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Gardner J

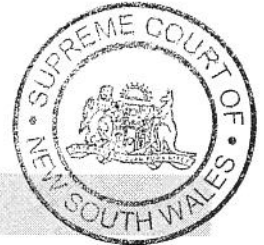
DEFENCE

COURT DETAILS

Court Supreme Court of New South Wales
Division Common Law
Registry Sydney
Case number 2009/329777

FILED

20 SEP 2012



TITLE OF PROCEEDINGS

NL

First plaintiff **Geraldine Dorothy Giles**
Second plaintiff **Vivian Catherine Drady**

First defendant **Commonwealth of Australia**
Number of defendants 3

FILING DETAILS

Filed for **Commonwealth of Australia**
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TYPE OF CLAIM

Torts – Negligence – Personal Injury

PLEADINGS AND PARTICULARS

In this pleading:

“Overseas child” has the same meaning as in the *National Security (Overseas Children) Regulations 1940*;

“Immigrant Child” and “Evacuee Child” have the same meaning as in the *Immigration (Guardianship of Children) Act 1946*;

“Welfare” means and includes welfare, care, custody, control, maintenance, education, training and employment; and

“Fairbridge” means the Fairbridge Farm School at Molong in NSW.

Representative Proceeding

- 1 In answer to paragraph 1 of the Second Amended Statement of Claim (“the Claim”) the First Defendant says that neither the First Plaintiff nor the Second Plaintiff (“the Plaintiffs”) are entitled to invoke the jurisdiction of the Court under Part 10 of the *Civil Procedure Act 2005* (NSW) (“CPA”) either on their own behalf or on behalf of the Represented Persons, and the proceedings are not maintainable as representative proceedings.

Particulars

The claims of the Plaintiffs and the Represented Persons do not arise out of the same, similar or related circumstances (as envisaged by Section 157(1)(b) of the CPA). The claims involve allegations of individual assaults perpetrated by different individuals and occurring at different times over a lengthy period (1937 and 1974).

The common questions of law and the common questions of fact identified in Annexures A and B to the claim are not substantial common questions of law or fact as envisaged by Section 157(1)(c) of the CPA. The claims, involving allegations of individual assaults perpetrated by different individuals and occurring at different times over a lengthy period (1937 and 1974), give rise to separate and distinct questions of fact and law in relation to each of the individual Plaintiffs and Represented Persons.

The Group Members

- 2 In answer to paragraph 2 of the Claim the First Defendant:
- (a) does not know and, until Discovery has been completed, cannot admit that each of the Represented Persons identified in the list referred to in

paragraph 2(d) of the Claim were resident at the Fairbridge Farm School at Molong (“Fairbridge”) between 1937 and 1974;

- (b) does not know and cannot admit that the Plaintiffs and the Represented Persons were physically or sexually assaulted while resident at Fairbridge;
- (c) does not know and cannot admit that the Plaintiffs and the Represented Persons suffered injury as alleged; and
- (d) admits that the Represented Persons to whom the Claim relates are the Represented Persons named in the list referred to in paragraph 2(d) of the Claim.

The Defendants

- 3 The First Defendant admits paragraph 3 of the Claim.
- 4 The First Defendant does not plead to paragraph 4 of the Claim.
- 5 The First Defendant does not plead to paragraph 5 of the Claim.

The Plaintiffs

- 6 The First Defendant:
 - (a) admits paragraph 6(a) of the Claim;
 - (b) does not know and until Discovery has been completed, cannot admit either that the First Plaintiff was an “*evacuee child*” or that the First Plaintiff came to Australia as an immigrant otherwise than in the charge of or for the purpose of living in Australia under the care of her parent or relative, and cannot therefore admit that the First Plaintiff was an “*immigrant child*” for the purposes of Section 4 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) (“the Guardianship Act”), or that the First Plaintiff arrived in Australia in or about 1954;
 - (c) does not know and until Discovery has been completed, cannot admit paragraph 6(c) of the Claim.
- 7 The First Defendant:
 - (a) admits paragraph 7(a) of the Claim;
 - (b) does not know and until Discovery has been completed, cannot admit either that the Second Plaintiff was an “*evacuee child*” or that the First Plaintiff came to Australia as an immigrant otherwise than in the charge of or for the purpose of living in Australia under the care of her parent or relative, and

cannot therefore admit that the First Plaintiff was an “*immigrant child*” for the purposes of Section 4 of the Guardianship Act, or that the First Plaintiff arrived in Australia in or about 1959;

- (c) does not know and until Discovery has been completed, cannot admit paragraph 7(c) of the Claim.

