

Form 7A (version 4)  
UCPR 14.3

**DEFENCE TO THE FURTHER AMENDED STATEMENT OF CLAIM**

**COURT DETAILS**

Court **SUPREME COURT OF NEW SOUTH WALES**  
Division **COMMON LAW**  
List **GENERAL**  
Registry **SYDNEY REGISTRY**  
Case number **2013/377410**

**FILED**

26 JUN 2015



**TITLE OF PROCEEDINGS**

First Plaintiff **MEDIAN NAZAR IBRAHIMI**

Number of Plaintiffs (if more than two) **3**

Defendant **COMMONWEALTH OF AUSTRALIA**

**FILING DETAILS**

Filed for **Commonwealth of Australia, Defendant**

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## PLEADINGS AND PARTICULARS

The following defence is made by the Defendant in response to the Plaintiffs' Further Amended Statement of Claim (**Claim**) filed on 11 May 2015.

### The Parties

1. The Defendant admits the matters alleged in paragraph 1 of the Claim.
2. The Defendant admits the matters alleged in paragraph 2 of the Claim.
3. In answer to the matters alleged in paragraph 3 of the Claim, the Defendant:
  - 3.1. says that the first plaintiff, Median Nazar Ibrahim, was not a passenger of suspected illegal entry vessel 221 (**SIEV 221**), but is a relative of deceased passengers of SIEV 221;
  - 3.2. says that the second plaintiff, Hossein Shahvari, was a passenger of SIEV 221 and is a relative of deceased passengers of SIEV 221;
  - 3.3. says that the third plaintiff, Hadi Afshin Norozi, was a passenger of SIEV 221 and is a relative of deceased passengers of SIEV 221;
  - 3.4. does not know and cannot admit that the Plaintiffs and Represented Persons suffered the personal injury, loss and damage alleged;
  - 3.5. denies the Plaintiffs and Represented Persons suffered any personal injury, loss and damage as a result of the negligence and/or breach of statutory duty of the Defendant, and/or any forfeiture of SIEV 221 to the Defendant under s 261A of the *Migration Act 1958* (Cth) (**Migration Act**); and
  - 3.6. otherwise does not admit the matters alleged in paragraph 3 of the Claim.

### Representative Nature of the Proceeding

4. In answer to the matters alleged in paragraph 4 of the Claim, the Defendant:
  - 4.1. admits the proceeding is brought by the Plaintiffs as a representative proceeding;
  - 4.2. denies that the proceeding is brought pursuant to rule 7.4 of the *Uniform Civil Procedure Rules 2005* (**UCPRs**);
  - 4.3. says that rule 7.4 of the UCPRs was repealed by schedule 6, item 6.4 of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) from 3 March 2011 and has no application to the proceeding;
  - 4.4. admits that Part 10 of the *Civil Procedure Act 2005* (NSW) applies to the proceeding; and
  - 4.5. otherwise does not admit the matters alleged in paragraph 4 of the Claim.
5. In answer to the matters alleged in paragraph 5 of the Claim, the Defendant:
  - 5.1. repeats and relies upon its answer to paragraph 3 of the Claim; and
  - 5.2. does not admit the matters alleged in paragraph 5 of the Claim.
6. In answer to the matters alleged in paragraph 6 of the Claim, the Defendant:
  - 6.1. in answer to the question at paragraph 6(a) of the Claim:

- 6.1.1. says that the question in paragraph 6(a) is a common question of fact or law and
- 6.1.2. refers to the matters in paragraphs 20 to 26 of this Defence;
- 6.2. in answer to the question at paragraph 6(b) of the Claim:
  - 6.2.1. says that the question in paragraph 6(b) is a common question of fact or law; and
  - 6.2.2. says that the question in paragraph 6(b) should be answered in the negative;
- 6.3. in answer to the question at paragraph 6(c) of the Claim:
  - 6.3.1. says that the question in paragraph 6(c) is a common question of fact or law; and
  - 6.3.2. says that the question in paragraph 6(c) should be answered in the negative;
- 6.4. in answer to the question at paragraph 6(d) of the Claim:
  - 6.4.1. says that the question in paragraph 6(d) is a common question of fact or law; and
  - 6.4.2. says that the question in paragraph 6(d) should be answered in the negative;
- 6.5. in answer to the question at paragraph 6(e) of the Claim:
  - 6.5.1. says that the question in paragraph 6(e) is a common question of fact or law; and
  - 6.5.2. says that the question in paragraph 6(e) should be answered in the negative;
- 6.6. in answer to the question at paragraph 6(f) of the Claim:
  - 6.6.1. says that the question in paragraph 6(f) is a common question of fact or law; and
  - 6.6.2. refers to the matters in paragraphs 20 to 26 and 30 of this Defence;
- 6.7. in answer to the question at paragraph 6(g) of the Claim:
  - 6.7.1. says that the question in paragraph 6(g) is a common question of fact or law; and
  - 6.7.2. refers to the matters in paragraphs 31 and 32 of this Defence;
- 6.8. in answer to the question at paragraph 6(h) of the Claim:
  - 6.8.1. says that the question in paragraph 6(h) is a common question of fact or law; and
  - 6.8.2. refers to the matters in paragraphs 33 and 34 of this Defence;
- 6.9. in answer to the question at paragraph 6(i) of the Claim:
  - 6.9.1. refers to the matters in paragraph 39 of this Defence;
  - 6.9.2. says that the question in paragraph 6(i) does not arise; and

- 6.9.3. in the alternative, says that if the question in paragraph 6(i) does arise, it should be answered in the negative;
- 6.10. in answer to the question at paragraph 6(j) of the Claim:
  - 6.10.1. refers to the matters in paragraph 49 of this Defence;
  - 6.10.2. says that the question in paragraph 6(j) does not arise; and
  - 6.10.3. in the alternative, says that if the question in paragraph 6(j) does arise, it should be answered in the negative;
- 6.11. in answer to the question at paragraph 6(k) of the Claim:
  - 6.11.1. refers to the matters in paragraphs 60 and 85 of this Defence;
  - 6.11.2. says that the question in paragraph 6(k) does not arise; and
  - 6.11.3. in the alternative, says that if the question in paragraph 6(k) does arise, it should be answered in the negative;
- 6.12. in answer to the question at paragraph 6(l) of the Claim:
  - 6.12.1. refers to the matters in paragraph 68 of this Defence;
  - 6.12.2. says that the question in paragraph 6(l) does not arise; and
  - 6.12.3. in the alternative, says that if the question in paragraph 6(l) does arise, it should be answered in the negative;
- 6.13. in answer to the question at paragraph 6(m) of the Claim:
  - 6.13.1. refers to the matters in paragraphs 72 to 79 of this Defence;
  - 6.13.2. says that the question in paragraph 6(m) does not arise; and
  - 6.13.3. in the alternative, says that if the question in paragraph 6(m) does arise, it should be answered in the negative;
- 6.14. in answer to the question at paragraph 6(n) of the Claim:
  - 6.14.1. refers to the matters in paragraphs 80 to 89 of this Defence;
  - 6.14.2. says that the question in paragraph 6(n) does not arise; and
  - 6.14.3. in the alternative, says that if the question in paragraph 6(n) does arise, it should be answered in the negative;
- 6.15. in answer to the question at paragraph 6(o) of the Claim:
  - 6.15.1. repeats and relies upon its answer to the question at paragraph 6(n) of the Claim;
  - 6.15.2. refers to the matters in paragraph 89 of this Defence;
  - 6.15.3. says that the question in paragraph 6(o) does not arise; and
  - 6.15.4. in the alternative, says that if the question in paragraph 6(o) does arise, it should be answered in the negative;
- 6.16. in answer to the question at paragraph 6(p) of the Claim:
  - 6.16.1. refers to the matters in paragraph 96 of this Defence;
  - 6.16.2. says that the question in paragraph 6(p) does not arise; and

- 6.16.3. in the alternative, says that if the question in paragraph 6(p) does arise, it should be answered in the negative;
- 6.17. in answer to the question at paragraph 6(q) of the Claim:
  - 6.17.1. repeats and relies upon its answer to the question at paragraph 6(p) of the Claim;
  - 6.17.2. refers to the matters in paragraphs 93 to 107 of this Defence;
  - 6.17.3. for those reasons, says that the question does not arise; and
  - 6.17.4. in the alternative, says that if the question in paragraph 6(q) does arise, it should be answered in the negative.

### **Applicable law**

- 7. The Defendant admits the matters alleged in paragraph 7 of the Claim.
- 8. In answer to the matters alleged in paragraph 8 of the Claim, the Defendant:
  - 8.1. 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 were 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;
  - 8.2. 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;
  - 8.3. says that on 15 December 2010, by s 15B(4)(b) of the AI Act, 'coastal sea' in relation to an external Territory meant:
    - 8.3.1. the territorial sea adjacent to the Territory; and
    - 8.3.2. the sea on the landward side of the territorial sea adjacent to the Territory and not within the limits of the Territory; and
    - 8.3.3. included the airspace over, and the sea-bed and subsoil beneath, any such sea;
  - 8.4. 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;
  - 8.5. says that the *Christmas Island Act 1958 (CI Act)* made provision for the government of Christmas Island as a Territory;
  - 8.6. says that Christmas Island is an 'external Territory'; and
  - 8.7. otherwise does not admit the matters alleged in paragraph 8 of the Claim.
- 9. In answer to the matters alleged in paragraph 9 of the Claim, the Defendant:
  - 9.1. says that by Proclamation issued on 9 November 1990 under s 7 of the *Seas and Submerged Lands Act 1973 (Cth) (SSL Act)*, the Governor-General of the Commonwealth of Australia declared that on and from 20 November 1990, the outer limit of the territorial sea of Australia (other than certain exceptions that do not apply to Christmas Island) is 12 international nautical miles measured from

