

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
File Number: VID328/2020  
File Title: ALI YASMIN & ORS v COMMONWEALTH OF AUSTRALIA  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 29/07/2022 10:11:38 AM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33  
Rule 16.32

**Amended Defence**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: VICTORIA  
DIVISION: GENERAL**

**NO VID 328 OF 2020  
NO VID 664 OF 2020**

**ALI YASMIN**

Applicant

**COMMONWEALTH OF AUSTRALIA**

Respondent

In answer to the Consolidated Statement of Claim dated 19 February 2021 (**SOC**), the Respondent pleads as follows.

Where headings and defined terms used in the SOC are used in this Defence, they are used for ease of reference only and without any admission as to the accuracy of the heading or the term or its definition in the SOC.

**A. THE PARTIES**

**A.1 The applicant**

1. It does not know and therefore cannot admit paragraph 1.
2. As to paragraph 2, it:
  - (a) as to sub-paragraph (a):
    - (i) admits that the applicant was at all material times of Indonesian national origin; and
    - (ii) otherwise does not know and therefore cannot admit sub-paragraph (a);
  - (b) does not know and therefore cannot admit sub-paragraph (b);
  - (c) as to sub-paragraph (c):
    - (i) denies sub-paragraph (i) and says that:

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Filed on behalf of the Respondent

File ref: 20205890

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- A. the applicant was on SIEV 86, which was intercepted by HMAS Launceston, and the applicant was subsequently transferred to HMAS Armidale and brought to Christmas Island;
  - B. the applicant, when SIEV 86 was intercepted, was in Australia's territorial sea, and not in Indonesia;
  - C. accordingly, any right to liberty that the applicant had in Indonesia (which is not admitted) did not apply when the applicant's SIEV was intercepted; and
  - D. no act or omission of the respondent led to the applicant being on board SIEV 86 in Australia's territorial sea without any right to be in Australia;
- (ii) admits sub-paragraph (ii);
  - (iii) does not know and therefore cannot admit sub-paragraph (iii);
  - (iv) does not know and therefore cannot admit sub-paragraph (iv);
  - (v) as to sub-paragraph (v), subject to the plea in sub-paragraph (iv) above, admits that no adult on board identified themselves as the applicant's guardian, and the applicant did not claim that any adult on board was his guardian, and otherwise does not know and therefore cannot admit sub-paragraph (v);
- (d) does not know and therefore cannot admit sub-paragraph (d);
  - (e) as to sub-paragraph (e):
    - (i) repeats sub-paragraph (d) above; and
    - (ii) therefore does not know and cannot admit sub-paragraph (e);
  - (f) admits sub-paragraph (f);
  - (g) admits sub-paragraph (g);
  - (h) admits sub-paragraph (h);
  - (i) admits sub-paragraph (i);
  - (j) does not know and therefore cannot admit sub-paragraph (j);
  - (k) admits sub-paragraph (k); and
  - (l) admits sub-paragraph (l).

## A.2 The respondent

3. As to paragraph 3, it:

(a) as to sub-paragraph (a):

- (i) admits that it detained the applicant;
- (ii) says that the claims pleaded on behalf of other Group Members (as defined in the Consolidated Statement of Claim (**SOC**)) lack any particulars and it cannot plead to those claims until they have been properly pleaded and particularised; and
- (iii) does not know and therefore cannot admit that it detained other Group Members;

(b) denies sub-paragraph (b); and

(c) admits sub-paragraph (c).