Duties Owed

- 8 (a) As to paragraph 8(a)(i) of the Claim the First Defendant:
- (i) admits that pursuant to regulation 3(1) of the *National Security (Overseas Children) Regulations* (“the National Security Regulations”) the Minister who from time to time held the portfolio of Minister of State for the Interior became the legal guardian of each of the Plaintiffs and Represented Persons who arrived as “*overseas children*” within the meaning of regulation 2 of those Regulations;
 - (ii) denies that from the time of their arrival in Australia and until each turned 21 years of age the Minister remained the legal guardian;
 - (iii) says that the legal guardianship of a Plaintiff or a Represented Person who arrived in Australia as an overseas child ceased once he or she was received into a State pursuant to regulation 3(2) of the National Security Regulations;
 - (iv) denies that the Minister was the guardian of any of the Plaintiffs or Represented Persons who had been received into the State of NSW prior to the commencement of the Guardianship Act;
 - (v) otherwise does not admit paragraph 8(a)(i) of the claim;
- (b) As to paragraph 8(a)(ii) of the Claim the First Defendant admits that pursuant to Section 6 of the Guardianship Act the Minister, who from time to time held the portfolio of Minister for Immigration, became the legal guardian of children who were “*immigrant children*” for the purposes of Section 4 of that Act from the time of their arrival in Australia until each turned 21 years of age or left Australia permanently, but otherwise does not admit paragraph 8(a)(ii);

- (c) As to paragraph 8(a)(iii) of the Claim the First Defendant admits that the Minister, who from time to time held the portfolio of Minister for Immigration and who as legal guardian of an immigrant child pursuant to Section 6 of the Guardianship Act, had the power pursuant to Section 7 of the Guardianship Act to remove that child from the custody of his or her custodian, but otherwise does not admit paragraph 8(a)(iii);
- (d) As to paragraph 8(a)(iv) of the Claim the First Defendant does not admit the existence of the duty and obligation as pleaded;
- (e) The First Defendant does not plead to paragraph 8(b) of the Claim as no allegations are made against it;
- (f) The First Defendant does not plead to paragraph 8(c) of the Claim as no allegations are made against it.
- (g) In answer to the whole of paragraph 8(a)(i) of the Claim the First Defendant says that the National Security Regulations were enacted with the legislative intent to put into effect a statutory scheme to promote the welfare of overseas children.
- (h) In further answer to the whole of paragraph 8(a)(ii) and (iii) of the Claim the First Defendant says the Guardianship Act was enacted with the legislative intent to put into effect an agreement between the Commonwealth and the States to establish a statutory scheme to promote the welfare of immigrant children ("the 1946 Agreement").

Particulars

The 1946 Agreement was entered into at a conference held in April 1946 attended by representatives of the Commonwealth and States, including the State of New South Wales. The terms of the Agreement were that the Federal Minister for Immigration from time to time holding that portfolio would become the legal guardian of immigrant children pending the Child Welfare Departments of the States, including New South Wales, becoming custodian of, and accepting responsibility for, the welfare and care of those children, and

that the States could in turn authorise voluntary migration organisations such as the Third Defendant to be appointed custodians of immigrant children.

- 9 (a) The First Defendant does not admit any of the matters alleged in paragraphs 9(a)(i) to 9(a)(vii) of the Claim or that the plaintiffs and the represented persons were vulnerable as a result of any such matters.
- (b) As to paragraph 9(b) of the Claim the First Defendant denies that it was either known by or reasonably foreseeable to it that there was an abusive environment at the Fairbridge Farm School and it otherwise does not admit the allegations contained therein.
- (c) In answer to paragraph 9(c) of the Claim the First Defendant admits that the First Defendant had the powers set out in the National Security Regulations and the Guardianship Act but does not admit that the First Defendant had the duties set out in paragraph 8 of the Claim and does not admit that it was foreseeable that a failure to exercise those powers and/or comply with those duties would result in the injury as alleged.
- (d) (i) The First Defendant does not admit so much of paragraph 9(d) of the Claim as alleges that the First Defendant was in *loco parentis* to the Plaintiffs and the Represented Persons:

Overseas children – National Security Regulations

- (ii) A Minister who became the legal guardian of an overseas child ceased to be so once the overseas child was received into the State of New South Wales pursuant to clause 3(2) of the National Security Regulations and thereafter the Second Defendant became responsible for taking all steps necessary to ensure the welfare of the overseas child.