- the baseline established under international law or as otherwise determined by Proclamation under s 7 of the SSL Act from time to time;
- 9.2. says that by s 4 of the SSL Act, that Act extends to all the Territories, including Christmas Island; and
  - 9.3. otherwise does not admit the matters alleged in paragraph 9 of the Claim.
10. In answer to the matters alleged in paragraph 10 of the Claim, the Defendant:
- 10.1. 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:
    - 10.1.1. Acts as in force from time to time in or in relation to Christmas Island on and after 1 July 1992;
    - 10.1.2. Ordinances made on or after 1 July 1992 as in force from time to time;
    - 10.1.3. laws in force in Christmas Island in accordance with s 8 of the CI Act; and
    - 10.1.4. Western Australian laws as in force in Christmas Island in accordance with s 8A of the CI Act;
  - 10.2. says that by s 8A(1) of the CI Act, subject to ss 8A and 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
  - 10.3. otherwise does not admit the matters alleged in paragraph 10 of the Claim.
11. In answer to the matters alleged in paragraph 11 of the Claim, the Defendant:
- 11.1. admits that some of the alleged acts or omissions of the Defendant occurred at Christmas Island;
  - 11.2. says that some of the alleged acts or omissions of the Defendant occurred in the territorial sea of Australia;
  - 11.3. denies that some of the alleged acts or omissions of the Defendant occurred in the territorial waters of Christmas Island;
  - 11.4. denies that any of the alleged acts or omissions of the Defendant were negligent; and
  - 11.5. otherwise does not admit the matters alleged in paragraph 11 of the Claim.
12. In answer to the matters alleged in paragraph 12 of the Claim, the Defendant:
- 12.1. says that the applicable law, so far as it is applicable and not inconsistent with the *Constitution* and the laws of the Commonwealth, is to be found in:
    - 12.1.1. the laws of the Commonwealth; and
    - 12.1.2. the common law in Australia as modified by the *Constitution* and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held;
  - 12.2. says that insofar as the alleged acts or omissions of the Defendant in the Claim occurred at Christmas Island or in the territorial seas of Australia, the laws of the

Commonwealth applicable include the CI Act and the laws made applicable by the CI Act, referred to in paragraph 10 above; and

12.3. otherwise does not admit the matters alleged in paragraph 12 of the Claim.

### **The Relevant Powers and Functions of the Defendant**

13. In answer to the matters alleged in paragraph 13 of the Claim, the Defendant:

13.1. in answer to the matters alleged in paragraph 13(a) of the Claim:

13.1.1. says that as at September to December 2010, the Minister for Immigration and Citizenship administered the Migration Act;

13.1.2. says that at that time, the matters dealt with by the Department of Immigration and Citizenship (**DIAC**) included matters arising under the Migration Act, including entry, stay and departure arrangements for non-citizens;

13.1.3. says DIAC was a Department of State of the Defendant;

13.1.4. says that the Migration Act applied at Christmas Island and in its territorial seas;

13.1.5. denies that the Defendant had the care and responsibility for ensuring compliance with the Migration Act; and

13.1.6. otherwise denies the matters alleged in paragraph 13(a) of the Claim;

13.2. in answer to the matters alleged in paragraph 13(b) of the Claim:

13.2.1. says that the preamble to the SSL Act relevantly provided to the effect that Australia as a coastal state has the right under international law to exercise control within a contiguous zone to:

- (a) prevent infringements of customs, fiscal, immigration or sanitary laws within Australia or the territorial sea of Australia;
- (b) to punish infringements of those laws ...;

13.2.2. says that as at September to December 2010, the Attorney-General of the Defendant administered the SSL Act; and

13.2.3. otherwise denies the matters alleged in paragraph 13(b) of the Claim;

13.3. in answer to the matters alleged in paragraph 13(c) of the Claim:

13.3.1. says that the Australian Government has responsibility for the lawful and orderly entry of people into Australia, along with ensuring that only those foreign nationals who are appropriately authorised are allowed to stay; and

13.3.2. otherwise denies the matters alleged in paragraph 13(c) of the Claim;

13.4. in answer to the matters alleged in paragraph 13(d) of the Claim:

13.4.1. repeats and relies upon its answer to paragraph 13(c) of the Claim;

13.4.2. says that interception, apprehension and processing of unauthorised maritime arrivals was within the Defendant's powers; and

13.4.3. otherwise denies the matters alleged in paragraph 13(d) of the Claim.

14. In answer to the matters alleged in paragraph 14 of the Claim, the Defendant:

- 14.1. in answer to the matters alleged in paragraph 14(a) of the Claim:
- 14.1.1. says that by s 61 of the *Constitution*, the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth; and
  - 14.1.2. otherwise denies the matters alleged in paragraph 14(a) of the Claim;
- 14.2. in answer to the matters alleged in paragraph 14(b) of the Claim:
- 14.2.1. says that by s 42(1) of the Migration Act, a non-citizen must not (subject to ss 42(2), (2A) and (3) of the Migration Act) travel to Australia without a visa that is in effect;
  - 14.2.2. says that by s 229(1) of the Migration Act, the master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia on or after 1 November 1979 are each guilty of an offence if the non-citizen, when entering Australia, is not in possession of evidence of a visa that is in effect and that permits him or her to travel to and enter Australia (amongst other things);
  - 14.2.3. says that by s 233A of the Migration Act, a person commits the offence of people smuggling if the person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person and the second person is a non-citizen and the second person had, or has, no lawful right to come to Australia;
  - 14.2.4. repeats and relies upon its answers to paragraphs 14(c) and 14(d) of the Claim; and
  - 14.2.5. otherwise denies the matters alleged in paragraph 14(b) of the Claim;
- 14.3. in answer to the matters alleged in paragraph 14(c) of the Claim:
- 14.3.1. says that by s 245B(1) of the Migration Act, the commander of a Commonwealth ship or a Commonwealth aircraft may request the master of a ship to permit the commander, a member of the commander's crew or an officer, to board the master's ship in certain circumstances;
  - 14.3.2. says that by s 245C(1) of the Migration Act, to enable the boarding of a foreign ship whose master has not complied with a request to board under s 245B (other than s 245B(7)), the commander of a Commonwealth ship or Commonwealth aircraft may use it to chase, or continue the chase of, the foreign ship to any place outside the territorial sea of a foreign country;
  - 14.3.3. says that by s 245F, an officer (as defined in s 245F(18)) may board and search a ship in certain circumstances;
  - 14.3.4. says that by s 245F of the Migration Act, an officer (as defined in s 245F(18)) may require all persons found on a ship to answer questions and produce any documents in their possession relating to certain issues in certain circumstances;



- 14.3.5. says that by s 245G(2) of the Migration Act, an officer (as defined in s 245G(7)) may board a ship in limited circumstances where the ship is outside the outer edge of the contiguous zone of Australia and outside the territorial sea of any country including Australia (s 245G(1));
- 14.3.6. says that s 249 of the Migration Act does not relate to the interception, boarding or searching of a ship or its passengers, but relates to certain persons being prevented from entering or landing;
- 14.3.7. says that s 251 of the Migration Act permits an officer at any time to board and search a vessel if s 245F does not apply to the vessel and the officer reasonably suspects there is on board the vessel an unlawful non-citizen or a person seeking to enter the migration zone (as defined in the Migration Act) who would, if in the migration zone, be an unlawful non-citizen; and
- 14.3.8. otherwise denies the matters alleged in paragraph 14(c) of the Claim;
- 14.4. in answer to the matters alleged in paragraph 14(d):
  - 14.4.1. 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;
  - 14.4.2. says that under s 250 of the Migration Act, as at 15 December 2010, an officer had a suspicion for the purposes of s 189 of the Migration Act about a person if, but not only if, the person is a suspect, within the meaning of s 250(1) of the Migration Act;
  - 14.4.3. says that as at 15 December 2010, a non-citizen detained because of s 250(2) may be kept in immigration detention for the period in s 250(3) of the Migration Act; and
  - 14.4.4. otherwise denies the matters alleged in paragraph 14(d) of the Claim.

### **The Exercise of the Defendant's Powers and Functions through Agencies**

- 15. In answer to the matters alleged in paragraph 15 of the Claim, the Defendant:
  - 15.1. says that as at 2010, Border Protection Command (**BPC**) was a joint multi-agency taskforce of the Defendant, based within the Australian Customs and Border Protection Service (**ACBPS**), and primarily staffed by officers from the ACBPS, the Department of Defence, the Australian Fisheries Management Authority and the Department of Agriculture;
  - 15.2. says that as at 2010, BPC was responsible for coordinating and controlling operations to protect Australia's national interests against 8 maritime threats in Australian's maritime jurisdiction, being:
    - 15.2.1. illegal exploitation of natural resources;
    - 15.2.2. illegal activity in protected areas;
    - 15.2.3. irregular maritime arrivals;
    - 15.2.4. prohibited imports/exports;
    - 15.2.5. maritime terrorism;

- 15.2.6. piracy, robbery and violence at sea;
  - 15.2.7. compromise to biosecurity;
  - 15.2.8. marine pollution; and
- 15.3. otherwise denies the matters alleged in paragraph 15 of the Claim.
16. In answer to the matters alleged in paragraph 16 of the Claim, the Defendant:
- 16.1. in answer to the matters alleged in paragraph 16(a) of the Claim:
    - 16.1.1. says that BPC was accountable, through the CEO ACBPS and the Chief of the Defence Force, to the Minister for Home Affairs and the Minister for Defence; and
    - 16.1.2. says that the Commander of BPC, a Royal Australian Navy officer, managed and controlled the operations of BPC;
  - 16.2. in answer to the matters alleged in paragraph 16(b) of the Claim:
    - 16.2.1. says that BPC used response assets assigned from the Australian Defence Force (**ADF**) and the ACBPS, including ACBPS contracted aircraft, Royal Australian Air Force maritime patrol aircraft, ACBPS vessels and Royal Australian Navy patrol boats;
    - 16.2.2. repeats and relies upon its answer to the matters alleged in paragraph 15 of the Claim;
    - 16.2.3. says that by s 8 of the *Defence Act 1903* (Cth) (**Defence Act**), the Minister for Defence has the general control and administration of the ADF;
    - 16.2.4. says that by s 9(2) of the Defence Act, and subject to s 8, the Chief of the Defence Force commands the ADF;
    - 16.2.5. says that by s 9A of the Defence Act, and subject to s 8, the Secretary of the Department of Defence and the Chief of the Defence Force jointly have the administration of the ADF except with respect to the matters specified in ss 9A(a) and (b);
    - 16.2.6. says the Australian Federal Police (**AFP**) was a portfolio agency of the Attorney-General's Department;
    - 16.2.7. denies the Defendant provided assets of, and assigned employees of, the AFP for use by BPC in its operations;
    - 16.2.8. says the ACBPS was a portfolio agency of the Attorney-General's Department;
    - 16.2.9. says the People Smuggling Intelligence Analysis Team was a team of people within the ACBPS; and
  - 16.3. otherwise denies the matters alleged in paragraph 16 of the Claim.
17. In answer to the matters alleged in paragraph 17 of the Claim, the Defendant:
- 17.1. says that the Australian Maritime Security Operations Centre (**AMSOC**) is located within BPC Headquarters;

