

FURTHER AMENDED STATEMENT OF CLAIM



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



Plaintiffs	Median Nazar Ibrahim
Number of Plaintiffs (if more than two)	3
Defendant	Commonwealth of Australia



Filed for	Plaintiffs
Legal representative	Simon Morrison, Shine Lawyers
Legal representative reference	9334740
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Common Law Negligence



- 1 Damages;
- 2 Damages under s 6 of the *Fatal Accidents Act 1959* (WA);
- 3 Interest;
- 4 Costs.



The Parties

- 1 The Defendant is capable of being sued in its own name pursuant to section 56(1) of the *Judiciary Act 1903* (Cth).
- 2 The Defendant is capable of being sued in the Supreme Court of NSW pursuant to jurisdiction conferred under section 39(2) of the *Judiciary Act 1903* (Cth).
- 3 The Plaintiffs are
 - a. Passengers on board SIEV 221 who suffered physical and/or psychological injury as a result of the events surrounding the loss of the SIEV 221 (**"the Passenger Claimants"**);
 - b. Persons who were not passengers on board SIEV 221 but who suffered psychological injury, as a result of the events surrounding the loss of the SIEV 221 (**"the Nervous Shock Claimants"**);
 - c. Persons who pursuant to section 9 of the *Fatal Accidents Act 1959* (WA) are entitled, as persons for whose benefit an action under section 6 of that Act might be brought by the executor or administrator of a deceased passenger, to bring an action for the benefit of the relatives of the deceased passenger who died as a result of the events surrounding the loss of the SIEV 221 (**"the Compensation to Relatives Claimants"**);
 - d. Passengers on board SIEV 221 who lost material possessions as a result of the events surrounding the loss of the SIEV 221 (**"the Property Damage Claimants"**);

- a Persons who pursuant to section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA) are entitled, as representatives of the estates of passengers on board SIEV 221 who lost material possessions as a result of the events surrounding the loss of the SIEV 221, to bring an action for damages arising from that loss (**the Property Damage Estate Claimants**);

Representative Nature of the Proceeding

- 4 This proceeding is brought by the Plaintiffs as a representative proceeding pursuant to rule 7.4 of the *Uniform Civil Procedure Rules 2005* and is continued by the Plaintiffs pursuant to Part 10 of the *Civil Procedure Act 2005* on their own behalf and on behalf of the group members who include the Plaintiffs (**the Represented Persons**).
- 5 The Plaintiffs belong to a group of persons (or their estates) who have suffered loss or damage (whether material, **physical**, psychiatric or economic loss) by reason of the shipwreck of SIEV 221 on **15 December 2010**.
- 6 The common questions of fact or law that arise in relation to the "Represented Persons" are:
- a. Whether, by no later than September **2010**, the Defendant was involved in an ongoing operation for the Interception of **SIEVs** in territorial waters North of Christmas Island (**the Interception Operation**).
 - b. **Whether**, in the period September to December 2010, the Defendant owed to passengers on board SIEVs which approached Christmas Island a duty to take reasonable care, in the exercise of the Defendant's powers and the deployment of the Defendant's resources in the Interception Operation, so as to avoid foreseeable physical harm to those passengers.
 - c. Whether, in the period September to December **2010**, the Defendant owed to relatives of passengers on board SIEVs which approached Christmas Island a duty to take reasonable care, in the exercise of the Defendant's powers and the deployment of the Defendant's resources in the Interception Operation, so as to avoid foreseeable psychiatric injury to those relatives.
 - d. Whether, in the period September to December 2010, the Defendant owed to rescuers and onlookers at Christmas Island a duty to take reasonable care, in

the exercise of the Defendant's powers and the deployment of the Defendant's resources in the Interception Operation, so as to avoid foreseeable mental harm to those rescuers and onlookers.

- e. Whether, in the period September to December **2010**, the Defendant owed to passengers on board SIEVs a duty to take reasonable care in the exercise of the Defendant's powers and the deployment of the Defendant's resources in the Interception Operation, so as to avoid foreseeable loss of property belonging to those **passengers**.
- f. Whether, in the period September to December **2010**, there was a risk that a SIEV heading south through territorial waters towards Christmas Island would, if not intercepted as part of the **Defendant's** Interception Operation, be shipwrecked on the cliffs of Christmas Island resulting in catastrophic loss of life ("**the Shipwreck Risk**").
- g. Whether, in the period September to December **2010**, the shipwreck risk was foreseeable within the meaning of s 5B(1)(a) of the *Civil Liability Act 2002* (WA) ("**the CLA**").
- h. Whether, in about September to December **2010**, the shipwreck risk was "**not insignificant**" within the meaning of s 5B(1)(b) of the CLA,
- i. Whether in response to the shipwreck risk, in the period September to December 2010 a reasonable public authority in the position of the Defendant and its servants and agents, owing the duties of care owed by the Defendant, would have taken the precaution of not permitting the rescue ships Sea Eye and Colin Winchester to remain out of survey and incapable of use in attending to any **SIEVs** in distress in territorial waters to the north of Christmas Island in poor weather ("**the Readiness Precaution**").
- j. Whether in response to the Shipwreck Risk, on the evening of 14 December 2010 a reasonable public authority in the position of the Defendant and its servants and agents, owing the duty of care owed by the Defendant, would have taken the precaution of returning the HMAS Pirie to patrol at the usual station for intercept of SIEVs in territorial waters to the north of Christmas Island ("**the Ongoing Patrol Precaution**").