4. As to paragraph 4, it:

(a) admits sub-paragraph (a);

(b) admits sub-paragraph (b) in respect of the alleged tort claims contained in the SOC and otherwise denies sub-paragraph (b);

(c) in relation to sub-paragraph (c):

- (i) denies that any breach of s 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**) is alleged in the SOC; and
- (ii) denies the allegations the respondent has breached s 9(1) and/or s 9(1A) of the RDA and refers to paragraphs 213 – 219 below;
- (iii) in relation to the CDPP:
  - A. denies that the respondent is vicariously liable under s 18A of the RDA for acts of the CDPP as the CDPP is not an employee or agent of the respondent; and
  - B. says further that s 32A of the *Director of Public Prosecutions Act 1983* (Cth) (**DPP Act**) provides immunity for, *inter alia*, the CDPP, a member of the staff of the Office of the Director of Public Prosecutions and persons to whom functions or powers are delegated under s 31 of the DPP Act in relation to an act done, or omitted to be done, in good faith by the person in performance or exercise, or purported performance or exercise, of any function, duty or power under, or in relation to, the DPP Act; and

- (iv) otherwise admits sub-paragraph (c).

## **B. GROUP MEMBERS**

- 5. As to paragraph 5, it:
  - (a) admits that the applicant purports to bring the claim on his own behalf and on behalf of persons described in paragraph 5; and
  - (b) otherwise does not know and therefore cannot admit the paragraph.
- 6. As to paragraph 6, it:
  - (a) repeats paragraphs 3(a)(ii) and 5 above;
  - (b) admits that, based on the allegations in the SOC, the applicant is an Investigation Sub-Group Member, a Wrist X-Ray Sub-Group Member, an Arrest Sub-Group Member, a Charged Sub-Group Member, an Indicted Sub-Group Member, and a Prosecution Sub-Group Member as those terms are defined in the SOC, except to say that it does not admit the accuracy of any of those defined terms; and
  - (c) otherwise does not know and therefore cannot admit the paragraph.
- 7. As to paragraph 7, it:
  - (a) repeats paragraph 3(a)(ii) above; and
  - (b) does not know and therefore cannot admit paragraph 7.
- 8. As to paragraph 8, it:
  - (a) repeats paragraph 3(a)(ii) above; and
  - (b) does not know and therefore cannot admit paragraph 8.

## **C. STATUTORY FRAMEWORK**

- 9. As to paragraph 9, subject to reference to the full terms and effect of the *Migration Act 1958* (Cth) (**Migration Act**), as amended from time to time, at trial, it:
  - (a) as to sub-paragraph (a):
    - (i) admits sub-paragraph (a)(i);
    - (i) admits sub-paragraph (a)(ii);
    - (ii) admits sub-paragraph (a)(iii);
    - (ii) admits sub-paragraph (a)(iv);

- (b) admits sub-paragraph (b);
- (c) admits sub-paragraph (c);
- (d) admits sub-paragraph (d);
- (e) admits sub-paragraph (e);
- (f) admits sub-paragraph (f);
- (g) admits sub-paragraph (g);
- (h) admits sub-paragraph (h);
- (i) admits sub-paragraph (i) and says further that:
  - (i) s 250(4) relevantly provided that, without limiting the generality of s 250(3)(b), the period that is required for the purposes of a prosecution includes any period required for:
    - A. any proceedings in connection with the prosecution;
    - B. the serving of any custodial sentence imposed because of the prosecution; and
    - C. the institution of, and any proceedings in connection with, any appeal from any decision in relation to the prosecution;
  - (ii) s 250(5) relevantly provided that, if the period for which a person may be kept in immigration detention under s 250(3) ends, he or she:
    - A. must, unless he or she has become the holder of a visa, that is in effect, to remain in Australia, be expeditiously removed from Australia under s 198; and
    - B. may, at the direction of an authorised officer, continue to be detained under s 189 until so removed;
- (j) as to sub-paragraph (j), the respondent says that s 256 relevantly provided that where a person is in immigration detention under the Migration Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention;
- (k) admits sub-paragraph (k);
- (l) admits sub-paragraph (l);
- (m) admits sub-paragraph (m);