- 17.2. says that AMSOC coordinates the planning and delivery of current operational activity for all ACBPS assets assigned to BPC, including deploying aerial surveillance and surface response assets, in collaboration with Headquarters Joint Task Force 639 (**HQJTF639**), to respond to maritime security threats; and
- 17.3. otherwise denies the matters alleged in paragraph 17 of the Claim.
18. In answer to the matters alleged in paragraph 18 of the Claim, the Defendant:
- 18.1. says that BPC's role was to detect, deter and intercept illegal activity in the maritime domain and to coordinate and control operations to protect Australia's interests against the 8 maritime threats pleaded in paragraph 15 of this Defence;
- 18.2. says that, in accordance with Australia's domestic and international obligations, the master of a vessel assigned to BPC may assist persons on or from a ship believed to be in distress;
- 18.3. says that the Defendant's assets, including BPC assets, may respond as circumstances permit to persons on or from a ship who are believed to be in distress; and
- 18.4. otherwise denies the matters alleged in paragraph 18 of the Claim.
19. In answer to the matters alleged in paragraph 19 of the Claim, the Defendant:
- 19.1. admits it is liable for any civil liability established against it in this proceeding;
- 19.2. admits it is liable for any civil liability established by reason of any acts or omissions of the entities named in paragraph 19(a) of the Claim;
- 19.3. says the correct name for the "Ministry for Justice and Customs" was the Ministry for Home Affairs and Justice;
- 19.4. says that no acts or omissions giving rise to any liability of any employee, officer or agent of the Defendant are alleged in the Claim; and
- 19.5. otherwise denies the matters alleged in paragraph 19 of the Claim.

**BPC's Operation to intercept SIEVs to the North of Christmas Island**

20. In answer to the matters alleged in paragraph 20 of the Claim and the accompanying table, the Defendant:
- 20.1. says that SIEV number 123 (referred to in row 11 of the table) was intercepted approximately 1nm from Flying Fish Cove jetty;
- 20.2. says the SIEV described as SIEV number 129 (referred to in row 16 of the table) was SIEV number 152;
- 20.3. says that SIEV number 211 (referred to in row 48 of the table) was intercepted approximately 4nm N of Rocky Point;
- 20.4. cannot plead to whether the SIEVs were intercepted under any response status, as no response statuses are pleaded in the table; and
- 20.5. otherwise admits the matters alleged in paragraph 20 of the Claim and the accompanying table.
21. In answer to the matters alleged in paragraph 21 of the Claim, the Defendant:
- 21.1. does not admit the matters alleged in paragraph 21(a) of the Claim;

- 21.2. does not admit the matters alleged in paragraph 21(b) of the Claim;
- 21.3. in answer to the matters alleged in paragraph 21(c) of the Claim:
  - 21.3.1. says that passengers on board SIEVs were exposed to danger to their health and safety whilst on board a SIEV;
  - 21.3.2. says the danger arose from the passengers' decisions to board a SIEV, their actions and omissions, the actions and omissions of the master and crew of a SIEV, the condition of a SIEV and the prevailing weather conditions; and
  - 21.3.3. otherwise does not admit the matters alleged in paragraph 21(c) of the Claim;
- 21.4. does not admit the matters alleged in paragraph 21 (d) of the Claim;
- 21.5. does not admit the matters alleged in paragraph 21(e) of the Claim;
- 21.6. in answer to the matters alleged in paragraph 21(f) of the Claim:
  - 21.6.1. says that Christmas Island had port facilities at Flying Fish Cove and a boat ramp at Ethel Beach;
  - 21.6.2. says that the port at Flying Fish Cove was exposed to open ocean from the west through to the north east;
  - 21.6.3. says that the port at Flying Fish Cove was exposed to significant winds and swells during the annual monsoon season from November to April and port closures are common during that period; and
  - 21.6.4. otherwise does not admit the matters alleged in paragraph 21 (f) of the Claim;
- 21.7. in answer to the matters alleged in paragraph 21(g) of the Claim:
  - 21.7.1. says that Christmas Island is a rocky outcrop and has steep, rocky cliffs along much of its coast that rise abruptly to the central plateau; and
  - 21.7.2. otherwise does not admit the matters alleged in paragraph 21 (g) of the Claim;
- 21.8. does not admit the matters alleged in paragraph 21(h) of the Claim;
- 21.9. does not admit the matters alleged in paragraph 21 (i) of the Claim;
- 21.10. does not admit the matters alleged in paragraph 21 (j) of the Claim; and
- 21.11. does not admit the matters alleged in paragraph 21(k)of the Claim.
- 22. In answer to the matters alleged in paragraph 22 of the Claim, the Defendant:
  - 22.1. denies the matters alleged in paragraph 22(a) of the Claim;
  - 22.2. in answer to the matters alleged in paragraph 22(b) of the Claim:
    - 22.2.1. says that at the time of the arrival of SIEV 221, the Defence asset assigned to BPC and tasked as the Christmas Island Response Vessel (**CIRV**) was HMAS Pirie;

- 22.2.2. says that as the CIRV, HMAS Pirie's mission was to intercept illegal and/or irregular vessels prior to their achieving a landing on Australian Territory; and
  - 22.2.3. otherwise does not admit the matters alleged in paragraph 22(b) of the Claim;
- 22.3. in answer to the matters alleged in paragraph 22(c) of the Claim:
- 22.3.1. says that at the time of the arrival of SIEV 221, the ACBPS asset assigned to BPC was ACV Triton;
  - 22.3.2. says that ACV Triton was a ship chartered by ACBPS;
  - 22.3.3. says that as an asset assigned to BPC, the ACV Triton could be tasked to respond to any of the 8 threats in the maritime domain (referred to in paragraph 15(b) above); and
  - 22.3.4. otherwise does not admit the matters alleged in paragraph 22(c) of the Claim.
- 22.4. in answer to the matters alleged in paragraph 22(d) of the Claim:
- 22.4.1. says that BPC conducted aerial surveillance of the northern approaches to Christmas Island during 2010 as and when required; and
  - 22.4.2. denies the matters alleged in paragraph 22(d) of the Claim.
23. In answer to the matters alleged in paragraph 23 of the Claim, the Defendant:
- 23.1. says that during the period September 2010 to December 2010, the CIRV's patrol posture was the NW and NE quadrants of Flying Fish Cove; and
  - 23.2. otherwise denies the matters alleged in paragraph 23 of the Claim.
24. In answer to the matters alleged in paragraph 24 of the Claim, the Defendant:
- 24.1. denies that the Sea Eye or the Colin Winchester was maintained by the Defendant at Christmas Island between September 2010 and December 2010 for the purpose of assisting BPC in the interception of SIEVs and the potential search and rescue of unseaworthy SIEVs approaching Christmas Island;
  - 24.2. denies that the Sea Eye was a vessel operated by the AFP on behalf of BPC;
  - 24.3. says that it agreed to provide a vessel, the Sea Eye, for use and operation by the Christmas Island Volunteer Marine Rescue Service (**VMRS**) for its (the VMRS's) maritime search and rescue operations around Christmas Island;
  - 24.4. denies that it maintained, or was responsible for maintaining, the Sea Eye between September and December 2010;
  - 24.5. denies that the Colin Winchester was provided by BPC to the VMRS and operated by the VMRS predominately through funding provided by BPC;
  - 24.6. says that the Colin Winchester was procured and operated by the AFP;
  - 24.7. says that the purpose of the Colin Winchester was use as an AFP patrol vessel;
  - 24.8. says that the VMRS was an organisation comprised of Christmas Island residents;
  - 24.9. denies that the VMRS was sponsored by the AFP;

- 24.10. denies that the VMRS received funding from BPC;
- 24.11. says that the VMRS was set up by, and received funding from, the Fire and Emergency Services Authority (**FESA**) of Western Australia;
- 24.12. says that on 15 December 2010, the Defendant (through ACBPS) had at Christmas Island a Port Class Stabi-Craft Response Tender and a Wiltrading Pursuit 640 vessel;
- 24.13. says that the Wiltrading Pursuit 640 vessel was predominantly used to support the transfer of potential irregular immigrants (**PII**) ashore to Christmas Island and that less frequently, it was used to intercept SIEVs in the vicinity of Christmas Island when the CIRV was not available; and
- 24.14. says that on 15 December 2010, the Port Class Stabi-Craft Response Tender had recently been delivered to Christmas Island, for predominant use in ACBPS inshore maritime operational patrol activities.
25. In answer to the matters alleged in paragraph 25 of the Claim, the Defendant:
- 25.1. says that pursuant to statutory powers under *inter alia* the Migration Act, BPC intercepted and boarded SIEVs in the vicinity of Christmas Island during the period September to December 2010;
- 25.2. repeats and relies upon its answers to paragraphs 20 to 24 of the Claim;
- 25.3. does not admit the matters alleged in paragraph 25(e) of the Claim;
- 25.4. otherwise denies the matters alleged in paragraph 25 of the Claim; and
- 25.5. says that if there was reliance of the kind alleged in paragraph 25(f) of the Claim, such reliance was neither lawful nor reasonable.
26. In answer to the matters alleged in paragraph 26 of the Claim, the Defendant:
- 26.1. says the Defendant had no legal, moral or other obligation or duty, or assumed responsibility, to ensure the safe passage of a SIEV illegally entering Australian waters;
- 26.2. says that if there was reliance of the kind alleged in paragraph 26(b)(ii) of the Claim, that reliance was neither lawful nor reasonable; and
- 26.3. denies the matters alleged in paragraph 26 of the Claim.