- k. Whether by about 6:00am on 15 December 2010 the commanding officer of the HMAS Pirie knew, or had reason to suspect, that SIEV 221 was approaching Christmas Island from the north in poor weather and in distress.
- i. Whether in response to the Shipwreck Risk and the SIEV 221 being in distress, at about 6 am on 15 December 2010 a servant or agent of a public authority in the position of the Defendant, owing the duty of care owed by the Defendant, would have taken the precaution of sailing the HMAS Pirie and the ACV Triton to attend to SIEV 221 earlier than they in fact did ("**the Earlier Response Precaution**").
- m. Whether, had the Defendant taken the Readiness Precaution, the Ongoing Patrol Precaution and/or the Earlier Response Precaution, SIEV 221 would not have been shipwrecked on the north coast of Christmas Island on 15 December 2010.
- n. Whether on about 15 December 2010 the Defendant's servants or agents in command of the HMAS Pirie and the ACV Triton owed any statutory duty to the Represented Persons pursuant to section 265 of the *Navigation Act 1912* (Cth),
- o. Whether the Defendant's servants or agents breached that duty by failing to cause their respective ships to proceed with all practicable speed to the assistance of the passengers of SIEV 221.
- p. Whether on the morning of 15 December 2010 the Defendant was, by operation of section 261A of the *Migration Act 1958* (Cth), the owner of SIEV 221.
- q. Whether by reason of its ownership, on the morning of 15 December 2010 the Defendant owed any statutory duty or duties to the Represented Persons consistently with, and derived in part from, a shipowner's obligations under sections 208 and 227B of the *Navigation Act 1912* (Cth).

Applicable Law

- 7 Pursuant to section 5 of the *Christmas Island Act 1958* (Cth), at all relevant times Christmas Island was declared to be accepted by the Defendant as a Territory under the authority of the Defendant.

- 8 Pursuant to section 15B of the *Acts Interpretation Act 1901* (Cth), at all relevant times the territory of Christmas Island was extended to include its land mass and its territorial and inland sea.
- 9 At all relevant times, the territorial waters of Christmas Island extended 12 nautical miles from the coast of Christmas Island pursuant to Part 2, Division 1 of the *Seas and Submerged Lands Act 1973*.
- 10 At all material times, the provisions of the law of Western Australia, as in force in Western Australia, applied in the Territory of Christmas Island, including its territorial waters, pursuant to section 7 and/or section 8A of the *Christmas Island Act*
- 11 The Defendant's negligent acts or omissions, as pleaded below, occurred in Christmas Island and its territorial waters in September to December 2010.
- 12 The applicable law for the determination of any liability arising from the Defendant's acts or omissions as pleaded below is the common law of negligence as applicable in Western Australia as at September to December 2010, as amended, affected or further stated under:
- a. the *Civil Liability Act 2002* (WA);
 - b. the *Fatal Accidents Act 1959* (WA); and
 - c. the *Navigation Act 1912* (Cth),

The Relevant Powers and Functions of the Defendant

- 13 At all material times the Defendant had the care and responsibility for:
- a. administering and ensuring compliance with the *Migration Act 1958* (Cth), including in Christmas Island and its territorial sea;
 - b. preventing the infringement of immigration laws within Australia or the territorial seas of Australia: preamble to *Seas and Submerged Lands Act 1973*;
 - c. 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
 - d. intercepting, apprehending and processing unauthorised maritime arrivals.

- 14 At all material times the Defendant through its servants and agents had the power to:
- a. execute and maintain the laws of the Commonwealth, pursuant to the Defendant's executive power under s 61 of the *Constitution*]
 - b. prevent the contravention of the *Migration Act*, including the prohibition in section 42 against a non-citizen travelling to Australia without a visa that is in effect, and the prohibitions in sections 229 and 233A against people smuggling;
 - c. intercept, board and search SIEVs and their passengers, pursuant to sections 245B, 245C, 245F, 245FA, 245G, 249 and 251 of the *Migration Act*] and
 - d. detain suspected non-citizens who have travelled to Australia pursuant to sections 189 and 250 of the *Migration Act*.

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

- 15 As at 2010, the Defendant coordinated the exercise of its powers and functions in relation to the arrival of "unlawful non-citizens" by sea to Australian territory, including the interception of suspected illegal entry vessels (**SIEVs**), through its agency the Border Protection Command (**BPC**).
- 16 Through the Minister for Justice and Customs, the Minister for Defence and the Attorney General, the Defendant:
- a. managed and controlled the operations of BPC; and
 - b. provided assets (such as ships and aircraft) and assigned employees for use by BPC in its operations, including assets and employees of:
 - (i) the Australian Defence Force (under the control and administration of the Minister for Defence);
 - (ii) the Australian Federal Police (an agency of the Attorney-General); and
 - (iii) the Australian Customs and Border Protection Service (an agency of the Attorney-General); and
 - (iv) the People Smuggling Intelligence Analysis Team (a sub-agency of the Australian Customs and Border Protection Service).