- (n) admits sub-paragraph (n);
  - (o) admits sub-paragraph (o); and
  - (p) says further that, at all times relevant to the claims made by the applicant on his own behalf:
    - (i) s 13 relevantly provided that a non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen;
    - (ii) s 14 relevantly provided that a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen;
    - (iii) s 147 relevantly provided that if:
      - A. an unlawful non-citizen is to be, or is likely to be, removed or deported; and
      - B. the Attorney-General considers that the non-citizen should remain in Australia temporarily for the purpose of, inter alia, the administration of criminal justice in relation to an offence against a law of the Commonwealth; and
      - C. the Attorney-General considers that satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for the relevant purposes or the non-citizen or both will meet the cost of keeping the non-citizen in Australia;
- the Attorney-General may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice (**Criminal Justice Stay Certificate**);
- (iv) s 150 provided that if a Criminal Justice Stay Certificate about a non-citizen is in force, the non-citizen is not to be removed or deported;
  - (v) s 152 relevantly provided that if a Criminal Justice Stay Certificate about a non-citizen is in force and the non-citizen does not have a visa to remain in Australia, the Criminal Justice Stay Certificate does not limit any power under the Migration Act relating to the detention of the non-citizen;
  - (vi) s 154 relevantly provided that an officer is not liable to any civil action for doing in good faith, or failing in good faith to do, any act or thing for the purpose of exercising a power under the Migration Act to keep a person who is the subject of a criminal justice stay certificate in immigration detention;
  - (vii) s 155(2) relevantly provided that a criminal justice stay visa is a visa permitting a non-citizen to remain temporarily in Australia;

- (viii) s 159 relevantly provided:
  - A. in sub-section (1), that if a criminal justice certificate in relation to a non-citizen is in force, the Minister may consider the grant of a criminal justice visa for the non-citizen;
  - B. in sub-section (2), that if the Minister, after considering the grant of a criminal justice visa for a non-citizen, is satisfied that the criteria for it have been met, the Minister may, in his or her absolute discretion grant it; and
- (ix) s 161(2)(a) relevantly provided that a criminal justice stay visa for a non-citizen is permission for the non-citizen to remain in Australia while it is in effect.

## D. POLICIES OF THE RESPONDENT

### D.1 Benefit of the Doubt Policy

- 10. It admits paragraph 10.
- 11. As to paragraph 11, it:
  - (a) says that Article 43 of the *Convention on the Rights of the Child 1990* (Australian Treaty Series 1991, No. 4 (**CRC**)) provides for the establishment of a Committee on the Rights of the Child for the purpose of examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the CRC; and
  - (b) otherwise denies the paragraph.
- 12. As to paragraph 12, it:
  - (a) admits that in or around 1 September 2005, the Committee on the Rights of the Child issued General Comment 6, 'Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (**General Comment 6**);
  - (b) says that General Comment 6 provided guidance to State Parties on their obligations deriving from the CRC (including Article 8) with respect to the particular group of vulnerable children with which General Comment 6 was concerned;
  - (c) says that the interpretation of the CRC as a treaty is governed by articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969* (Australian Treaty Series 1974, No 2); and
  - (d) otherwise denies the paragraph.

## PARTICULARS



General Comment 6, paragraph 4.

13. As to paragraph 13, it:

(a) says that General Comment 6 provides that:

*“The best interests of the child must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children. This necessary initial assessment process, in particular, entails the following:*

(i) *Prioritised identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to authorities (art 8). Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such;”*; and

(b) otherwise denies the paragraph.

14. As to paragraph 14, it:

(a) repeats paragraphs 10 – 13 above; and

(b) denies the paragraph.

15. As to paragraph 15, it:

(a) repeats paragraph 14 above; and

(b) denies the paragraph.

15A. On 27 May 2004 Australia ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Australian Treaty Series 2004, No. 11) (**Smuggling of Migrants Protocol**)

15B. At all material times, the Smuggling of Migrants Protocol relevantly provided that:

(a) the purpose of the Smuggling of Migrants Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants;

**PARTICULARS**

Article 2, Statement of purpose.

- (b) the Smuggling of Migrants Protocol shall apply, except as otherwise stated therein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of the Smuggling of Migrants Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences;

**PARTICULARS**

Article 4, Scope of application.