Particulars

Particulars of who among the Represented Persons was received into the State of NSW will be provided once discovery is complete.

Immigrant children – Guardianship Act

- (iii) The relevant Minister(s) and each of them holding the portfolio of Federal Minister for Immigration from time to time throughout the

period 1946 to 1974, did by instrument of delegation, pursuant to s.5 of the Guardianship Act, delegate to the person from time to time occupying the office or performing the duties of Director of the Child Welfare Department of the State of New South Wales all of the Minister's powers and functions under the provisions of the Guardianship Act (except the power of delegation) and thereafter the day to day responsibility for the welfare of an immigrant child (including the Plaintiffs and those of the Represented Persons who had not been received into the State of New South Wales under the National Security Regulations) became the responsibility of either the Second Defendant or the Third Defendant or both.

Particulars

Particulars of whom among the Represented Persons were the subject of a delegation and copies of instruments of delegation will be provided once discovery is complete.

- (iv) In answer to the whole of paragraph 9(d) the First Defendant says that once the Plaintiffs or a Represented Person were received into the State of NSW under the Security Regulations or the Minister delegated the powers and functions under the Act to the Second Defendant, the First Defendant retained no legal control over the exercise of those powers or performance of those functions and the exercise of those powers and functions was the exercise by the Second Defendant of an independent statutory power and function in accordance with an independent statutory duty for which the First Defendant is not liable or vicariously liable.

- 10 The First Defendant denies paragraph 10 of the Claim insofar as it relates to the First Defendant. Further, it says that the nature of the relationship between the First and Second Defendant was such that the First Defendant knew the Second Defendant was competent to make decisions about the placement of children with suitable custodians and knew that the Second Defendant had appropriate powers to supervise, inspect, monitor and audit custodians including the Third Defendant so that the probability of the injury and disability occurring as alleged if the Plaintiffs and the Represented Persons were placed at Fairbridge was negligible.

11. (a) The First Defendant does not admit it owed to the plaintiff and the represented persons any of the duties alleged in paragraphs 11(a) to (d) of the claim and it denies that the Second Defendant, its officers, servants or agents or the Third Defendant, its officers, servants or agents were officers, servants or agents of the First Defendant.
- (b) Clause 3(4) of the National Security Regulations and Section 7 of the Guardianship Act repose in the Minister a power and discretion to revoke the guardianship granted to the NSW Child Welfare Department and to remove a child from the custody of his or her custodian but does not impose at common law a general obligation on the Minister as guardian to supervise the custodian by inspection, monitoring or audit.
- (c) If Clause 3(4) of the National Security Regulations or Section 7 of the Act imposes a duty to consider the exercise of the discretion when an appropriate request is made or appropriate circumstances arise, in circumstances where neither the Minister or the First Defendant were made aware during the period 1937 to 1974 that a risk of physical and/or sexual assault existed at Fairbridge, or of other circumstances that would have made it appropriate to consider the exercise of the discretion, no occasion for the exercise of the discretion did arise and no consequential duty to exercise that discretion arose.
- (d) Further and in answer to the whole of paragraph 11 the First Defendant says it is not appropriate, having regard to the following matters, and in the factual circumstances pleaded in paragraphs 6, 7, 8 and 9 of the Claim, to impose upon the First Defendant a common law duty of care of the kind pleaded:

The following matters

No Legislative intent

- (i) Parliament intended by enacting the National Security Regulations, by agreeing to the terms of the 1946 Agreement and by enacting the Guardianship Act:

- (a) to establish a statutory scheme to promote the welfare of overseas children and immigrant children whereby all matters both as to policy and practice relating to the day to day welfare, of those children would be the responsibility of the Second Defendant and/or the Director of the NSW Child Welfare Department or such custodian of the children as the Second Defendant or the Director should nominate or agree to.
- (b) That once a child was received into the State of New South Wales pursuant to clause 3(2) of the National Security Regulations, the guardianship of that child would vest in the Director of the NSW Child Welfare Department who would thereafter become responsible for taking all steps necessary to ensure the welfare of the overseas child and would become responsible for taking precautions against the risk of harm of the type alleged.
- (c) That responsibility for the welfare of an immigrant child would be delegated to the person from time to time occupying the office of, or performing the duties of Director of the Child Welfare Department of the State of New South Wales and thereafter the Second Defendant would become responsible for taking all steps necessary to ensure the welfare of the immigrant child and would become responsible for taking precautions against the risk of harm of the type alleged.
- (d) That the First Defendant would not thereafter be responsible for either matters of policy or practice for or in relation to the day to day welfare of overseas or immigrant children.
- (e) That the First Defendant would not thereafter be responsible for either matters of policy or practice for or in relation to the taking of precautions against the risk that overseas or immigrant children would suffer physical and / or sexual abuse and /or consequent injury or disability.

- (f) Upon a proper construction of both the National Security Regulations and the Guardianship Act, and having regard to the terms of the 1946 Agreement, Parliament intended to establish the statutory scheme for the benefit of society in general and did not intend thereby to create any right to a private cause of action for the benefit of any particular individual or any particular class of overseas or immigrant child either generally or in relation to physical and/or sexual assault or in relation to the creation of an abusive environment or in relation to consequential injury and/or disability.
- (g) Upon a proper construction of both the National Security Regulations and the Guardianship Act, and having regard to the terms of the 1946 Agreement, Parliament did not intend to impose upon the First Defendant a duty of care which could give rise to a private right of action for damages, or to otherwise create or allow an entitlement to damages in the event that the welfare of overseas children, including the Plaintiffs and the Represented Persons was not promoted and/or provided for, or in the event that physical and/or sexual assault occurred or an abusive environment was created or in relation to consequential injury and/or disability.

The Relationship with the First Defendant

- (ii) (a) The relationship between the First Defendant and the Plaintiffs and the Represented Persons was determined by the terms of the National Security Regulations, by the 1946 Agreement, the enactment of the Guardianship Act, the exercise of the various delegations under the Guardianship Act, and by the statutory scheme thereafter put in place to provide for the welfare of the Plaintiffs and the Represented Persons.
- (b) Once the Second Defendant assumed responsibility for taking precautions against the risk of harm of the type alleged, the First Defendant was not thereafter responsible for taking precautions generally or taking precautions against the risk of

the occurrence of the particular harm pleaded, nor was the First Defendant required to and nor did it have the power to attend to the day to day welfare of the Plaintiffs or the Represented Persons, even though from time to time some assistance, both in the form of child endowment payments and otherwise in the form of monetary assistance to the Third Defendant, was provided. Once the Second Defendant assumed that responsibility no relevant relationship existed between the First Defendant and the Plaintiffs and the Represented Persons capable of giving rise to a duty of care of the kind pleaded.

The Degree of control exercised by the First Defendant

- (iii) (a) Upon receipt of an overseas child into NSW (under the National Security Regulations) and upon the exercise of the delegation(s) (under the Guardianship Act), the First Defendant relinquished any control over and was relieved of any responsibility for any matter of policy or procedure relating to the implementation and management of the Statutory scheme for the welfare of the Plaintiffs and the Represented Persons.
- (b) Thereafter the Second Defendant and the Third Defendant assumed legal control over and responsibility for all matters of policy and procedure relating to the welfare of the Plaintiffs and the Represented Persons including the day to day operation of the statutory scheme and did in fact exercise that control and responsibility to the exclusion of the First Defendant.
- (c) Thereafter, even though the First Defendant did from time to time conduct visits and inspections and did from time to time provide assistance both in the form of child endowment payments and otherwise in the form of monetary assistance to the Third Defendant, the First Defendant had no legal control over the conduct of the Second Defendant in relation to the matters of policy and/or procedure or the day to day operation of Fairbridge by the Third Defendant or relating to the welfare of the Plaintiffs or the Represented persons, subject only to the

existence of circumstances brought to the attention of the First Defendant requiring consideration of the exercise of the power in s.3(4) of the National Security Regulations or s.7 of the Guardianship Act, none of which arose.