- 17 BPC in turn operated through its sub-agency the Australian Maritime Security Organisation Command ("**AMSOC**").
- 18 The purpose of BPC included:
- a. to monitor SIEVs' passages;
 - b. to detain SIEVs, its passengers and crew;
 - c. to assist occupants of SIEVs if the vessel got into difficulty; and
 - d. to attempt to eliminate, or alternatively, reduce the loss of life or injury to persons travelling on a SIEV.
- 19 At all material times, the Defendant was liable for any acts or omissions of:
- a. BPC, AMSOC, the Australian Defence Force, the Australian Federal Police, the Australian Customs and Border Protection Service, the Attorney General's Department the Ministry of Defence, the Ministry for Justice and Customs, the People Smuggling Intelligence Analysis Team; and
 - b. the Defendant's personnel, servants and agents assigned to work in those ministries or agencies.

BPC's Operation to Intercept SIEVs to the North of Christmas Island

- 20 Between 1 January 2010 and 15 December 2010, SIEVs approached Christmas Island and were intercepted on the dates, at the approximate locations, and under the response status as set out in the table below:

No.	Date	SIEV number	Approx. Interception Location
1	03.01.10	92	4nm N of Christmas Island
2	10.01.10	95	4.8nm N of Flying Fish Cove
3	13.01.10	96	9nm N of Flying Fish Cove
4	23.01.10	98	1nm N of Flying Fish Cove
5	01.02.10	100	Flying Fish Cove

6	25.02.10	107	1 nm NW of Flying Fish Cove
7	28.02.10	108	20nm WNW of Christmas Island
8	06.03.10	110	8nm from Christmas Island
9	13.03.10	115	5nm N of Rocky Point
10	19.03.10	116	8nm NW of Christmas Island
11	29.03.10	123	1 nm from Flying Fish Cove
12	31.03.10	124	0.5nm NW of North East Point
13	16.04.10	134	14nm E of Christmas Island
14	10.05.10	145	6nm NW of Christmas Island
15	13.05.10	148	Not intercepted, arrived at Christmas Island
16	29.05.10	129	Not intercepted, arrived at Christmas Island
17	11.06.10	158	3.2nm NW of Christmas Island
18	18.06.10	162	2nm NW of Christmas Island
19	23.06.10	163	Not intercepted, arrived at Christmas Island
20	26.06.10	164	17.5nm E of Christmas Island
21	02.07.10	165	12nm N of Christmas Island
22	03.07.10	166	0.5nm from Christmas Island
23	21.07.10	171	1nm from Flying Fish Cove
24	21.07.10	172	1nm from Flying Fish Cove

25	10.08.10	174	4.2nm NE of North East Point
26	13.08.10	175	5nm N of Flying Fish Cove
27	17.08.10	176	1.5nm from Flying Fish Cove
28	19.08.10	177	12nm N of Flying Fish Cove
29	28.08.10	181	3nm N of Flying Fish Cove
30	31.08.10	182	1.7nm N of Flying Fish Cove
31	01.09.10	183	2nm NW of Flying Fish Cove
32	03.09.10	184	0.1 nm from Christmas Island
33	13.09.10	186	2nm N of Flying Fish Cove
34	20.09.10	187	Half way between NW and SW corner of Christmas Island
35	04.10.10	191	7.5nm NW of Flying Fish Cove
36	08.10.10	193	8nm N of Flying Fish Cove
37	09.10.10	194	Near Flying Fish Cove
38	11.10.10	195	4.5nm N of Flying Fish Cove
39	13.10.10	196	2nm N of Rocky Point
40	21.10.10	197	9nm N of Christmas Island
41	24.10.10	200	3.5nm N of North East Point
42	26.10.10	201	3nm N of Christmas Island
43	02.11.10	203	9nm SE of Christmas Island
44	02.11.10	204	1.2nm from Dolly Beach

45	03.11.10	205	5nm N of Flying Fish Cove
46	03.11.10	206	5nm N of Flying Fish Cove
47	07.11.10	208	6.7nm N of Flying Fish Cove
48	17.11.10	211	4nm N or Rocky Point
49	30.11.10	216	4.8nm N of Christmas Island
50	01.12.10	217	2.3nm NW of Christmas Island
51	14.12.10	220	Near Rocky Point