### **Duties of Care in the Conduct of the Interception Operation**

27. In answer to the matters alleged in paragraph 27 of the Claim, the Defendant:
- 27.1. repeats and relies upon its answers to paragraphs 13 to 26 of the Claim; and
- 27.2. denies the matters alleged in paragraph 27 of the Claim.
28. In answer to the matters alleged in paragraph 28 of the Claim, the Defendant:
- 28.1. says there were potentially catastrophic consequences for passengers of a SIEV if it were shipwrecked on the coast of Christmas Island;
- 28.2. says that those potentially catastrophic consequences arose from the passengers' decisions to board a SIEV, their actions and omissions, the actions and omissions of the master and crew of a SIEV, the condition of a SIEV and the prevailing weather conditions; and

28.3. otherwise denies the matters alleged in paragraph 28 of the Claim.

29. The Defendant denies the matters alleged in paragraph 29 of the Claim.

### **The Relevant Risk of Harm - the Shipwreck Risk**

30. In answer to the matters alleged in paragraph 30 of the Claim, the Defendant:

30.1. admits there was a risk that a SIEV might, on approaching Christmas Island from the north, be shipwrecked;

30.2. says the risk arose from the passengers' decisions to board a SIEV, their actions and omissions, the actions and omissions of the master and crew of a SIEV, the condition of the SIEV and the prevailing weather conditions;

30.3. says that the risk referred to in paragraph 30.1 above was an obvious risk within the meaning of ss 5E and 5F of the *Civil Liability Act 2002* (WA) and/or s 5F of the *Civil Liability Act 2002* (NSW);

30.4. says that by reason of the matters pleaded in paragraph 30.3 of this Defence, the risk referred to in paragraph 30.1 of this Defence is a risk of which the passenger Plaintiffs and Represented Persons are presumed to be aware by reason of s 5N of the *Civil Liability Act 2002* (WA) and s 5G of the *Civil Liability Act 2002* (NSW);

30.5. says that the risk referred to in paragraph 30.1 above was an inherent risk within the meaning of s 5P of the *Civil Liability Act 2002* (WA) and s 5I(2) of the *Civil Liability Act 2002* (NSW);

30.6. says that, in the premises, the risk referred to in paragraph 30.1 of this Defence is a risk that the passenger Plaintiffs and Represented Persons voluntarily assumed by boarding SIEV 221 and in respect of which they waive any claim in respect of loss, injury or damage caused by the conduct of the Defendant;

30.7. further, and in the alternative, says that, by reason of the matters pleaded in paragraph 30.5 of this Defence, the Commonwealth is not liable for harm that is the result of the occurrence or materialisation of that risk by reason of s 5P of the *Civil Liability Act 2002* (WA) and s 5I(1) of the *Civil Liability Act 2002* (NSW); and

30.8. otherwise denies the matters alleged in paragraph 30 of the Claim.

### **The Foreseeability of the Shipwreck Risk (s 5B(1)(a) of the CLA)**

31. In answer to the matters alleged in paragraph 31 of the Claim, the Defendant:

31.1. repeats and relies upon its answer to paragraph 30 of the Claim; and

31.2. otherwise denies the matters alleged in paragraph 31 of the Claim.

32. In answer to the matters alleged in paragraph 32 of the Claim, the Defendant:

32.1. repeats and relies upon its answers to paragraphs 30 and 31 of the Claim; and

32.2. otherwise denies the matters alleged in paragraph 32 of the Claim.

### **The Shipwreck Risk was "not insignificant" (s 5B(1)(b) of the CLA)**

33. In answer to the matters alleged in paragraph 33 of the Claim, the Defendant:

- 33.1. repeats and relies upon its answers to paragraphs 15 to 21 and 27 to 32 of the Claim;
  - 33.2. says that the unauthorised arrival of SIEVs in Australia created a danger to the servants and agents of the Defendant if persons on board a SIEV were believed to be in distress and servants and agents of the Defendant proceeded to those persons' assistance; and
  - 33.3. otherwise denies the matters alleged in paragraph 33 of the Claim.
34. In answer to the matters alleged in paragraph 34 of the Claim, the Defendant:
- 34.1. repeats and relies upon its answers to paragraphs 30 to 33 of the Claim; and
  - 34.2. otherwise denies the matters alleged in paragraph 34 of the Claim.

**Precaution A (s 5B(1)(c) of the CLA) - The Readiness Precaution**

35. In answer to the matters alleged in paragraph 35 of the Claim, the Defendant:
- 35.1. admits that on or about 14 January 2008, the Commonwealth, through its agency the AFP, procured the vessel the Colin Winchester;
  - 35.2. says that the purpose of the Colin Winchester was use as a police patrol vessel; and
  - 35.3. otherwise does not admit the matters alleged in paragraph 35 of the Claim.
36. The Defendant admits the matters alleged in paragraph 36 of the Claim.
37. In answer to the matters alleged in paragraph 37 of the Claim, the Defendant:
- 37.1. says that on 15 July 2009, the Australian Maritime Safety Authority (**AMSA**) issued certificates of survey for the Colin Winchester and the Sea Eye, which expired on 30 June 2013, subject to annual survey and inspection;
  - 37.2. 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;
  - 37.3. 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;
  - 37.4. says that from 11 November 2010, the Colin Winchester's certificate of survey was deemed to be suspended;
  - 37.5. says that from 12 November 2010, the Sea Eye's certificate of survey was deemed to be suspended;
  - 37.6. says there is an internationally accepted practice, consistent with regulations V/33 and V/34-1 in the annexure of the *International Convention for the Safety of Life at Sea, 1974*, and which has been accepted by AMSA, that survey requirements will not prevent the use of a vessel in an emergency involving the safety of life at sea where it is safe to use that vessel in the prevailing conditions;
  - 37.7. says that additionally, the Wiltrading Pursuit 640 and Port Class Stabi-Craft Response Tender vessels were available to respond, in appropriate weather and



sea conditions, and as circumstances permitted, to persons on or from a ship who were believed to be in distress at Christmas Island at the discretion of each vessel's master on 15 December 2010;

- 37.8. says that although the vessels' certificates of survey were deemed to be suspended, both the Colin Winchester and the Sea Eye were available to respond as circumstances permitted to persons on or from a ship who were believed to be in distress at Christmas Island at the discretion of each vessel's master throughout 2010, including on 15 December 2010; and
- 37.9. denies the matters alleged in paragraph 37 of the Claim.
38. In answer to the matters alleged in paragraph 38 of the Claim, the Defendant:
- 38.1. repeats and relies upon its answer to paragraph 37 of the Claim;
- 38.2. says that the AFP received AMSA's Marine Surveyor's Report of Deficiencies in respect of the Colin Winchester on 11 August 2010;
- 38.3. says that from at least 16 August 2010, the AFP knew that AMSA had identified, in respect of the Sea Eye, similar deficiencies to those identified in respect of the Colin Winchester; and
- 38.4. denies the matters alleged in paragraph 38 of the Claim.
39. In answer to the matters alleged in paragraph 39 of the Claim, the Defendant:
- 39.1. repeats and relies upon its answer to paragraph 37 of the Claim;
- 39.2. says that on 1 December 2010, the Commander of the VMRS wrote to Sergeant Peter Swann, the AFP Officer in Charge on Christmas Island, and stated that 'until such time the issues outstanding with Sea Eye are resolved and our rescue crews can re-commence training, the CI VMR group is unable to provide a dedicated, viable marine rescue service';
- 39.3. says that the Commander's letter was given to Sergeant Swann and the Administrator of Christmas Island at a meeting on 2 December 2010; and
- 39.4. denies the matters alleged in paragraph 39 of the Claim.
40. In answer to the matters alleged in paragraph 40 of the Claim, the Defendant:
- 40.1. repeats and relies upon its answer to paragraph 37 of the Claim; and
- 40.2. denies the matters alleged in paragraph 40 of the Claim.
41. The Defendant denies the matters alleged in paragraph 41 of the Claim.

**Precaution B (s 5(B)(1)(c) of the CLA) - the Ongoing Patrol Precaution**

42. In answer to the matters alleged in paragraph 42 of the Claim, the Defendant:
- 42.1. says that for part of 14 December 2010, there was a high threat status;
- 42.2. says that high threat status equated to an imminent departure of an individual venture where both passengers and the vessel were ready and when the venture was believed to be within 72 hours of departure, or had already departed;
- 42.3. says that on the evening of 14 December 2010, the threat status was reduced to medium;