No Reliance

- (iv) (b) Neither the Plaintiffs, nor the Represented Persons relied upon the First Defendant for their welfare or to take precautions against the risk of harm alleged, but rather relied upon the Second Defendant and its Department of Child Welfare to whom responsibility for the taking such precautions had been given, and upon the Third Defendant which in conjunction with the Second Defendant had the day to day responsibility for the provision of the welfare of the Plaintiffs and the Represented Persons.

The assumption of responsibility by the Second Defendant

- (v) (a) The First Defendant repeats paragraphs 11(d)(ii)(a) and (b) herein.
- (b) The legislature, in implementing the statutory scheme, envisaged the delegation of powers and functions of the Minister to State Welfare authorities who were considered by the legislature to be competent to place children with suitable custodians and to supervise that custody, and those authorities had the appropriate powers to supervise inspect monitor and audit that custody.
- (c) The legislature envisaged that when the First Defendant delegated its powers and functions to the Second Defendant, the Second Defendant would thereafter assume responsibility for and exercise legal control over matters of policy and procedure relating to the Statutory scheme and including the supervision, inspection, monitoring and auditing of the operation of the statutory scheme, the supervision, inspection, monitoring

and auditing of the operation of Fairbridge, and would assume responsibility for and legal control over the welfare of the Plaintiffs and the Represented Persons, and it was envisaged that such responsibility and legal control would continue even though the First Defendant did from time to time conduct visits and inspections and did from time to time provide assistance both in the form of child endowment payments and otherwise in the form of monetary assistance to the Third Defendant.

- (d) Thereafter, and even though the First Defendant did from time to time conduct some visits, it had no legal control over the conduct of the Second Defendant in relation to the matters of policy and/or procedure or the day to day operation of Fairbridge by the Third Defendant or relating to the welfare of the Plaintiffs or the Represented persons, subject only to the existence of circumstances brought to the attention of the First Defendant requiring consideration of the exercise of the power in s.3(4) of the National Security Regulations or s.7 of the Guardianship Act, none of which arose.

No Proximate Relationship

- (vi) (a) The First Defendant repeats paragraphs 11(d)(ii) (a) and (b) herein.
- (b) Once the First Defendant delegated its powers and functions to the Second Defendant, no relevant physical, temporal, relational or other form of proximate relationship existed between the First Defendant and the Plaintiffs and the Represented Persons because the legislative intent in enacting the National Security Regulations and the Guardianship Act was that the Second Defendant and the NSW Child Welfare Departments would thereafter assume responsibility for and exercise legal control over the provision of the welfare of the Plaintiffs and the Represented Persons.

- (c) The relationship between the First Plaintiff, the Second Plaintiff and the Represented Persons on the one hand, and the First Defendant on the other, was not sufficiently proximate to give rise to a duty of the kind pleaded.

The Nature of the activity undertaken by the First Defendant

- (vii) (a) The Executive arm of the First Defendant, in the present context, was at the relevant time primarily responsible for the operation of the National Security Regulations and the Guardianship Act and in so doing, and as part of the exercise of that responsibility, delegated powers and functions to the Second Defendant.
- (b) Once those delegations were made and took effect the First Defendant undertook no activity either in a policy or procedural sense in relation to any of the day to day functions concerning the welfare of the Plaintiffs or the Represented Persons or in relation to the implementation or operation of the Statutory scheme, even though the First Defendant did from time to time conduct visits and inspections and did from time to time provide assistance both in the form of child endowment payments and otherwise in the form of monetary assistance to the Third Defendant.
- (c) During the period 1937 to 1974 none of the relevant Ministers from time to time holding the portfolio of Minister for Immigration considered it necessary to exercise the power contained in clause 3(4) of the National Security Regulations or s.7 of the Guardianship Act.

The knowledge (actual or constructive) of the First Defendant

- (viii) The First Defendant repeats paragraphs 9(b) and 11(d)(ii) (a) and (b) herein.

Potential indeterminacy of Liability

- (ix) (a) The liability for a breach of the duty pleaded is indeterminate.
- (b) The First Defendant repeats paragraph 10(b) herein and says that it had no actual or constructive knowledge of the events as pleaded in paragraph 9(a) of the Claim and it repeats paragraph 9 herein.
- (c) The membership of the group, upon whose behalf the proceedings are brought, is not closed.
- (d) The First Defendant cannot determine how many potential claims might be brought against it concerning acts or omissions of a Minister of State as a statutory guardian under the Guardianship Act and cannot determine the nature of those claims.
- (e) The potential monetary liability for those claims cannot be determined.
- (f) The Claim requires evaluation of conduct which is alleged to have occurred between 1937 and 1974, the limitation period in respect of the cause of action has expired and has not been extended, and many of the witnesses who could have given evidence are now dead.