- 21 By no later than about September 2010, the BPC knew or ought to have known that:
- a. most of the SIEVs approaching Christmas Island were crewed by persons who were not competent to operate vessels for a voyage to Christmas Island;
 - b. most of the SIEVs approaching Christmas Island had sufficient fuel only for an uninterrupted journey to Christmas Island, without reserves for poor weather or redirection;
 - c. passengers on board SIEVs suffered a danger to their health and safety whilst aboard;
 - d. most of the SIEVs were not seaworthy and had engines prone to failure;
 - e. most of the SIEVs were incapable of landing safely at Christmas island to disembark passengers;
 - f. Christmas Island had few locations where ships can safely dock;
 - g. The rest of the coast of Christmas Island consisted of rocky cliffs up to 20m in height;
 - h. In poor weather there was no safe way for a SIEV to land at Christmas Island to disembark passengers;
 - i. the expectation of the crew and passengers of most SIEVs heading to Christmas island was to be intercepted by the Defendant's servants or agents

in territorial waters north of Christmas Island, or in the contiguous zone just before entering territorial waters;

- j. the expectation of the crew and passengers of most SIEVs heading to Christmas Island was that, upon interception, they would be taken safely to Christmas Island for immigration processing; and
- k. it was common practice for the crew of most SIEVs to openly bring passengers to Christmas Island and to make themselves known to the servants and agents of the Defendant at the earliest available opportunity.

22 To assist in the interception of SIEVs heading towards Christmas Island, during 2010, BPC:

- a. deployed personnel overseas, including in Indonesia to identify departing SIEVs;
- b. deployed HMAS Pirie as the Christmas Island Response Vessel to patrol the waters around Christmas Island;
- c. deployed ACV Triton, a ship leased by BPC to monitor and intercept SIEVs near Christmas Island and the Ashmore Islands;
- d. deployed spotter planes to monitor and survey SIEVs leaving Indonesian ports and the waters between Indonesia and Christmas Island.

23 Between September 2010 and December 2010, in anticipation of regularly approaching SIEVs, BPC maintained a station or tract in the territorial waters to the North of Christmas Island for its ships to patrol for interception of SIEVs.

24 Further, to assist BPC in the interception SIEVs and the potential search and rescue of unseaworthy SIEVs approaching Christmas Island, between September 2010 and December 2010 the Defendant maintained the following search and rescue ships at Christmas Island:

- a. The vessel "Sea Eye", which was operated by the AFP on behalf of BPC; and
- b. The vessel "Colin Winchester", which was provided by the BPC to the Volunteer Marine Rescue Service (an organisation of Christmas Island residents, sponsored by the AFP) and operated by the Volunteer Marine Rescue Service predominately through funding provided by BPC.

- 25 In the premises, by no later than September 2010 and from that time until December 2010, in the exercise of its statutory powers under the *Migration Act*, the Defendant through its agency BPC was engaged in an ongoing operation ("**the Interception Operation**") which was:
- a. Directed to the surveillance, detection and interception of SIEVs approaching Christmas Island from the North;
 - b. Geographically focused on a narrow stretch of territorial waters to the North of Christmas Island;
 - c. Intercepting and boarding SIEVs at that location on a regular basis;
 - d. Accepting the forfeiture and thereby becoming owner of any SIEV which entered that location, by operation of section 261A of the *Migration Act*
 - e. Known to people smugglers and those intending to travel to Australia as "Irregular Maritime Arrivals"; and
 - f. Relied upon by passengers of SIEVs to continue to operate in this way, as once those passengers had set off for Christmas Island, they had:
 - (i) no means of turning back;
 - (ii) limited means of landing at Christmas Island without being intercepted; and
 - (iii) if not intercepted, a substantial risk of being shipwrecked and catastrophic loss of life, especially if they encountered poor weather, ran out of fuel or had engine failure.
- 26 Further, by no later than September 2010 and from that time until December 2010, the Defendant:
- a. Had assumed responsibility and control of the safe arrival of SIEVs approaching Christmas Island from the North through the Interception Operation; and
 - b. Had special knowledge of:
 - (i) the particular vulnerability of passengers of SIEVs approaching Christmas Island from the north in the expectation of being intercepted by the servants and agents of the Defendant; and

- (ii) the particular reliance of passengers of SIEVs approaching Christmas Island from the north upon interception by the servants and agents of the Defendant.

Duties of Care in the Conduct of the Interception Operation

27 By reason of the matters in paragraphs 13 to 26 above, in September to December 2010 the Defendant owed, to the passengers of SIEVs approaching Christmas Island, a duty to take reasonable care in the exercise of its powers and the deployment of resources in the conduct of the Interception Operation, so as to avoid foreseeable risks of physical injury, death and property damage to those passengers.

28 Further, given the potentially catastrophic consequences for passengers of a SIEV if it were shipwrecked on the coast of **Christmas** Island due to any failure by the Defendant to take reasonable care in the conduct of the Interception Operation, the Defendant ought to have foreseen that:

- a. the family members of a passenger learning of the passenger being killed, injured or put in peril; and
- b. the bystanders and rescuers witnessing the passengers being killed, injured or put in peril,

might, though of normal fortitude, in the circumstances suffer a recognised psychiatric illness.

29 By reason of the above, in September to December 2010 the Defendant owed to:

- a. the family members of passengers on a SIEV approaching Christmas Island; and
- b. the bystanders and rescuers who witness a shipwreck of a SIEV approaching Christmas Island,

a duty to take reasonable care in the exercise of its powers and the deployment of resources in the conduct of the Interception Operation, so as to avoid foreseeable risks of mental harm to them.