- 42.4. says that a medium threat status meant an imminent arrival of a venture was not likely; and
- 42.5. otherwise denies the matters alleged in paragraph 42 of the Claim.
43. The Defendant admits the matters alleged in paragraph 43 of the Claim.
44. In answer to the matters alleged in paragraph 44 of the Claim, the Defendant:
- 44.1. says that after arriving at Christmas Island on 9 December 2010 and being tasked as the CIRV, HMAS Pirie conducted a barrier patrol to the north of Flying Fish Cove;
- 44.2. says that patrol was maintained until approximately 7:30am on 14 December 2010, when an engineering defect on the port-side propeller shaft of HMAS Pirie was identified, and HMAS Pirie moved to sheltered waters in the vicinity of Nui Nui Point to undertake repairs;
- 44.3. says that at about 10:22am on 14 December 2010, HMAS Pirie received a report that the vessel now known as SIEV 220 had been sighted approximately 300 yards to the north of Flying Fish Cove;
- 44.4. says that although its engineering defect was not repaired, HMAS Pirie moved towards the reported location of SIEV 220;
- 44.5. says that at about 10:47am on 14 December 2010, HMAS Pirie observed SIEV 220 heading in a westerly direction away from Flying Fish Cove;
- 44.6. says that at that time, the weather and sea state were such that it was unsafe to launch a RHIB to board SIEV 220;
- 44.7. says that the weather conditions at the time prevented an approach to Flying Fish Cove harbour;
- 44.8. says that HMAS Pirie escorted SIEV 220 to the lee of Christmas Island, to the north east of Nui Nui Point;
- 44.9. says that HMAS Pirie's boarding team boarded SIEV 220 at about 1:47pm on 14 December 2010; and
- 44.10. otherwise denies the matters alleged in paragraph 44 of the Claim.
45. In answer to the matters alleged in paragraph 45 of the Claim, the Defendant:
- 45.1. repeats and relies upon its answer to paragraph 44 of the Claim; and
- 45.2. does not admit the remainder of the matters alleged in paragraph 45 of the Claim.
46. In answer to the matters alleged in paragraph 46 of the Claim, the Defendant:
- 46.1. repeats and relies upon its answer to paragraph 44 of the Claim;
- 46.2. admits that the crew of HMAS Pirie offloaded the passengers and crew of SIEV 220;
- 46.3. says that the 8 PII and 3 crew on board SIEV 220 were offloaded at Ethel Breach at approximately 6:00pm on 14 December 2010; and
- 46.4. otherwise denies the matters alleged in paragraph 46 of the Claim.
47. In answer to the matters alleged in paragraph 47 of the Claim, the Defendant:

- 47.1. says that the destruction of SIEVs was required to take place, where possible, 10nm from Christmas Island;
  - 47.2. says that for biosecurity reasons, SIEVs were not taken ashore;
  - 47.3. says that the sunset and weather conditions prevented the destruction of SIEV 220 on the evening of 14 December 2010;
  - 47.4. says that HMAS Pirie transferred 4 crew members (a steaming party) onto the hulk of SIEV 220 to operate it under its own power, maintain navigational safety and retain custody of the hulk of SIEV 220 while awaiting approval of its destruction;
  - 47.5. says that the conditions at the time required HMAS Pirie to conduct constant surveillance of SIEV 220;
  - 47.6. says that HMAS Pirie maintained a short racetrack to the east of SIEV 220 throughout the night of 14 December 2010, and into the morning of 15 December 2010;
  - 47.7. says that maintaining the short racetrack allowed HMAS Pirie to provide operational and navigational oversight of SIEV 220 until it could be safely destroyed, whilst maintaining radar and visual surveillance capability to the north;
  - 47.8. says that HMAS Pirie maintained the racetrack in light of the medium threat level, the need to confirm its engineering defect, the weather state and the safety of its steaming party on board SIEV 220; and
  - 47.9. otherwise denies the matters alleged in paragraph 47 of the Claim.
48. In answer to the matters alleged in paragraph 48 of the Claim, the Defendant:
- 48.1. in answer to the matters alleged in paragraph 48(a) of the Claim:
    - 48.1.1. denies the matters alleged;
    - 48.1.2. repeats and relies upon its answer to paragraph 42 of the Claim; and
    - 48.1.3. says that as SIEV 220 had already arrived that day, any threat level on the evening of 14 December 2010 did not relate to the arrival of SIEV 220;
  - 48.2. in answer to the matters alleged in paragraph 48(b) of the Claim:
    - 48.2.1. says that during the evening of 14 December 2010, BPC knew that both the HMAS Pirie and the ACV Triton were on the eastern side of Christmas Island;
    - 48.2.2. says that immediately prior to the first sighting of SIEV 221 at 5:40am on 15 December 2010, ACV Triton was located approximately 9.5 to 10.5 nm from Rocky Point, approximately 4.5 nm south of HMAS Pirie;
    - 48.2.3. says that ACV Triton was at that location sheltering from the adverse weather conditions and waiting for an improvement in the weather to allow it to offload the 108 PII already on board;
    - 48.2.4. says that immediately prior to the first sighting of SIEV 221 at 5:40am on 15 December 2010, HMAS Pirie was in the vicinity of Ethel Beach approximately 5 to 6 nm from Rocky Point;

- 48.2.5. says that HMAS Pirie was at that location with the hulk of SIEV 220, which it had intercepted the day before; and
- 48.2.6. denies the matters alleged in paragraph 48(b) of the Claim;
- 48.3. in answer to the matters alleged in paragraph 48(c) of the Claim:
  - 48.3.1. repeats and relies upon its answer to paragraph 47 of the Claim;
  - 48.3.2. says that the conditions at the time meant that constant surveillance of SIEV 220 (and its 4-person steaming party of HMAS Pirie crew) was required to maintain its safety; and
  - 48.3.3. denies the matters alleged in paragraph 48(c) of the Claim;
- 48.4. in answer to the matters alleged in paragraph 48(d) of the Claim:
  - 48.4.1. repeats and relies upon its answer to paragraph 48(b) of the Claim; and
  - 48.4.2. denies the matters alleged in paragraph 48(d) of the Claim;
- 48.5. in answer to the matters alleged in paragraph 48(e) of the Claim, the Defendant:
  - 48.5.1. repeats and relies upon its answers to paragraphs 47 and 48(a) to (d) of the Claim;
  - 48.5.2. says that in the circumstances, it was reasonable and proper for HMAS Pirie to maintain the racetrack referred to in paragraph 47 above; and
- 48.6. in answer to the matters alleged in paragraph 48(f) of the Claim, the Defendant says that no surveillance flights were scheduled for the area to the north of Christmas Island in the period immediately preceding 15 December 2010;
- 48.7. in answer to the matters alleged in paragraph 48(g) of the Claim, the Defendant:
  - 48.7.1. says that some of the radar surveillance capability of HMAS Pirie and ACV Triton was impeded by the geography of Christmas Island;
  - 48.7.2. says that ACV Triton was not the CIRV and therefore was not required to conduct surveillance to the north of Christmas Island;
  - 48.7.3. says that the weather and sea conditions also restricted the effectiveness of HMAS Pirie's radar and visual lookout during the night of 14 to 15 December 2010; and
  - 48.7.4. says that the location of HMAS Pirie to the east of Christmas Island further reduced the effectiveness of its radar and visual lookout;
- 48.8. in answer to the matters alleged in paragraph 48(h) of the Claim, the Defendant says that the PRISM III radar system on HMAS Pirie was being used on the evening of 14 December 2010;
- 48.9. admits the matters alleged in paragraph 48(i) of the Claim;
- 48.10. in answer to the matters alleged in paragraph 48(j) of the Claim:
  - 48.10.1. admits the matters alleged in paragraph 48(j) of the Claim; and
  - 48.10.2. says this was because of the sea state and weather conditions at the time;
- 48.11. does not admit the matters alleged in paragraph 48(k) of the Claim; and

- 48.12. otherwise does not admit the matters alleged in paragraph 48 of the Claim.
49. In answer to the matters alleged in paragraph 49 of the Claim, the Defendant:
- 49.1. repeats and relies upon its answers to paragraphs 42 to 48 of the Claim;
- 49.2. says that under the Standing Patrol Instructions that applied in December 2010, HMAS Pirie's patrol posture was to be determined and executed appropriate to the prevailing threat, environmental conditions, ship's material state and effective surveillance coverage;
- 49.3. says that the allegations in paragraph 49 of the Claim are inconsistent with a Commanding Officer's responsibility for the safety of his/her vessel and its crew; and
- 49.4. denies the matters alleged in paragraph 49 of the Claim.
50. In answer to the matters alleged in paragraph 50 of the Claim, the Defendant:
- 50.1. repeats and relies upon its answers to paragraphs 42 to 49 of the Claim;
- 50.2. denies that the Ongoing Patrol Precaution would have been taken by a reasonable public authority in the position of the Defendant; and
- 50.3. otherwise does not admit the matters alleged in paragraph 50 of the Claim.
51. The Defendant denies the matters alleged in paragraph 51 of the Claim.

**Precaution C (s 5(B)(1)(c) of the CLA) - The Earlier Response Precaution**

52. In answer to the matters alleged in paragraph 52 of the Claim, the Defendant:
- 52.1. says that SIEV 221 departed Indonesia carrying non-citizens of Australia;
- 52.2. says that SIEV 221 departed Indonesia on or about 12 December 2010; and
- 52.3. otherwise does not admit the matters alleged in paragraph 52 of the Claim.
53. In answer to the matters alleged in paragraph 53 of the Claim, the Defendant:
- 53.1. does not know and cannot admit the matters alleged in paragraphs 53(a), 53(b) and 53(c) of the Claim;
- 53.2. in answer to the matters alleged in paragraph 53(d) of the Claim, denies that SIEV 221 entered Flying Fish Cove at any time on 15 December 2010;
- 53.3. in answer to the matters alleged in paragraph 53(e) of the Claim:
- 53.3.1. admits that SIEV 221 broke apart after smashing into rocks on 15 December 2010;
- 53.3.2. denies that this occurred at Flying Fish Cove;
- 53.3.3. says that this occurred at Rocky Point;
- 53.3.4. says that SIEV 221 first impacted the rocks at about 6:54am; and
- 53.4. otherwise does not admit the matters alleged in paragraph 53 of the Claim.
54. The Defendant does not know and cannot admit the matters alleged in paragraph 54 of the Claim.
55. In answer to the matters alleged in paragraph 55 of the Claim, the Defendant:

- 55.1. says that Ross Martin first observed SIEV 221 from the shore of Christmas Island at close to 5:40am;
- 55.2. says that at that time, SIEV 221 was about 500m to 600m off shore;
- 55.3. admits that Mr Martin telephoned Customs Officer Leslie William Jardine at 5:43am;
- 55.4. says Mr Martin advised Mr Jardine that he had seen a potential SIEV 500m off the coast near the Mango Tree Lodge; and
- 55.5. denies the matters alleged in paragraph 55 of the Claim.
56. In answer to the matters alleged in paragraph 56 of the Claim, the Defendant:
  - 56.1. says that Leslie William Jardine informed the Customs National Operations Centre (**CNOC**) of SIEV 221 's location;
  - 56.2. says that this was done by telephone call placed at 5:47am; and
  - 56.3. otherwise denies the matters alleged in paragraph 56 of the Claim.
57. In answer to the matters alleged in paragraph 57 of the Claim, the Defendant:
  - 57.1. says that Amy Luetich telephoned 000 just before 6:00am;
  - 57.2. says that at 5:56am, the AFP on-call member on Christmas Island received a 000 call transferred from the Perth switchboard;
  - 57.3. says the call was from a Christmas Island resident advising there was a SIEV close to the shore near the Sunset Motel; and
  - 57.4. otherwise does not admit the matters alleged in paragraph 57 of the Claim.
58. In answer to the matters alleged in paragraph 58 of the Claim, the Defendant:
  - 58.1. says that Matthew Saunders, Enforcement Commander of ACV Triton, was telephoned by AMSOC at about 5:55am;
  - 58.2. says that AMSOC advised Commanders Saunders there was a reported sighting of a SIEV about 300m off Rocky Point;
  - 58.3. says that AMSOC asked Commander Saunders to confirm whether the reported SIEV could be SIEV 220;
  - 58.4. says that Commander Saunders replied that given the reported location of the SIEV, it could not be SIEV 220;
  - 58.5. says that AMSOC did not inform Commanders Saunders that the SIEV that was the subject of the reported sighting was in danger or that persons on board the SIEV were in distress; and
  - 58.6. otherwise denies the matters alleged in paragraph 58 of the Claim.
59. In answer to the matters alleged in paragraph 59 of the Claim, the Defendant:
  - 59.1. says that at about 6:01am, Commander Saunders made a radio call to HMAS Pirie and advised he had received a call from AMSOC reporting a sighting of a potential SIEV to the north of Rocky Point;
  - 59.2. says it was decided that HMAS Pirie would respond and proceed north, given HMAS Pirie was located closer to Rocky Point than the ACV Triton, HMAS Pirie

- had a higher top speed than ACV Triton and the number of PII already on board ACV Triton;
- 59.3. says it was decided that ACV Triton would move north to look after the hulk of SIEV 220 and the steaming party from HMAS Pirie on board the hulk of SIEV 220; and
- 59.4. otherwise denies the matters alleged in paragraph 59 of the Claim.
60. In answer to the matters alleged in paragraph 60 of the Claim, the Defendant:
- 60.1. denies that at or about 6:00am, the Commanding Officers of the HMAS Pirie and the ACV Triton knew or ought to have known that persons on board SIEV 221 were believed to be in distress at sea;
- 60.2. says that at or about 6:00am, the Commanding Officers of the HMAS Pirie and the ACV Triton knew that a contact of interest had been sighted off Rocky Point; and
- 60.3. otherwise denies the matters alleged in paragraph 60 of the Claim.
61. In answer to the matters alleged in paragraph 61 of the Claim, the Defendant:
- 61.1. admits that the engine of SIEV 221 failed and stopped;
- 61.2. says that occurred at approximately 6:22am, after the crew caused SIEV 221 to approach the shore break under its own power; and
- 61.3. otherwise denies the matters alleged in paragraph 61 of the Claim.
62. In answer to the matters alleged in paragraph 62 of the Claim, the Defendant:
- 62.1. says that the crew of SIEV 221 caused the vessel to approach the shore break under its own power before the engine failed;
- 62.2. repeats and relies upon its answer to paragraph 61 of the Claim; and
- 62.3. otherwise denies the matters alleged in paragraph 62 of the Claim.
63. In answer to the matters alleged in paragraph 63 of the Claim, the Defendant:
- 63.1. says that HMAS Pirie set out from the eastern side of Christmas Island;
- 63.2. 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
- 63.3. otherwise denies the matters alleged in paragraph 63 of the Claim.
64. In answer to the matters alleged in paragraph 64 of the Claim, the Defendant:
- 64.1. says that at about 6:23am HMAS Pirie reversed course to the south to provide a lee to recover its second RHIB and resumed a northerly course by 6:32am;
- 64.2. says that HMAS Pirie recovered the second RHIB because the Headquarters Northern Command (**NORCOM**) Operations Officer had informed HMAS Pirie's Commanding Officer that both RHIBs would be needed, as there were approximately 50 to 60 people on SIEV 221; and
- 64.3. otherwise denies the matters alleged in paragraph 64 of the Claim.
65. In answer to the matters alleged in paragraph 65 of the Claim, the Defendant:
- 65.1. says that SIEV 221 first hit the rocks near Rocky Point at 6:54am;

- 65.2. says that SIEV 221 commenced to disintegrate at this time; and
- 65.3. otherwise denies the matters alleged in paragraph 65 of the Claim.
66. In answer to the matters alleged in paragraph 66 of the Claim, the Defendant:
- 66.1. says that at about 6:50am, HMAS Pirie's first RHIB arrived at Rocky Point in the vicinity of SIEV 221;
- 66.2. says that HMAS Pirie's second RHIB arrived at Rocky Point in the vicinity of SIEV 221 by about 7:00am; and
- 66.3. otherwise denies the matters alleged in paragraph 66 of the Claim.
67. The Defendant does not admit the matters alleged in paragraph 67 of the Claim.
68. In answer to the matters alleged in paragraph 68 of the Claim, the Defendant:
- 68.1. repeats and relies upon its answers to paragraphs 52 to 67 of the Claim;
- 68.2. says that in the circumstances, the HMAS Pirie and the ACV Triton responded to SIEV 221 reasonably and as quickly as practicable; and
- 68.3. denies the matters alleged in paragraph 68 of the Claim.
69. In answer to the matters alleged in paragraph 69 of the Claim, the Defendant:
- 69.1. repeats and relies upon its answer to paragraph 68 of the Claim; and
- 69.2. denies the matters alleged in paragraph 69 of the Claim.
70. The Defendant denies the matters alleged in paragraph 70 of the Claim.
71. In answer to the matters alleged in paragraph 71 of the Claim, the Defendant:
- 71.1. repeats and relies upon its answers to paragraphs 69 and 70 of the Claim;
- 71.2. says if, which is denied, any acts or omissions of its servants or agents committed in the course of their employment is established, it is vicariously liable for those acts or omissions; and
- 71.3. otherwise denies the matters alleged in paragraph 71 of the Claim.

**Causation (s 5C(1)(a) of the CLA)**

72. In answer to the matters alleged in paragraph 72 of the Claim, the Defendant:
- 72.1. denies the matters alleged;
- 72.2. repeats and relies on the matters pleaded in paragraphs 37.6, 37.7 and 37.8 above;
- 72.3. says that the survey status of the Colin Winchester and the Sea Eye had no impact on the decisions not to launch those vessels on 15 December 2010;
- 72.4. says the Colin Winchester and the Sea Eye were available on 14 and 15 December 2010, at the discretion of their masters, to respond as circumstances permitted to persons on or from a ship who were believed to be in distress;
- 72.5. says that the Colin Winchester and the Sea Eye were not used on 15 December 2010 because the weather conditions made it too dangerous to attempt to launch and operate any type of small vessel;



- 72.6. says that on 15 December 2010, the Port Manager and Harbour Master for Christmas Island determined that the weather and sea conditions made it unsafe to launch the Sea Eye or any vessel;
- 72.7. says that on 15 December 2010, the AFP Officer in Charge of Christmas Island Police Station, who was also the Territory Controller under Christmas Island's Emergency Management Plan for all emergency incidents, determined that the weather and sea conditions made it unsafe to launch the Colin Winchester or any vessel;
- 72.8. says that the Port Manager and Harbour Master for Christmas Island determined that the weather conditions on 14 and 15 December 2010 made it unsafe to offload vessels on Christmas Island and closed the harbour on those days;
- 72.9. says that the weather and sea conditions on 15 December 2010 precluded the use of the Wiltrading Pursuit 640 and Port Class Stabi-Craft Response Tender vessels to assist with the rescue effort on 15 December 2010;
- 72.10. says that the decision not to launch the Wiltrading Pursuit 640 and Port Class Stabi-Craft Response Tender vessels on 15 December 2010 was in accordance with the survey limitations of the vessels and was made in the interests of ensuring the safety of the officers who would have embarked in the vessels and others who may have been required to respond to ensure their safety;
- 72.11. says that the fact the certificates of survey for the Colin Winchester and the Sea Eye were deemed to be suspended on 15 December 2010 had no impact on the emergency response to the incident;
- 72.12. says that even if it had been possible to launch a vessel from Christmas Island (the Colin Winchester, the Sea Eye, or otherwise) on 15 December 2010, it would have taken at least 30 to 45 minutes to transport a vessel to Ethel Beach and at least a further 20 minutes to arrive at SIEV 221; and
- 72.13. says that in the premises, any vessel launched from Christmas Island on 15 December 2010 would have been unable to respond to SIEV 221 any faster than HMAS Pirie and ACV Triton responded.
73. In answer to the matters alleged in paragraph 73 of the Claim, the Defendant:
- 73.1. denies the matters alleged;
- 73.2. repeats and relies upon its answers to paragraphs 16(b) and 72 of the Claim;
- 73.3. says that as a police patrol vessel, the Colin Winchester did not have a 'usual station' of patrol 'in territorial waters north of Christmas Island'; and
- 73.4. says that as a police patrol vessel, the Colin Winchester would not have been deployed as alleged.
74. In answer to the matters alleged in paragraph 74 of the Claim, the Defendant:
- 74.1. repeats and relies upon its answers to paragraphs 16(b), 72 and 73 of the Claim; and
- 74.2. denies the matters alleged in paragraph 74 of the Claim.
75. In answer to the matters alleged in paragraph 75 of the Claim, the Defendant:
- 75.1. repeats and relies upon its answer to paragraph 72 of the Claim; and

- 75.2. denies the matters alleged in paragraph 75 of the Claim.
76. In answer to the matters alleged in paragraph 76 of the Claim, the Defendant:
- 76.1. repeats and relies upon its answer to paragraph 72 of the Claim; and
- 76.2. denies the matters alleged in paragraph 76 of the Claim.
77. In answer to the matters alleged in paragraph 77 of the Claim, the Defendant:
- 77.1. repeats and relies upon its answers to paragraphs 49 and 50 of the Claim; and
- 77.2. denies the matters alleged in paragraph 77 of the Claim.
78. In answer to the matters alleged in paragraph 78 of the Claim, the Defendant:
- 78.1. repeats and relies upon its answers to paragraphs 68 and 69 of the Claim; and
- 78.2. denies the matters alleged in paragraph 78 of the Claim.
79. In answer to the matters alleged in paragraph 79 of the Claim, the Defendant:
- 79.1. repeats and relies upon its answers to paragraphs 68 and 69 of the Claim; and
- 79.2. denies the matters alleged in paragraph 79 of the Claim.