Consistency

- (x) (a) The First Defendant had no legal control over the exercise by the Second Defendant of any of the powers granted under a delegation made pursuant to Clause 3(2) of the National Security Regulations or s.5 of the Guardianship Act.
- (b) The imposition upon the First Defendant of a duty of care of the kind pleaded would be inconsistent with the transfer to the State of NSW of complete legal control over the exercise of the

entirety of the powers and functions of the statutory guardian, which was the consequence of and the effect of clause 3(2) of the National Security Regulation and s.5 of the Guardianship Act.

Imposition of a Duty of Care of the Kind Pleaded would be Unfair Unjust and Unreasonable

- (xi) (a) The nature of the 1946 Agreement, the policy which underpinned the 1946 Agreement, and the terms of the delegations, delegating as they did the entirety of the powers and functions of the Minister for Immigration under the Guardianship Act, demonstrates that it was the intention of Parliament and the intention of the respective Commonwealth and State Governments that the First Defendant would have no ongoing responsibility or function in relation to the day to day care and welfare of immigrant and overseas children and that those responsibilities would fall to the State and the NSW Child Welfare Departments, the voluntary migration organisations and the church.
- (b) To impose a duty of care upon the First Defendant in those circumstances would be unfair, unjust and unreasonable.

Criminal Conduct

- (xii) To the extent that the risk of harm against which it is said precautions should have been taken included the risk of physical and sexual assaults which were criminal acts, those acts were perpetrated by third parties for whom the First Defendant was not responsible and the First Defendant did not have a duty to take precautions to prevent such criminal conduct.

Non-Delegable duty

- (xiii) The relationship between the First Defendant and the Plaintiffs and the Represented Persons was not a special relationship capable of giving

rise to a non-delegable duty of care as pleaded and not recognised at law as one capable of giving rise to a non-delegable duty of care, and the First Defendant repeats paragraphs 11(d)(ii)(a) and (b) and paragraph 9(b) herein.

12. The First Defendant does not plead to paragraph 12 of the Claim.
13. The First Defendant does not plead to paragraph 13 of the Claim.

Content of Duties

- 15 (a) The First Defendant does not admit paragraph 15(a) to 15(n) inclusive of the Claim.
- (b) The First Defendant does not admit that it became aware during the period 1937 to 1974 that a risk of physical and/or sexual abuse as alleged existed at Fairbridge.
- (c) The First Defendant denies paragraph 15(o) of the Claim and repeats paragraph 9(d) herein and paragraph 11 herein and denies that the Second Defendant or its officers, servants or agents or the Third Defendant or its officers, servants or agents, were officers servants or agents of the First Defendant.
- (d) The First Defendant does not plead to paragraph 15(p) of the Claim.
- (e) The First Defendant does not plead to paragraph 15(q) of the Claim.

Breaches of Duties

- 16 (1) The First Defendant denies paragraph 16(a)(i) to (xvii) of the Claim and repeats paragraphs 9, 10 and 11 herein and:
- (a) says it did not fail to exercise reasonable care and skill as alleged and relies upon s.5B(1), 5B(2) and 5C of the *Civil Liability Act 2002*;