- (c) each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, inter alia, the smuggling of migrants;

**PARTICULARS**

Article 6(1)(a), Criminalization.

- (d) each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
  - (i) subject to the basic concepts of the legal system, attempting to commit an offence established in accordance with sub-paragraph (c) above;
  - (ii) participating as an accomplice in an offence established in accordance with sub-paragraph (c) above; and
  - (iii) organising or directing other persons to commit an offence established in accordance with sub-paragraph (c) above;

**PARTICULARS**

Article 6(2), Criminalization.

- (e) each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with sub-paragraph (c) above and subject to the basic concepts of its legal system, to the offences established in accordance with sub-paragraph (d)(ii) and (iii) above, circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned or that entail inhuman or degrading treatment, including for exploitation, of such migrants; and

**PARTICULARS**

Article 6(3), Criminalization.

- (f) State Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

## PARTICULARS

Article 7, Cooperation.

### D.2 Youth Identification Policy

16. As to paragraph 16, it:

(a) says that:

- (i) relevantly, between 1 January 2007 and 30 June 2008, the Department of Immigration and Multicultural and Indigenous Affairs (**DIMIA**) (which was subsequently called DIAC), had Migration Series Instruction 370: “Procedure for unaccompanied wards in immigration detention facilities” (**MSI 370**);
- (ii) section 5.3 of MSI 370 concerned “Identification of unaccompanied wards during the reception process”;
- (iii) section 5.4 of MSI 370 concerned “Identification of unaccompanied non-wards during the reception process”;
- (iv) on 1 July 2008, MSI 370 ceased to operate and *PAM3: Act – Detention Services Manual – Chapter 2 – Client placement – Minors in detention* (**PAM3 Chapter 2 Minors in detention instruction**) commenced to operate;
- (v) PAM3 Chapter 2 Minors in detention instruction relevantly operated until 31 December 2013;
- (vi) the purpose of PAM3 Chapter 2 Minors in detention instruction was to provide guidance for departmental officers and immigration detention service providers on the approach to be taken under the Migration Act in relation to the care and treatment of minors in immigration detention to whom the instruction applied;

## PARTICULARS

PAM3 Chapter 2 Minors in detention instruction ss 1, 5.

- (vii) PAM3 Chapter 2 Minors in detention instruction had a section concerning “Identifying a minor”;

## PARTICULARS

PAM3 Chapter 2 Minors in detention instruction s 11.

- (viii) it will refer at trial to the full terms and effect of MSI 370 and PAM3 as amended from time to time; and
  - (b) otherwise denies the paragraph.
- 17. As to paragraph 17, it:
  - (a) in relation to the claims pleaded by the applicant on his own behalf, admits that:
    - (i) s 11.1 of PAM3 Chapter 2 Minors in detention instruction set out, among other things, the matters contained in sub-paragraphs 17(a) and (b) of the SOC; and
    - (ii) s 11.2 of PAM3 Chapter 2 set out the matters contained in sub-paragraph 17(c) of the SOC;
  - (b) in relation to the claims pleaded by the applicant on behalf of Group Members, will refer at trial to the full terms and effect of MSI 370 and PAM3, as amended from time to time; and
  - (c) otherwise denies the paragraph.
- 18. As to paragraph 18, it:
  - (a) will refer at trial to the full terms and effect of MSI 370 and PAM3, as amended from time to time;
  - (b) in relation to the claims pleaded by the applicant on his own behalf, says that the applicant did not fall within any of the categories set out in s 5 of PAM3 Chapter 2 Minors in detention instruction (headed 'Minors to whom this instruction applies');
  - (c) in relation to the claims pleaded by the applicant on behalf of Group Members, does not know and therefore cannot admit the paragraph; and
  - (d) otherwise denies the paragraph.