The Relevant Risk of Harm –The Shipwreck Risk

30 In September to December 2010, there was a risk that in the course of the Interception Operation, a SIEV might if not intercepted on approaching Christmas Island from the north, be shipwrecked on the rocky coast of Christmas Island due to poor weather, poor navigation, running out of fuel, or a combination of those factors, thereby leading to catastrophic loss of life ("**the Shipwreck Risk**").

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

31 By reason of the matters in paragraphs 15 to 21 above, in September to December 2010 the Defendant through its servants and agents at BPC:

- a. knew of the Shipwreck Risk; or
- b. alternatively, ought to have known of the Shipwreck Risk.

32 By reason of the above, in September to December 2010 the Shipwreck Risk was foreseeable to the Defendant, within the meaning of that expression in s 5B(1)(a) of the CLA.

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

33 By reason of the matters in paragraphs 15 to 21 above, in September to December 2010 and from the perspective of the Defendant and its servants and agents at BPC, the Shipwreck Risk:

- a. had a significant probability of coming to fruition, given that a significant number of the SIEVs approaching Australian territory between 1 January 2010 and 14 December 2010 was intercepted, despite being outside of territorial waters, in observation of Australia's obligations under the Safety of Life at Sea Convention;
- b. had a significant probability of coming to fruition given the increasing regularity of SIEVs approaching Christmas Island;
- c. was increasing due to the arrival of the monsoon season in December;
- d. involved the catastrophic loss of human life; and
- e. involved exposure of the **Defendant's** servants and agents, as well as residents of Christmas Island, to danger in any subsequent rescue operation in poor weather close to shore.

34 By reason of the above, in September to December 2010 the Shipwreck Risk was "not insignificant", within the meaning of that expression in s 5B(1)(b) of the CLA.

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

35 On or about 14 January 2008, the Defendant through its agency the AFP procured the vessel Colin Winchester for use by the AFP in marine operations at Christmas Island, including search and rescue.

36 On about 14 January 2008, the Defendant through its agency the AFP procured the vessel Sea Eye for use by the Volunteer Marine Rescue Service in search and rescue operations at Christmas Island.

37 Throughout 2010, both the Colin Winchester and the Sea Eye were out of survey and unfit for use in search and rescue in Christmas Island due to defects in the **ships'** design and build which rendered them unsafe for use in a sea state of greater than level 1.

38 From about August 2010, as a result of inspections and reports by the Australian Maritime Safety Authority ("**AMSA**") dated 11 and 12 August 2010, the AFP knew that the Colin Winchester and the Sea Eye were unfit for use in search and rescue in Christmas Island due to defects in the ships' design and build which rendered them unsafe for use in a sea state of greater than level 1.

39 Between September and December 2010, a reasonable public authority in the position of the Defendant and its servants and agents, owing the duties of care said to be owed by the Defendant, would have in response to the Shipwreck Risk taken the following precaution ("**the Readiness Precaution**"):

- a. not permit the Colin Winchester and the Sea Eye to remain out of survey and incapable of use as search and rescue vessels in poor weather, despite advice of AMSA as to defects in those ships, **AMSA's** requirement that those defects be corrected by 11 and 12 November 2010 respectively, and concerns raised by the Volunteer Marine Rescue Service on 1 December 2010 that it was unable to provide a dedicated, viable marine rescue service; or
- b. alternatively, replaced the Colin Winchester and the Sea Eye with vessels capable of use as search and rescue vessels in bad weather close to shore.

40 At no stage prior to 15 December 2010 did the Defendant take the Readiness Precaution.

41 By reason of the above, the Defendant failed to take all reasonable precautions a public authority in its position would have, and therefore breached its duties of care to the Plaintiffs.

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

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

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

44 Shortly thereafter HMAS Pirie left its usual surveillance station north/north west of Christmas Island and detained SIEV 220.

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

46 At or about 1:47 pm on 14 December 2010 crew of HMAS Pirie boarded SIEV 220 and removed the passengers.

47 HMAS Pirie commenced a north-south track at the eastern side of Christmas Island to monitor SIEV 220, which was unable to be taken to shore or destroyed at sea due to poor weather,

48 As at the evening of 14 December 2010, BPC knew or ought to have known:

- a. BPC was on "high" alert for the probable arrival of a SIEV at Christmas Island, which might or might not have been SIEV 220;
- b. both the HMAS Pirie and the ACV Triton were within one kilometre of each other on the eastern side of Christmas Island;
- c. the four personnel on SIEV 220 were capable of keeping SIEV 220 safely at sea on the eastern side of Christmas Island without assistance;
- d. alternatively, the ACV Triton was capable of monitoring SIEV 220 and assisting if necessary;
- e. no BPC vessel patrolled the usual north/north-west station in territorial waters north of Christmas Island;

- f. no aerial surveillance at or beyond Christmas Island had been carried out for at least 3 days;
- g. navigational radar surveillance by HMAS Pirie and ACV Triton towards the north of Christmas Island, from their then positions and tracks, was impeded by the geography of Christmas Island;
- h. the **PRISM** III radar identification system on HMAS Pirie, which was capable of detecting from HMAS Pirie's position through microwave frequencies a SIEV approaching Christmas Island from the north, was not being used;
- L. the weather and sea state to the north of Christmas Island was dangerous and presented a significant threat to the safety of passengers on any approaching SIEV;
- j. besides the HMAS Pirie and the ACV Triton, there was no vessel on Christmas Island capable of intercepting any SIEV that approached Christmas Island, or preventing a SIEV from floundering on the coast of Christmas Island;
- k. throughout 2010, it was not uncommon for two or more SIEVs to approach Christmas Island from the north shortly one after the other.

