to paragraph 106 of the Claim, the Defendant:
- a. says that HMAS Pirie set out from the eastern side of the Island;
 - b. says that HMAS Pirie was underway at 6:21am and set out on a northerly course with a view to rounding North East Point; and
 - c. otherwise denies the matters alleged in paragraph 106 of the Claim.
- 107 The Defendant denies the matters alleged in paragraph 107 of the Claim.
- 108 The Defendant admits the matters alleged in paragraph 108 of the Claim.
- 109 The Defendant admits the matters alleged in paragraph 109 of the Claim.
- 110 In answer to paragraph 110 of the Claim, the Defendant:
- a. says that SIEV 221 smashed onto the rocks of Christmas Island;
 - b. says that SIEV 221 first hit the rocks near Rocky Point between 6:29am and 6:35am;
 - c. says that SIEV 221 commenced to disintegrate at about 6:58am;
 - d. does not admit that the spine of the hull of SIEV 221 was last observed at 7:12am; and

e. otherwise denies the matters alleged in paragraph 110 of the Claim.

111 The Defendant admits the matters alleged in paragraph 111 of the Claim.

112 In answer to paragraph 112 of the Claim, the Defendant:

a. says that as a consequence of being smashed onto the rocks of Christmas Island, SIEV 221 was smashed to pieces;

b. denies that all of its passengers and crew ended up in the water; and

c. otherwise does not admit the matters alleged in paragraph 112 of the Claim.

113 In answer to paragraph 113 of the Claim, the Defendant:

a. says that the Coroner's Court of Western Australia found that 50 persons died;

b. says that other persons suffered injury; and

c. otherwise does not admit the matters alleged in paragraph 113 of the Claim.

Alleged Duty of Care and Breach

114 The Defendant denies the matters alleged in paragraph 114 of the Claim.

115 The Defendant denies the matters alleged in paragraph 115 of the Claim.

116 The Defendant denies the matters alleged in paragraph 116 of the Claim.

117 The Defendant denies the matters alleged in paragraph 117 of the Claim.

Alleged Breach of International Conventions

118 The Defendant admits the matters alleged in paragraph 118 of the Claim.

119 The Defendant denies the matters alleged in paragraph 119 of the Claim.

120 In answer to paragraph 120 of the Claim, the Defendant:

a. repeats and relies upon its answer to paragraph 118 of the Claim; and

b. in answer to paragraph 120(d) of the Claim, repeats and relies upon its answer to paragraphs 24 to 27 of the Claim and otherwise does not admit the matters alleged in paragraph 120(d) of the Claim; and

c. otherwise does not admit the matters alleged in paragraph 120 of the Claim.

121 The Defendant denies the matters alleged in paragraph 121 of the Claim.

122 The Defendant denies the matters alleged in paragraph 122 of the Claim.

123 The Defendant denies the matters alleged in paragraph 123 of the Claim.

124 The Defendant denies the matters alleged in paragraph 124 of the Claim.

125 The Defendant denies the matters alleged in paragraph 125 of the Claim.

Defendant as owner of SIEV 221

126 In answer to paragraph 126 of the Claim, the Defendant:

- a. does not admit the matters alleged in paragraphs 126(a), (b), (c) and (d); and
- b. in answer to paragraph 126(e), says that the engine of SIEV 221 failed at 6:22am and otherwise denies the matters alleged in paragraph 126(e) of the Claim.

127 In answer to paragraph 127 of the Claim, the Defendant:

- a. denies that the vessel came within the vicinity of Flying Fish Cove; and
- b. otherwise does not admit the matters alleged in paragraph 127 of the Claim.

128 The Defendant admits the matters alleged in paragraph 128 of the Claim.

129 In answer to paragraph 129 of the Claim:

- a. the Defendant repeats and relies upon its answer to paragraph 105 of the Claim; and
- b. otherwise does not admit the matters alleged in paragraph 129 of the Claim.

130 In answer to paragraph 130 of the Claim, the Defendant:

- a. admits that SIEV 221 was washed onto the rocks of Christmas Island;
- b. says that SIEV 221 first hit the rocks between 6:29am and 6:35am; and
- c. otherwise denies the matters alleged in paragraph 130 of the Claim.

131 In answer to paragraph 131 of the Claim:

- a. the Defendant repeats and relies upon its answer to paragraph 112 of the Claim; and
- b. otherwise does not admit the matters alleged in paragraph 131 of the Claim.

132 In answer to paragraph 132 of the Claim:

- a. the Defendant repeats and relies upon its answer to paragraph 113 of the Claim; and
- b. otherwise does not admit the matters alleged in paragraph 132 of the Claim.

133 In answer to paragraph 133 of the Claim, the Defendant:

- a. in answer to the matters alleged in paragraph 133(a) of the Claim, says that (subject to certain exceptions) a non-citizen travelling to Australia without a visa that is in effect is in contravention of s 42 of the Migration Act; and

b. otherwise does not admit the matters alleged in paragraph 133 of the Claim.

134 The Defendant does not admit the matters alleged in paragraph 134 of the Claim.

135 The Defendant does not admit the matters alleged in paragraph 135 of the Claim.

136 In answer to paragraph 136 of the Claim, the Defendant:

a. does not admit the matters alleged in paragraph 136(a) of the Claim; and

b. denies the matters alleged in paragraph 136(b) of the Claim.

137 The Defendant denies the matters alleged in paragraph 137 of the Claim.

Signals of distress

138 The Defendant does not admit the matters alleged in paragraph 138 of the Claim.

139 The Defendant does not admit the matters alleged in paragraph 139 of the Claim.

Radio and/or navigational aids

140 The Defendant does not admit the matters alleged in paragraph 140 of the Claim.

141 The Defendant does not admit the matters alleged in paragraph 141 of the Claim.

Compass

142 The Defendant does not admit the matters alleged in paragraph 142 of the Claim.

Operation of SIEV 221

143 The Defendant denies the matters alleged in paragraph 143 of the Claim.

144 The Defendant denies the matters alleged in paragraph 144 of the Claim.

145 The Defendant does not admit the matters alleged in paragraph 145 of the Claim.

146 The Defendant denies the matters alleged in paragraph 146 of the Claim.

147 The Defendant denies the matters alleged in paragraph 147 of the Claim.

148 The Defendant denies the matters alleged in paragraph 148 of the Claim.

149 The Defendant denies the matters alleged in paragraph 149 of the Claim.

150 The Defendant does not admit the matters alleged in paragraph 150 of the Claim.

151 The Defendant does not admit the matters alleged in paragraph 151 of the Claim.

152 The Defendant denies the matters alleged in paragraph 152 of the Claim.

153 The Defendant denies the matters alleged in paragraph 153 of the Claim.

154 The Defendant denies the matters alleged in paragraph 154 of the Claim.

155 The Defendant denies the matters alleged in paragraph 155 of the Claim.

156 The Defendant denies the matters alleged in paragraph 156 of the Claim.

Injuries and disabilities

The Defendant denies the existence of the alleged duties and the breaches of the alleged duties against it and does not admit that each of the Plaintiffs and the Represented Persons has suffered physical and/or psychiatric and/or latent psychiatric injury and does not admit that as a consequence of any such injury or injuries each of the Plaintiffs and each of the Represented Persons suffered disability, loss and damage.

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 defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

A handwritten signature in black ink, appearing to be 'J.W.L.', followed by a period.

Capacity

Solicitor for the Defendant

Date of signature

19 September 2014