### **D.3 Youth Treatment Policy**

- 19. As to paragraph 19, it:
  - (a) repeats sub-paragraph 16(a) above;
  - (b) says that:
    - (i) MSI 370 and PAM3 Chapter 2 Minors in detention instruction contained provisions concerning treatment of the persons to whom those documents applied who were in immigration detention;
    - (ii) between 9 November 2009 and 30 September 2011, PAM3: Detention Services Manual - Chapter 2 – Client placement – Client placement

model (PAM3 Chapter 2 Client placement model instruction) provided policy and procedures for departmental officers on how and where to place in immigration detention a person who has been detained under the Migration Act; and

(iii) s 7.1 of PAM 3 Chapter 2 Client placement model instruction set out “Special Client Group Considerations” in respect of “Children/Minors”; and

(c) otherwise denies the paragraph.

20. As to paragraph 20, it:

(a) in relation to the claims pleaded by the applicant on his own behalf, says that, subject to reference to the full terms and effect of PAM3:

(i) PAM3 Chapter 2 Minors in detention instruction ss 2, 4, 4.1 and 4.2 included provisions in the same or similar terms to those pleaded in sub-paragraphs 20(a), (b), (e), (f), (g), (h), (i) and (j) of the SOC; and

(ii) between 9 November 2009 and 30 September 2011, PAM3 Chapter 2 Client placement model instruction s 7.1 included provisions in the same or similar terms to those pleaded in sub-paragraphs 20(c) and (d) of the SOC;

(b) in relation to the claims pleaded by the applicant on behalf of Group Members, will refer at trial to the full terms and effect of MSI 370 and PAM3, as amended from time to time; and

(c) otherwise denies the paragraph.

21. As to paragraph 21, it:

(a) will refer at trial to the full terms and effect of MSI 370 and PAM3, as amended from time to time;

(b) in relation to the claims pleaded by the applicant on his own behalf, says that:

(i) the applicant did not fall within any of the categories set out in s 5 of PAM3 Chapter 2 Minors in detention instruction (headed ‘Minors to whom this instruction applies’); and

(ii) by operation of s 5 of PAM3 Chapter 2 Client placement model instruction (headed ‘Who is the CPM not applied to?’), that instruction did not apply to the applicant, as an unauthorised boat arrival;

(c) in relation to the claims pleaded by the applicant on behalf of Group Members, does not know and therefore cannot admit the paragraph; and

(d) otherwise denies the paragraph.

#### **D.4 AFP Youth Policy**

22. As to paragraph 22, it:

- (a) says that from 29 October 2012 the AFP maintained a document titled 'AFP National Guideline on upholding the rights of children during investigations' (**AFP National Guideline**), which was amended from time to time; and
- (b) otherwise denies the paragraph.

23. As to paragraph 23, it:

- (a) admits that the AFP National Guideline contained the statements to the effect of those in sub-paragraphs 23(a) and (b) of the SOC;
- (b) will refer at trial to the full terms and effect of the AFP National Guideline; and
- (c) otherwise denies the paragraph.

24. As to paragraph 24, it:

- (a) refers to and repeats paragraph 22;
- (b) in relation to the claims made by the applicant on his own behalf, otherwise denies the paragraph; and
- (c) in relation to the claims made by the applicant on behalf of Group Members, otherwise does not know and therefore cannot admit the paragraph.

#### **D.5 Prosecutorial discretion regarding minors – CDPP Youth Prosecution Policy**

25. It admits paragraph 25, except to say that the CDPP was not the only such authority.

26. As to paragraph 26, it:

- (a) admits that at all material times the CDPP had a discretion whether or not to prosecute;
- (b) says that at all material times the CDPP made decisions about whether to prosecute and decisions in the prosecution process pursuant to the DPP Act and its prosecution policy titled "Prosecution Policy of the Commonwealth: Guidelines for the making of decision in the prosecution process" (**Prosecution Policy**);
- (c) says that at all material times the DPP Act and the Prosecution Policy provided for the CDPP to make decisions relating to prosecutions independently;
- (d) will refer at trial to the terms and effect of the Prosecution Policy, as amended from time to time; and
- (e) otherwise denies the paragraph.