49 In those circumstances, on the evening of 14 December 2010, a reasonable public authority in the position of the Defendant and its servants and agents, owing the duty of care owed by the Defendant, would in response to the Shipwreck Risk have taken the precaution of:

- a. not **permit** the HMAS Pirie to continue on a limited north-south track which did not take it far north enough to detect incoming SIEVs either by sight or by navigation radar; or
- b. in the alternative, returning the HMAS Pirie to patrol at the usual station for intercept of SIEVs in territorial waters to the north of Christmas Island.

(the Ongoing Patrol Precaution").

50 The Defendant did not take the Ongoing Patrol Precaution.

51 By reason of the above, the Defendant failed to take all reasonable precautions a public authority in its position would have, and therefore breached its duties of care to the Plaintiffs.

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

52 On or about 11 December 2010, SIEV 221 departed Indonesia bound for Christmas Island, carrying non-citizens of Australia

53 The passage of SIEV 221 towards Christmas Island comprised the following stages:

- a At 9 pm on 14 December 2010 it entered the contiguous zone north of Christmas Island;
- b. At 2 am on 15 December 2010 it entered territorial waters north of Christmas Island;
- c. At 5 am on 15 December 2010 it entered coastal waters north of Christmas Island;
- d. At 6:40 am on 15 December 2010 it entered Flying Fish Cove, being internal waters of Christmas Island; and
- e. At 7:10 am on 15 December 2010 it broke apart after smashing into rocks at Flying Fish Cove.

54 At all material times SIEV 221 was not seaworthy in that:

- a. it carried an excess of passengers for its size and capability;
- b. it had no or insufficient life jackets;
- c. it did not have sufficient fuel to travel to and dock at Christmas Island safely;
- d. it was not manned by crew capable of navigating it to and docking at Christmas island safely; and
- e. it was unfit for use in poor weather.

55 SIEV 221 was observed from the shore of Christmas Island between about 5:10am and 5:40am, in that:

- a. Nicola Tassone observed SIEV 221 at 5:10 am;
- b. Beverly Orchard observed SIEV 221 400 metres from shore at 5:15 am and 100 metres off shore at 5:20 am;

- c. Brian Key took photographs of SIEV 221 at 5:35 am; and
- d. Ross Martin observed SIEV 221 when it was 100 metres from shore at 5:40 am and telephoned Customs Officer William Jardine at 5:43 am to advise.

56 At 5:49 am William Jardine informed CNOOC of SIEV **221's** location.

57 At about 5:55 am, the AFP was informed by Amy Leutch of SIEV **221's** location.

58 At about 5:55 am, Mr Saunders on ACV Triton was informed by AMSOC of SIEV **221's** location.

59 At 6:00 am, the Commanding Officer of ACV Triton advised the Commanding Officer of HMAS Pirie of the reports of SIEV 221 approaching Christmas Island.

60 At or about 6:00am, the Commanding Officers of both the HMAS Pirie and the ACV Triton knew or ought to have known that the SIEV 221 was approaching the windward side of the Island and was in distress at sea.

61 At approximately **6:10** a.m. the engine of SIEV 221 failed and stopped.

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

63 At **6:18** am HMAS Pirie set out for Flying Fish Cove from the eastern leeward side of the island.

64 At 6:23 am HMAS Pirie turned around to collect an additional RHIB rescue boat and resumed sailing to Flying Fish Cove at 6:32 am.

65 At about 6:40 am SIEV 221 first smashed onto the rocks at Flying Fish Cove and commenced to disintegrate by 6:58 am.

66 Two RHIB rescue boats launched from HMAS Pirie arrived at the shipwreck scene at 7:05am.

67 The spine of the hull of **SIEV 221** was last observed at **7:12** am.

68 In the circumstances, a reasonable servant or agent of the Defendant, in the position of the commanding officers of the HMAS Pirie and the ACV Triton, would have in response to the Shipwreck Risk and the information available to him by about 6 am on 15 December 2010, taken the precaution of ("**the Earlier Response Precaution**");

- a. Immediately sailing the HMAS Pirie and ACV Triton towards Flying Fish Cove; and
- b. Immediately deploying their available RHIBs and tenders towards Flying Fish Cove to tow or anchor SIEV 221; and
- c. Not stopping to collect an additional RHIB.