- (b) says that any failure to exercise reasonable care and skill was not a necessary condition of the occurrence of the harm alleged and it is not appropriate for the scope of the First Defendants liability to extend the harm alleged to have occurred and the First Defendant relies upon s.5D of the *Civil Liability Act 2002*;
 - (c) says that to the extent that the conduct of the First Defendant alleged to have been negligent was conduct of a person practising a profession the First Defendant relies upon s.5O of the *Civil Liability Act 2002*;
- (2) In answer to the whole of paragraph 16 the First Defendant says during the period 1937 to 1974 it did not know and ought not to have known that of a risk of physical and/or sexual abuse as alleged existed at Fairbridge and did not receive any information that physical or sexual abuse was taking place at Fairbridge as alleged or any information that would lead it to conclude that placement at Fairbridge would result in either exposure to the abusive environment pleaded, or exposure to the risk of physical and/or sexual abuse, or would cause the injury and disability pleaded and the First Defendant relies upon s.5B(1), 5B(2) and 5C of the *Civil Liability Act 2002*.
- (3) In further answer to the whole of paragraph 16 of the Claim, the First Defendant says that once the Plaintiffs and/or the Represented Persons had either been received into the State of New South Wales, or a delegation pursuant to Section 5 of the Guardianship Act had been executed, a reasonable person in the position of the Minister would not have taken the precautions against the risk of harm as pleaded in paragraphs 15(a) to (n) of the Claim, and that not to have taken those precautions did not amount to a breach of duty as pleaded in paragraphs 16(a)(i) to (xviii) of the Claim and was not negligent having regard to the following matters:
 - (a) Once a child was received into the State of New South Wales pursuant to clause 3(2) of the National Security Regulations, and thereafter, the Minister was no longer the guardian of that child and no longer responsible for the welfare of the Plaintiffs and the Represented Persons to the extent they were overseas children.

- (b) Once the Minister delegated his powers and functions under s. 5(1) of the Act, the First Defendant ceased to be responsible for the welfare of the Plaintiffs and the Represented Persons. The Second Defendant and person from time to time occupying the office of, or performing the duties of Director of the Child Welfare Department of the State of New South Wales then became responsible for the welfare of the Plaintiffs and the Represented Persons to the extent they were immigrant children. Further, the First Defendant repeats paragraph 9(d)(iv) herein;

And the First Defendant:

- (i) says it did not fail to exercise reasonable care and skill as alleged and relies upon s.5B(1), 5B(2) and 5C of the *Civil Liability Act 2002*;
- (ii) says that any failure to exercise reasonable care and skill was not a necessary condition of the occurrence of the harm alleged and it is not appropriate for the scope of the First Defendant's liability to extend the harm alleged to have occurred and the First Defendant relies upon s.5D or the *Civil Liability Act 2002*
- (4) It was reasonable for the Minister to suppose that the 1946 Agreement would be adhered to by the State of NSW and that the State of NSW would take any necessary precautions since the State was responsible for doing all things necessary for the welfare of the Plaintiffs and the Represented Persons and the First Defendant repeats paragraph 9(d)(iv) herein and relies upon s.5B(1), 5B(2) and 5C of the *Civil Liability Act 2002*.
- (5) If the duties of care alleged against the First Defendant in paragraphs 8 to 15 of the Claim were owed to the Plaintiffs and the Represented Persons (which is not admitted) and those duties were breached by the First Defendant engaging in the acts and/or omissions as alleged in paragraph 16 of the Claim, (which is not admitted) those acts or omissions are not actionable at Common Law.

Particulars

The acts and/or admissions if engaged in were the exercise of discretionary power and/or ministerial discretion ("the discretion") residing in the Minister

from time to time holding the portfolio of Federal Minister for Immigration, pursuant to the provisions of the National Security Regulations and the Guardianship Act.

The discretion was exercised from time to time for the purpose of putting the 1946 Agreement into effect.

The decision of the Minister to exercise the discretion or decline to exercise the discretion in any particular case or generally, and the exercise or non-exercise of the discretion:

- (a) involved the consideration of matters of policy including weighing and balancing matters government policy, either of which are non-justiciable; and,
 - (b) were decisions which fell within the ambit of the ministerial discretion granted to the Minister by the National Security Regulations and the Guardianship Act, and therefore not actionable at common law.
- (6) Further and in the alternative, and to the extent that the risk of harm against which it is said precautions should have been taken included the risk of physical and sexual assaults which were criminal acts, those acts were perpetrated by third parties for whom the First Defendant was not responsible and the First Defendant did not have a duty to take precautions to prevent such criminal conduct.
- (7) Further, and to the extent that the risk of harm against which it is said precautions should have been taken was the risk of the occurrence of conduct which was not and did not include criminal physical and/or sexual assault, if a common law duty of care did exist in the circumstances as pleaded, the First Defendant was not negligent having regard to the social and cultural standards of the time, including the accepted social norms which dictated what were the appropriate, reasonable and socially and morally acceptable standards of behaviour of and by parents and guardians in relation to child rearing, child discipline and child protection in Australia during the period 1937 to 1974 and further the First Defendant relies upon s.5B, s.5C and s.5D of the *Civil Liability Act 2002*.