27. As to paragraph 27, it:
- (a) admits, subject to reference to the full terms and effect of the Prosecution Policy, that at all material times the Prosecution Policy included provisions in the same or similar terms to those pleaded in paragraph 27;
  - (b) will refer at trial to the full terms and effect of the Prosecution Policy, as amended from time to time; and
  - (c) otherwise denies the paragraph.
28. As to paragraph 28, it:
- (a) admits that at all material times it was the practice of the CDPP to apply the Prosecution Policy when making decisions relating to prosecutions; and
  - (b) otherwise denies the paragraph.

#### **D.6 Youth People Smuggling Policy**

29. As to paragraph 29, it:
- (a) as to bail, says that:
    - (i) at all material times, the CDPP's practice with respect to bail was informed by relevant bail legislation regarding bail category and risk;
    - (ii) at all material times until approximately June 2011, the CDPP's practice was to oppose bail for defendants charged with people smuggling offences;
    - (iii) from 28 June 2011 until approximately November 2011, where the defendant in a people smuggling matter disputed that they were an adult and provided material to support this or there was otherwise concern that the defendant may not be an adult, the practice of the CDPP was generally not to oppose bail until such time as a court found the person was an adult, though there was some residual discretion to oppose bail where, for example, a person claiming to be a child was clearly not a child;
    - (iv) in November 2011, a practice was implemented to write to all legal representatives of defendants who claimed to be juveniles but who had not applied for bail informing them of the CDPP's position not to oppose bail for persons claiming to be juveniles; and
    - (v) from approximately April 2011, the AFP's position with respect to bail, was to request the granting of bail to those defendants who challenged that they were over the age of 18 years old, pending determination of age by a court;

- (b) as to prosecution:
  - (i) repeats paragraphs 26 – 28 above;
  - (ii) says that, relevantly, from late 2010, it was the CDPP’s practice only to prosecute minors with people smuggling offences in exceptional circumstances on the basis of their significant involvement in a people smuggling venture or their involvement in multiple ventures;
  - (iii) subject to referring to its full terms and effect at trial, says that a Minute from the AFP National Manager Crime Operations, dated 25 May 2010, titled ‘People Smuggling – Policy with respect to Prosecution of Juveniles’ stated that:
    - A. prosecution of juvenile crew members of SIEVs for people smuggling related offences contained within the Migration Act will typically not be in the public interest;
    - B. regard must be had to the Prosecution Policy, particularly sections 2.10 and 2.16; and
    - C. there will be exceptional circumstances where prosecution of juveniles might be appropriate, including where a juvenile is the master of the vessel, where a juvenile has committed some other act of facilitation other than the crewing of the boat or where the juvenile had previously crewed another SIEV; and
- (c) otherwise denies the paragraph.

30. As to paragraph 30, it repeats paragraph 29 above and:

- (a) in relation to the claims made by the applicant on his own behalf, otherwise denies the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of Group Members, otherwise does not know and cannot admit the paragraph.

## **E. DETENTION AND RELATED EVENTS**

### **E.1 Apprehension and processing**

30A. As to the whole of section E, and the following sections in the SOC, the allegations pleaded on behalf of Group Members claims lack any particulars and accordingly the respondent does not know and cannot admit those allegations, and cannot otherwise plead to those allegations until they have been properly pleaded and particularised.