69 The commanding officers of the HMAS Pirie and the ACV Triton did not take the Earlier Response Precaution.

70 By reason of the above, the Defendant's servants or agents failed to take all reasonable precautions a commanding officer in his position would have, and therefore breached its duties of care to the Plaintiffs.

71 The Defendant is vicariously liable for that breach of duty.

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

72 Had the Defendant taken the Readiness Precaution, the Colin Winchester or the Sea Eye, or both of them, would have been capable of use as a search and rescue vessel on 14-15 December 2010.

73 The AFP would have on 14-15 December 2010 deployed the Colin Winchester to the usual station in territorial waters north of Christmas Island whilst both ACV Triton and HMAS Pirie were attending to SIEV 220 in the east of Christmas Island.

74 The AFP personnel on board the Colin Winchester would have intercepted SIEV 221 prior to its arrival at Flying Fish Cove and avoided the shipwreck.

75 Alternatively, the Volunteer Marine Rescue Service would have deployed the Sea Eye no later than about 5:20am on 15 December 2010 to attend to SIEV 221 in Flying Fish Cove.

76 The Sea Eye would have anchored SIEV 221 before it reached the shore, or towed SIEV to safer waters in the eastern side of Christmas Island, and avoided the shipwreck.

77 Had the Defendant taken the Ongoing Patrol Precaution, on the evening of 14 December 2010 the HMAS Pirie would have been deployed in the usual station in territorial waters north of Christmas Island and intercepted SIEV 221 prior to its arrival at Flying Fish Cove and avoided the shipwreck.

- 78 Had the Defendant taken the Earlier Response Precaution, the HMAS Pirie and the ACV Triton, or the RHiBs and tenders deployed from them, would have reached SIEV 221 before it first smashed into rocks at Flying Fish Cove and anchored or towed SIEV 221 to safety, thereby avoiding the shipwreck.
- 79 Alternatively, the HMAS Pirie and the ACV Triton, or the RHiBs and tenders deployed from them, would have reached SIEV 221 before it began to disintegrate, and rescued the passengers of SIEV 221 before they drowned.

First Alternative Claim –Breach of Statutory Duty to Rescue

- 80 As at **15 December 2010**, the HMAS Pirie was a ship:
- a. owned by the Defendant; and
 - b. operated by the BPC for customs and border protection operations; and
 - c. to which Part 4 of the *Navigation Act 1912* (Cth) applied.
- 81 As at **15 December 2010**, the ACV Triton was a ship:
- a. leased by the Defendant;
 - b. operated by the Australian Customs and Border Protection Service; and
 - c. to which Part 4 of the *Navigation Act 1912* (Cth) applied.
- 82 As at **15 December 2010**, both the HMAS Pirie and the ACV Triton were ships:
- a. registered in Australia; or
 - b. alternatively of which the majority of the crew were residents of Australia and which was operated by the BPC of the Australian Customs and Border Protection Service, being agencies of the Defendant and firms with their principal place of business in Australia.
- 83 By reason of the above, as at **15 December 2010**, both the HMAS Pirie and the ACV Triton were ships to which Part 2 of the *Navigation Act 1912* (Cth) applied.
- 84 As at **15 December 2010**, both the HMAS Pirie and the ACV Triton were at sea within the meaning of that expression in section 265 of the *Navigation Act 1912* (Cth).
- 85 By reason of the matters in paragraphs 52 to 60 above, at about 6:00 am on **15 December 2010** both the Commanding Officer of the HMAS Pirie and the

Commanding Officer of the ACV Triton had reason to believe that the passengers on SIEV 221 were in distress.

86 At about 6:00 am on 15 December 2010, both the Commanding Officer of the HMAS Pirie and the Commanding Officer of the ACV Triton owed a duty, pursuant to section 265 of the *Navigation Act* 1912 (Cth), to cause the HMAS Pirie and the ACV Triton respectively, and their RHiBs and tenders, to proceed with all practicable speed to the assistance of those passengers.

87 This duty was owed to:

- a. the passengers of SIEV 221;
- b. the relatives of the passengers, who might suffer a recognised psychiatric injury if they witnessed, or learned of a family member who was a passenger of SIEV 221, being killed, injured or put in peril from a failure to discharge the duty; and
- c. rescuers and onlookers present at Christmas Island, who might suffer a recognised psychiatric injury if they witnessed a passenger of SIEV 221 being killed, injured or put in peril from a failure to discharge the duty.

88 By reason of the matters in paragraphs 61 to 68 above, both the Commanding Officer of the HMAS Pirie and the Commanding Officer of the ACV Triton failed to cause their respective ships and RHiBs and tenders to proceed with all practicable speed to the assistance of those passengers.

89 That failure was in breach of each Commanding Officer's duty under s 265 of the *Navigation Act* 1912 (Cth).

90 The Defendant is vicariously liable for each Commanding Officer's breach of duty.

91 Had either Commanding Officer proceeded with all practicable speed to the assistance of those passengers, either the HMAS Pirie, the ACV Triton, or their RHiBs and tenders would have reached SIEV 221 before it first smashed into rocks at Flying Fish Cove and anchored or towed SIEV 221 to safety, thereby avoiding the shipwreck.