**First Alternative Claim - Breach of Statutory Duty to Rescue**

80. In answer to the matters alleged in paragraph 80 of the Claim, the Defendant:
- 80.1. in answer to the matters alleged in paragraph 80(a) of the Claim:
- 80.1.1. admits the matters alleged in paragraph 80(a) of the Claim; and
- 80.1.2. says that the HMAS Pirie belonged to and was operated by the Australian Defence Force of the Defendant;
- 80.2. in answer to the matters alleged in paragraph 80(b) of the Claim:
- 80.2.1. denies that the HMAS Pirie was operated by BPC on 15 December 2010;
- 80.2.2. says that on 15 December 2010, HMAS Pirie was the Defence asset under the operational control of BPC and was tasked by BPC as the CIRV;
- 80.2.3. says that on 15 December 2010, HMAS Pirie was operated by the Australian Defence Force;
- 80.2.4. says that as the CIRV on 15 December 2010, HMAS Pirie's mission was to intercept illegal and/or irregular vessels prior to their achieving a landing on Australian Territory; and
- 80.2.5. otherwise does not admit the matters alleged in paragraph 80(b) of the Claim; and
- 80.3. in answer to the matters alleged in paragraph 80(c) of the Claim:
- 80.3.1. says that by s 261A of the *Navigation Act 1912* (Cth) (**Navigation Act**), ss 259, 260 and 261 of Part IV of the Navigation Act applied to a ship belonging to, or operated by, the Australian Defence Force, including HMAS Pirie, as those sections applied in the case of other ships; and
- 80.3.2. otherwise denies the matters alleged in paragraph 80(c) of the Claim.

81. In answer to the matters alleged in paragraph 81 of the Claim, the Defendant:
- 81.1. in answer to the matters alleged in paragraph 81(a) of the Claim:
- 81.1.1. denies the matters alleged; and
- 81.1.2. says that as at 15 December 2010, the ACV Triton was chartered by the ACBPS of the Defendant;
- 81.2. in answer to the matters alleged in paragraph 81(b) of the Claim:
- 81.2.1. denies the matters alleged;
- 81.2.2. says that as at 15 December 2010, ACBPS contracted Gardline Australia Pty Ltd to man and operate ACV Triton; and
- 81.2.3. says that the ACV Triton also contained a compliment of ACBPS personnel; and
- 81.3. admits the matters alleged in paragraph 81(c) of the Claim.
82. In answer to the matters alleged in paragraph 82 of the Claim, the Defendant:
- 82.1. in answer to the matters alleged in paragraph 82(a) of the Claim:
- 82.1.1. admits that the ACV Triton was registered in Australia;
- 82.1.2. denies that the HMAS Pirie was registered in Australia; and
- 82.1.3. says that on 15 December 2010, by s 7 of the *Shipping Registration Act 1981* (Cth), that Act, including the obligation to register Australian-owned ships in s 12, did not apply in relation to a ship belonging to an arm of the Defence Force of Australia or to the naval, military or air forces or a foreign country;
- 82.2. in answer to the matters alleged in paragraph 82(b) of the Claim:
- 82.2.1. denies the HMAS Pirie was operated by the BPC of the ACBPS and repeats and relies upon its answer to paragraph 80(b) of the Claim;
- 82.2.2. says that the crew of the HMAS Pirie were citizens of Australia;
- 82.2.3. denies the ACV Triton was operated by the BPC of the ACBPS and repeats and relies upon its answer to paragraph 81(b) of the Claim;
- 82.2.4. admits that the majority of the crew of the ACV Triton were residents of Australia;
- 82.2.5. admits that the ACBPS was an agency of the Defendant;
- 82.2.6. denies that the ACBPS was a 'firm' with its principal place of business in Australia;
- 82.2.7. says that the ACBPS's central office was in Canberra, Australia;
- 82.2.8. admits that the BPC was a joint multi-agency taskforce of the Defendant, based within the ACBPS; and
- 82.3. otherwise does not admit the matters alleged in paragraph 82 of the Claim.
83. In answer to the matters alleged in paragraph 83 of the Claim, the Defendant:

- 83.1. denies that as at 15 December 2010, the HMAS Pirie was a ship to which Part 2 of the Navigation Act applied;
  - 83.2. says that by s 3 of the Navigation Act, that Act did not apply to or in relation to a ship belonging to, or operated by, the Australian Defence Force, including HMAS Pirie, except where the contrary intention appeared;
  - 83.3. says that s 10 of Part 2 of the Navigation Act did not display any intention that Part 2 was to apply to or in relation to a ship, belonging to, or operated by, the Australian Defence Force, including HMAS Pirie; and
  - 83.4. admits that as at 15 December 2010, the ACV Triton was a ship to which Part 2 of the Navigation Act applied.
84. In answer to the matters alleged in paragraph 84 of the Claim, the Defendant:
- 84.1. denies that s 265 of the Navigation Act applied to HMAS Pirie on 15 December 2010;
  - 84.2. repeats and relies upon its answer to paragraph 83 of the Claim;
  - 84.3. denies that the HMAS Pirie was 'at sea' within the meaning of that expression in s 265 of the Navigation Act as at 15 December 2010; and
  - 84.4. otherwise admits the matters alleged in paragraph 84 of the Claim.
85. In answer to the matters alleged in paragraph 85 of the Claim, the Defendant:
- 85.1. repeats and relies upon its answer to paragraph 60 of the Claim; and
  - 85.2. denies the matters alleged in paragraph 85 of the Claim.
86. In answer to the matters alleged in paragraph 86 of the Claim, the Defendant:
- 86.1. denies the Commanding Officer of the HMAS Pirie owed the alleged duty and repeats and relies upon its answer to paragraph 84 of the Claim;
  - 86.2. denies the Commanding Officer of the ACV Triton owed the alleged duty;
  - 86.3. says that under s 265 of the Navigation Act, on 15 December 2010, the master of the ACV Triton, an employee of Gardline Australia Pty Ltd, if he had reason to believe that a person on a ship was in distress, was required by s 265 of the Navigation Act to cause his ship to proceed with all practicable speed to the assistance of the persons on board SIEV 221, and, if possible, inform them that he was doing so;
  - 86.4. denies that at about 6:00am on 15 December 2010, the master of the ACV Triton had reason to believe that a person on a ship was in distress;
  - 86.5. says that by s 265(1 A) of the Navigation Act, the obligation pleaded in paragraph 86.3 above did not apply to the ACV Triton if its master considered it unreasonable or unnecessary to respond;
  - 86.6. repeats and relies upon its answer to paragraph 59 of the Claim;
  - 86.7. says that in the circumstances, as at about 6:00am on 15 December 2010, it was unreasonable or unnecessary for the ACV Triton to respond to SIEV 221; and
  - 86.8. otherwise denies the matters alleged in paragraph 86 of the Claim.
87. In answer to the matters alleged in paragraph 87 of the Claim, the Defendant:

- 87.1. repeats and relies upon its answer to paragraph 86 of the Claim;
  - 87.2. denies the matters alleged in paragraph 87 of the Claim; and
  - 87.3. says that s 265 of the Navigation Act does not create any right of action sounding in damages in any of the persons referred to in paragraph 87 of the Claim.
88. In answer to the matters alleged in paragraph 88 of the Claim, the Defendant:
- 88.1. repeats and relies upon its answer to paragraphs 61 to 68 of the Claim;
  - 88.2. denies the Commanding Officer of the HMAS Pirie owed the alleged duty and repeats and relies upon its answer to paragraph 84 of the Claim;
  - 88.3. denies that the Commanding Officer of ACV Triton owed the alleged duty and repeats and relies upon its answer to paragraph 86 of the Claim; and
  - 88.4. denies that the master of HMAS Pirie and the master of the ACV Triton failed to cause their ships, RHIBs and tenders to proceed with all practicable speed to the assistance of the persons on board SIEV 221.
89. In answer to the matters alleged in paragraph 89 of the Claim, the Defendant:
- 89.1. denies the Commanding Officer of the HMAS Pirie owed the alleged duty and repeats and relies upon its answer to paragraph 84 of the Claim;
  - 89.2. denies the Commander of ACV Triton owed the alleged duty and repeats and relies upon its answer to paragraph 86 of the Claim;
  - 89.3. repeats and relies upon its answer to paragraph 88 of the Claim; and
  - 89.4. otherwise denies the matters alleged in paragraph 89 of the Claim.
90. In answer to the matters alleged in paragraph 90 of the Claim, the Defendant:
- 90.1. repeats and relies upon its answers to paragraphs 88 and 89 of the Claim;
  - 90.2. says if, which is denied, any acts or omissions of its servants or agents committed in the course of their employment is established, it is vicariously liable for those acts or omissions; and
  - 90.3. otherwise denies the matters alleged in paragraph 90 of the Claim.
91. In answer to the matters alleged in paragraph 91 of the Claim, the Defendant:
- 91.1. denies the matters alleged in paragraph 91 of the Claim;
  - 91.2. says that the Commanding Officer of the HMAS Pirie proceeded with all practicable speed to assist the passengers and crew of SIEV 221, even though his ship was not subject to s 265 of the Navigation Act; and
  - 91.3. says that the master of the ACV Triton proceeded with all practicable speed to assist the passengers and crew of SIEV 221.
92. In answer to the matters alleged in paragraph 92 of the Claim, the Defendant:
- 92.1. repeats and relies upon its answer to paragraph 91 of the Claim; and
  - 92.2. denies the matters alleged in paragraph 92 of the Claim.