- (8) (a) In answer to the whole of paragraphs 16(a)(iii), (x), (xiii) and(xiv) the First Defendant says in circumstances where neither the Minister or the First Defendant were made aware during the period 1937 to 1974 that a risk of physical and/or sexual assault existed at Fairbridge, or of other circumstances that would have made it appropriate to consider the exercise of the discretion under Clause 3(4) of the National Security Regulations or Section 7 of the Guardianship Act, no occasion arose for the exercise by the First Defendant of the discretion and no breach of duty occurred.
- (b) In further answer to paragraphs 16(a)(iii), (x), (xiii) and(xiv) the First Defendant says that it is a Public Authority for the purposes of the *Civil Liability Act 2002* and relies upon s.42(a) to (d) and says that Clause 3(4) of the National Security Regulations or Section 7 of the Guardianship Act were special statutory powers for the purposes of s.43A of the *Civil Liability Act 2002* and the First Defendant relies upon s.43A of the *Civil Liability Act 2002* and to the extent that Clause 3(4) of the National Security Regulations or Section 7 of the Guardianship Act constitute a statutory statement of a function to regulate an activity for the purposes of s.44 of the *Civil Liability Act 2002*, the First Defendant relies upon s.44 of the *Civil Liability Act 2002*.
- (9) First Defendant does not plead to paragraph 16(b) of the Claim.
- (10) The First Defendant does not plead to paragraph 16(c) of the Claim.

Vicarious Liability

- (11) The First Defendant denies paragraph 16(d) of the Claim that in the circumstances as pleaded, the First Defendant is vicariously liable to the Plaintiffs and the Represented Persons and the First Defendant repeats paragraph 15(c) herein.
- (12) The First Defendant does not plead to Section 16(e) of the Claim.
- (13) The First Defendant does not plead to paragraph 16(f) of the Claim.

17. The First Defendant does not admit paragraph 17 of the Claim.

Joint and Several Liability

18. The First Defendant denies that where the First or Second Plaintiff or a represented Person was an overseas child who was received into the State of New South Wales pursuant to clause 3(2) of the National Security Regulations, or was an immigrant child for the purposes of the Guardianship Act, that it was carrying out a joint enterprise as alleged.

Particulars

The First Defendant repeats the particulars in paragraph 9(d) herein and says that the exercise by the Second Defendant of the powers and functions delegated to the Second Defendant by the First Defendant was the exercise of an independent statutory function pursuant to an independent statutory duty by the Second Defendant in circumstances where the First Defendant retained no control of the exercise of the power of the Second Defendant in the exercise of the delegated powers and functions.

Injuries and Disabilities

18. The First Defendant denies the breaches of duty alleged against the First Defendant, does not admit that each of the Plaintiffs and each of the Represented Persons was subjected to physical and/or sexual abuse, does not admit that each of the Plaintiffs and the Represented Persons has suffered physical and/or psychiatric and/or latent psychiatric injury and does not admit that as a consequence of any such injury or injuries each of the Plaintiffs and each of the Represented Persons suffered disability, loss and damage.

Substantial, Interest and Issues

20. The First Defendant does not plead to paragraph 20 of the Claim.
21. The First Defendant does not admit the sexual and/or physical abuse alleged to have occurred during the residence of the Plaintiffs and Represented Persons as immigrant children at Fairbridge Farm School. The First Defendant denies that the claims of the

Plaintiffs and Represented Persons are in respect or arise from the same, similar or related circumstances.

22. The First Defendant denies that the claims of the Plaintiffs and Represented Persons give rise to substantial common issues of law and fact as set out in Annexures A and B to the Claim.

Limitation Act

23. In answer to the whole of the Claim the First Defendant says that the action on the cause of action is not maintainable and that the cause of action has been extinguished and relies upon the *Statute of Limitations, 1623* (21 Jac. I c. 16 (Imp.)) and the *Limitation Act 1969* (NSW).

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

Capacity

Date of signature



Solicitor

19 September 2012

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FURTHER DETAILS ABOUT FILING PARTY

Filing party

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Address	C/o Australian Government Solicitor Level 42, MLC Centre 19 Martin Place SYDNEY NSW 2000 GPO BOX 2727 SYDNEY

Legal representative for filing party

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Firm	Australian Government solicitor
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