31. As to paragraph 31, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:



- (i) does not know and therefore cannot admit sub-paragraph (a);
    - (ii) does not know and therefore cannot admit sub-paragraph (b);
    - (iii) does not know and therefore cannot admit sub-paragraph (c);
    - (iv) does not know and therefore cannot admit sub-paragraph (d); and
  - (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.
32. It does not know and therefore cannot admit paragraph 32.
33. As to paragraph 33, it:
- (a) in relation to the claims made by the applicant on his own behalf:
    - (i) does not know and therefore cannot admit sub-paragraph (a);
    - (ii) admits that, when SIEV 86 was intercepted, no adult on board identified themselves as the applicant's guardian, and the applicant did not claim that any adult on board was his guardian, and otherwise does not know and therefore cannot admit sub-paragraph (b); and
  - (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
34. As to paragraph 34, it:
- (a) in relation to the claims made by the applicant on his own behalf:
    - (i) says that SIEV 86, on which the applicant was a crew member, was intercepted at 12 04S 122 55E, within Australia's territorial sea around Ashmore Reef, by the Royal Australian Navy, and otherwise denies sub-paragraph (a);
    - (ii) admits that SIEV 86 was intercepted by the Royal Australian Navy and the applicant was later transferred to HMAS Armidale controlled by the respondent, and otherwise denies sub-paragraph (b);
    - (iii) admits sub-paragraph (c) and says that the applicant was brought to Christmas Island on 24 December 2009; and
  - (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
35. As to paragraph 35, it:
- (a) in relation to the claims made by the applicant on his own behalf:

- (i) admits sub-paragraph (a);
  - (ii) denies sub-paragraph (b); and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

## **E.2 Christmas Island Detention**

36. As to paragraph 36, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph and says that the applicant was detained at Christmas Island from 24 December 2009; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

## **E.3 Biodata Forms and DIAC Entry Interviews**

37. As to paragraph 37, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph and says that the applicant was provided with a Biodata Form on 24 December 2009; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

38. As to paragraph 38, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

39. As to paragraph 39, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph and says that the applicant completed and signed the Biodata Form on 24 December 2009; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

40. As to paragraph 40, it:

- (a) in relation to the claims made by the applicant on his own behalf, says that in the Biodata Form the applicant gave a date of birth of 12 October 1993 which, if

correct, would have made him under 18 years of age at the date of executing the Biodata Form, and otherwise denies the paragraph; and

- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

41. As to paragraph 41, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

42. As to paragraph 42, it:

- (a) in relation to the claims made by the applicant on his own behalf, subject to reference to the full terms and effect of the DIAC Entry Interview conducted with the applicant:
  - (i) says that in the DIAC Entry Interview the applicant stated that his date of birth was 12 October 1993 which, if correct, was consistent with him being under the age of 18 and otherwise admits sub-paragraph (a);
  - (ii) admits sub-paragraph (b);
  - (iii) admits sub-paragraph (c); and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

43. As to paragraph 43, it:

- (a) says that paragraph 43 is rolled up, unclear and inadequately particularised, and is liable to be struck out as likely to cause prejudice, embarrassment and delay in the proceeding; and
- (b) under cover of that objection, in relation to the claims made by the applicant on his own behalf:
  - (i) admits that in his Biodata Form and DIAC Entry Interview, the applicant provided information to the respondent's officers purportedly about his circumstances, including stating that his date of birth was 12 October 1993 which, if correct, was consistent with him being under the age of 18;
  - (ii) admits that in his DIAC Entry Interview, the applicant provided information to the respondent's officers which purported to be about how he came to be on SIEV 86;

- (iii) will refer at trial to the full terms and effect of the Biodata Form and DIAC Entry Interview; and
    - (iv) otherwise denies the paragraph; and
  - (c) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
- 44. As to paragraph 44, it:
  - (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
  - (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
- 45. As to paragraph 45, it:
  - (a) in relation to the claims made by the applicant on his own behalf:
    - (i) in relation to sub-paragraph (a):
      - A. says that in his Biodata Form and DIAC Entry Interview the applicant provided information to the respondent which purported to be to the effect that his date of birth was 12 October 1993;
      - B. will refer at trial to the full terms and effect of the Biodata Form and DIAC Entry Interview; and
      - C. otherwise denies sub-paragraph (a);
    - (ii) admits sub-paragraph (b) and says further that it did not have evidence which determined whether the applicant was over or under 18 years old; and
  - (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
- 46. As to paragraph 46, it:
  - (a) in relation to the claims made by the applicant on his own behalf:
    - (i) admits that it knew that the applicant had provided information in his DIAC Entry Interview which was consistent with him being a person of Indonesian national origin and otherwise denies sub-paragraph (a)(i);
    - (ii) admits sub-paragraph (a)(ii)
    - (iii) admits sub-paragraph (a)(iii);