## **Second Alternative Claim - Breach of Duty as Owner of SIEV 221**

93. The Defendant does not know and cannot admit the matters alleged in paragraph 93 of the Claim.
94. In answer to the matters alleged in paragraph 94 of the Claim, the Defendant:
  - 94.1. says that the passengers and crew on board SIEV 221 were unlawful non-citizens; and
  - 94.2. otherwise does not know and cannot admit the matters alleged in paragraph 94 of the Claim.
95. The Defendant does not know and cannot admit the matters alleged in paragraph 95 of the Claim.
96. In answer to the matters alleged in paragraph 96 of the Claim, the Defendant:
  - 96.1. repeats and relies upon its answer to paragraphs 94 and 95 of the Claim;
  - 96.2. says that even if SIEV 221 was immediately forfeited pursuant to s 261A of the Migration Act, the Defendant did not thereby become the owner of SIEV 221; and
  - 96.3. denies the matters alleged in paragraph 96 of the Claim.
97. In answer to the matters alleged in paragraph 97 of the Claim, the Defendant:
  - 97.1. says that by s 208(1) of the Navigation Act, every person (including the owner of a ship) who sent any ship to sea in an unseaworthy state, so that the life of any person was likely to be thereby endangered, was guilty of an offence; and
  - 97.2. otherwise does not admit the matters alleged in paragraph 97 of the Claim.
98. In answer to the matters alleged in paragraph 98 of the Claim, the Defendant:
  - 98.1. says that by s 208(4) of the Navigation Act, nothing in s 208 subjected the owner or master of a ship to any liability, by reason of the ship being sent or taken to sea in an unseaworthy state, where, owing to special circumstances, the sending of the ship to sea in that state was reasonable and justifiable; and
  - 98.2. otherwise does not admit the matters alleged in paragraph 98 of the Claim.
99. In answer to the matters alleged in paragraph 99 of the Claim, the Defendant:
  - 99.1. says that by s 227B(1) of the Navigation Act, if a ship not registered in Australia that was overloaded went to sea from, or arrived at, a port in Australia, the master and owner of the ship were each guilty of an indictable offence; and
  - 99.2. otherwise does not admit the matters alleged in paragraph 99 of the Claim.
100. In answer to the matters alleged in paragraph 100 of the Claim, the Defendant:
  - 100.1. says that by s 227B(3) of the Navigation Act, it was a defence in proceedings for an offence against s 227B(1) in respect of a ship if it was proved that the circumstances giving rise to the offence were due only to a deviation or delay of the ship caused solely by stress of weather or other circumstances which neither the master nor owner of the ship could have prevented or forestalled; and
  - 100.2. otherwise does not admit the matters alleged in paragraph 100 of the Claim.
101. In answer to the matters alleged in paragraph 101 of the Claim, the Defendant:

- 101.1. repeats and relies upon its answers to paragraphs 97 to 100 of the Claim;
  - 101.2. relies on the terms of ss 208 and 227B of the Navigation Act for their full force and effect; and
  - 101.3. does not admit the matters alleged in paragraph 101 of the Claim.
102. In answer to the matters alleged in paragraph 102 of the Claim, the Defendant:
- 102.1. repeats and relies upon its answer to paragraph 101 of the Claim;
  - 102.2. says that the Defendant was not, at any time, the owner of SIEV 221; and
  - 102.3. does not admit the matters alleged in paragraph 102 of the Claim.
103. In answer to the matters alleged in paragraph 103 of the Claim, the Defendant:
- 103.1. denies the matters alleged in paragraph 103 of the Claim;
  - 103.2. repeats and relies upon its answers to paragraphs 96 to 102 of the Claim; and
  - 103.3. says that the duty sought to be imposed on it by the alleged statutory forfeiture is inconsistent with the purpose of statutory forfeiture as a measure to penalise criminal conduct.
104. In answer to the matters alleged in paragraph 104 of the Claim, the Defendant:
- 104.1. repeats and relies upon its answers to paragraphs 30 to 71 of the Claim; and
  - 104.2. denies the matters alleged in paragraph 104 of the Claim.
105. In answer to the matters alleged in paragraph 105 of the Claim, the Defendant:
- 105.1. repeats and relies upon its answers to paragraphs 72 to 79 of the Claim; and
  - 105.2. denies the matters alleged in paragraph 105 of the Claim.
106. The Defendant denies the matters alleged in paragraph 106 of the Claim.
107. The Defendant denies the matters alleged in paragraph 107 of the Claim.

### **Damage**

108. In answer to the matters alleged in paragraph 108 of the Claim, the Defendant:
- 108.1. says that of the 89 PII passengers on board SIEV 221, 50 died on 15 December 2010 and 39 survived;
  - 108.2. says that 3 crew of SIEV 221 survived; and
  - 108.3. otherwise does not admit the matters alleged in paragraph 108 of the Claim.
109. The Defendant admits that of the 24 juveniles and infants on board SIEV 221, 15 died as a result of the incident on 15 December 2010 and 9 survived.
110. In answer to the matters alleged in paragraph 110 of the Claim, the Defendant:
- 110.1. repeats and relies upon its answers to paragraphs 108 and 109 of the Claim and
  - 110.2. otherwise denies the matters alleged in paragraph 110 of the Claim.
111. The Defendant denies the matters alleged in paragraph 111 of the Claim.
112. The Defendant denies the matters alleged in paragraph 112 of the Claim.

113. The Defendant denies the matters alleged in paragraph 113 of the Claim.

#### **Limitation period**

114. Further, in answer to the matters alleged in paragraphs 52 to 71 and 80 to 92 of the Claim, the Defendant says:

- 114.1. pursuant to ss 64 and 65 of the *Civil Procedure Act 2005* (NSW), the amendment to plead the claims in paragraphs 52 to 71 and 80 to 92 of the Claim should take effect from 11 May 2015;
- 114.2. says that if (which is denied) the matters pleaded in paragraphs 52 to 71 and 80 to 92 of the Claim plead a cause of action in the Plaintiffs and Represented Persons, that cause of action accrued no later than 15 December 2010;
- 114.3. says that the limitation period applicable to the causes of action pleaded in paragraphs 52 to 71 and 80 to 92 of the Claim is 3 years from the accrual of the cause of action pursuant to s 14 of the *Limitation Act 2005* (WA) and/or s 18A of the *Limitation Act 1969* (NSW); and
- 114.4. says that, in the premises, the causes of action pleaded in paragraphs 52 to 71 and 80 to 92 of the Claim were commenced outside of the applicable limitation period, are statute barred and should be dismissed.

#### **Contributory negligence**

115. Further, in answer to the whole of the Claim, the Defendant:

- 115.1. says that if (which is denied) it is liable to the Plaintiffs and Represented Persons for any loss and damage, the loss alleged to have been suffered by the Plaintiffs and Represented Persons who were passengers on board SIEV 221 was caused or contributed to by the negligence of those Plaintiffs and Represented Persons.

#### **Particulars**

The Defendant repeats the matters in paragraphs 21.3, 21.6, 30 above and says that the action of the Plaintiffs and Represented Persons in choosing to unlawfully travel to Australia in a vessel in the condition alleged in paragraphs 54 and 106 of the Claim and in circumstances where there was no reasonable expectation that the vessel would be intercepted by assets of the Defendant was a failure by those persons to take reasonable care for their own safety.

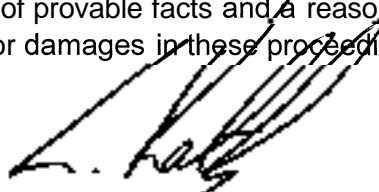
- 115.2. says that, by reason of the matters in the preceding paragraph, any damages to be awarded to the Plaintiffs and Represented Persons is to be reduced in the amount the Court thinks just and equitable and up to 100%.



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



Greg Kathner  
A solicitor employed by  
Australian Government Solicitor  
Solicitor for the Defendant

Date of signature

25 June 2015

AFFIDAVIT VERIFYING

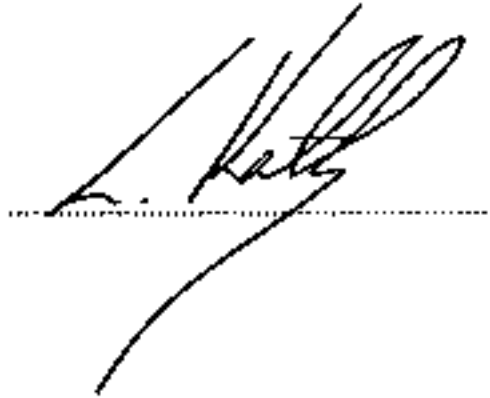
Name Greg Kathner  
Address c/- Level 42, MLC Centre  
19 Martin Place  
SYDNEY NSW 2000  
Occupation Solicitor

I say on oath:

1. I am a solicitor employed by the Australian Government Solicitor, instructed by the Defendant in these proceedings.
2. I believe that the allegations of fact contained in this Defence are true.
3. I believe that the allegations of fact that are denied in this Defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in this Defence are true.

SWORN at Sydney

Signature of deponent



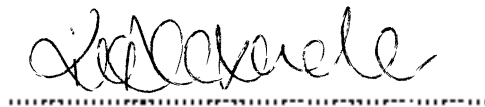
Date 25 June 2015

Name of witness Kristy Alexander  
Address of witness c/- Level 42, MLC Centre  
19 Martin Place  
SYDNEY NSW 2000  
Capacity of witness Solicitor

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.
2. I have known the deponent for at least 12 months

Signature of witness



Date 25 June 2015

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