92 Alternatively, the HMAS Pirie and/or the ACV Triton, and/or their RHiBs and tenders would have reached SIEV 221 before it began to disintegrate, and rescued the passengers of SIEV 221 before they drowned.

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

- 93 At about 2am on 15 December 2010, SIEV 221 entered into territorial waters north of Christmas Island.
- 94 At about 2am on 15 December 2010, SIEV 221 was bringing to Christmas Island passengers who were unlawful non-citizens.
- 95 By reason of the above, at about 2am on 15 December 2010 SIEV 221 was a vessel used or involved in a contravention of section 229 of the *Migration Act*
- 96 Upon entry of SIEV 221 into territorial waters at about 2am on 15 December 2010, the Defendant became the owner of SIEV 221 by immediate forfeiture pursuant to section 261A of the *Migration Act*.
- 97 Pursuant to section 208 of the *Navigation Act 1912* (Cth), it was an offence for the owner of any ship to send the ship to sea in an unseaworthy state so that the life of any person is thereby endangered.
- 98 Pursuant to section 208(4) of the *Navigation Act 1912* (Cth), the owner avoids liability for contravention of section 208 if there is reasonable excuse for the ship being in an unseaworthy state at sea.
- 99 Pursuant to section 227B of the *Navigation Act 1912* (Cth), it was an offence for the owner of a ship not registered in Australia if the ship arrives overloaded at a port in Australia.
- 100 Pursuant to section 227B(3) of the *Navigation Act 1912* (Cth), the owner avoids liability for contravention of section 227B if the circumstances giving rise to the contravention were due only to 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.
- 101 The sanctions in sections 208 and 227B of the *Navigation Act 1912* (Cth) prescribe, as against owners of ships, a fixed standard of safety for ships for the benefit of among others, the passengers of ships, the contravention of which does not give rise to liability if that contravention in all the circumstances were reasonable.
- 102 The statutory liability imposed by sections 208 and 227B of the *Navigation Act* was consistent with the imposition under common law of a duty upon the owners of a

passenger ship to ensure that reasonable care was taken in the safe passage, including seaworthiness, of the ship to its destination.

103 In the premises, from about 2am on 15 December 2010 the Defendant, as owner of SIEV 221, owed a duty to the passengers of SIEV 221 to ensure that reasonable care is taken in bringing about their safe arrival at Christmas Island.

104 For the same reasons as set out in paragraphs 30 to 71 above, the Defendant was in breach of this duty by failing to take the Readiness Precaution, the Ongoing Patrol Precaution and the Earlier Response Precaution.

105 For the same reasons as set out in paragraphs 72 to 79 above, but for those failures either the shipwreck would not have occurred, or the passengers of SIEV 221 would have been rescued despite it occurring.

106 Further, the Defendant was in breach of its duty in that from about 2am on 15 December 2010:

a. SIEV 221 was unseaworthy; and

b. SIEV 221 was overloaded.

107 But for these failures, SIEV 221 would not have suffered engine failure or lack of fuel on approach to Christmas Island and suffered shipwreck.

Damage

108 Of the 89 passengers on board SIEV 221, 50 died as a result of the shipwreck, and 39 survived.

109 Of the 24 juveniles on board SIEV 221, 15 died as a result of the shipwreck, and 9 survived.

110 By reason of the negligence and/or breach of statutory duty of the Defendant or its servants and agents, 50 passengers of SIEV 221 died on 15 December 2010, causing loss and damage to the Compensation to Relatives Claimants.

111 By reason of the negligence and/or breach of statutory duty of the Defendant or its servants and agents, the Passenger Claimants suffered physical injury and/or mental harm in the shipwreck of SIEV 221 on 15 December 2010.

112 By reason of the negligence and/or breach of statutory duty of the Defendant or its servants and agents, the Property Damage Claimants, and the passengers who

died and for whom the Property Damage Estate Claimants represent, suffered damage to their property on their person when SIEV 221 was shipwrecked on 15 December 2010.

113 By reason of the negligence and/or breach of statutory duty of the Defendant or its servants and agents, the Nervous Shock Claimants suffered recognised psychiatric illness as a result of:

- a. Learning that a family member who was a passenger on SIEV 221 had been killed, injured or put in peril in the shipwreck;
- b. Witnessing a family member who was a passenger on SIEV 221 had been killed, injured or put in peril in the shipwreck; or
- c. Witnessing the passengers on SIEV 221 being killed, injured or put in peril in the shipwreck of SIEV 221 on 15 December 2010.




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

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

Signature

Capacity

Date of signature


Solicitor on the record
21/5/15

WARNING TO DEFENDANT

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

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

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

PLEASE READ THIS STATEMENT OF CLAIM VERY CAREFULLY

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

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

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

You can respond in one of the following ways:

- 1 **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 **If money is claimed, and you believe you owe the money claimed, by:**
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under **UCPR 6.17** further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the **claim**.
- 3 **If money is claimed, and you believe you owe part of the money claimed, by:**
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

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

REGISTRY ADDRESS

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Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001
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DETAILS ABOUT DEFENDANT

Defendant

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