- (iv) denies sub-paragraph (a)(iv);
  - (v) denies sub-paragraph (a)(v);
  - (vi) admits that it knew that the applicant had provided information in his DIAC Entry Interview which was consistent with him having been born and raised in Indonesia and otherwise denies sub-paragraph (a)(vi);
  - (vii) denies sub-paragraph (a)(vii);
  - (viii) denies sub-paragraph (a)(viii);
  - (ix) admits sub-paragraph (a)(ix);
  - (x) denies sub-paragraph (a)(x);
  - (xi) admits sub-paragraph (a)(xi);
  - (xii) admits sub-paragraph (b) and says further that DIAC did not have evidence that determined whether the applicant was over or under 18 years of age; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

**E.4 DIAC Non-Removal and Non-Assistance Acts**

47. As to paragraph 47, it:

- (a) in relation to the claims made by the applicant on his own behalf, denies the paragraph and says further that:
  - (i) when the applicant was on Christmas Island, he was an unlawful non-citizen in an excised offshore place ~~and s 189(3) of the Migration Act authorised his detention;~~
  - (ii) when the applicant was on Christmas Island, officers knew or reasonably suspected that the applicant was an unlawful non-citizen, and detained the applicant under s 189(3) of the Migration Act;

**PARTICULARS**

The officers who knew or reasonably suspected that the applicant was an unlawful non-citizen and detained the applicant within the meaning of the Migration Act while the applicant was on Christmas Island included Craig Barnsley (relevantly from approximately 19 December 2009 to approximately 13 January 2010);

- (iii) by reason of the matters in (i) and (ii) above, the applicant's detention on Christmas Island was authorised by s 189(3) and then required by s 196(1) of the Migration Act;
- (ii) (iv) when the applicant was transferred to the Australian mainland on 13 January 2010, he was an unlawful non-citizen in the migration zone (other than an excised offshore place), and s 189(1) of the Migration Act authorised and required his detention;
- (v) at all times after being brought to the Australian mainland on 13 January 2010 up until, relevantly, 30 March 2010, officers who detained the applicant within the meaning of the Migration Act knew or reasonably suspected that the applicant was an unlawful non-citizen;

### **PARTICULARS**

The officers who knew or reasonably suspected that the applicant was an unlawful non-citizen and detained the applicant within the meaning of the Migration Act included the following:

1. Craig Barnsley (from approximately 19 December 2009 to approximately – 30 March 2010);
2. Julie Furby (from approximately 13 January 2010 to approximately 28 March 2010);
3. Gregory Moore (from approximately 15 January 2010 to approximately 25 January 2010);
4. Rosaleen Mitchell (from approximately 27 January 2010 to approximately 12 February 2010);
5. Sharon McKenzie (from approximately 25 March 2010 to approximately 30 March 2010).

- (vi) by reason of the matters in (iv) and (v) above, the applicant's detention on the Australian mainland was authorised and required by s 189(1) and s 196(1) of the Migration Act;
- (vii) further or in the alternative to (i)-(vi) above, by reason of the matters pleaded in (viii)-(x) below, the applicant's detention was at all relevant times authorised and required by s 189(1) or s 189(3) and s 196(1) of the Migration Act in conjunction with s 250 of the Migration Act.
- (iii) (viii) further, by the time of the DIAC Entry Interview the applicant was able to be detained pursuant to ss 189 and 250 of the Migration Act because:
- A. the applicant was a non-citizen who had been brought to the migration zone, within the meaning of s 250(1)(a) of the Migration Act;

by the time of the time of the DIAC Entry Interview the applicant was a non-citizen who had travelled, or was brought, to the migration zone;

## PARTICULARS

The applicant had been brought to the migration zone at Christmas Island on 24 December 2009.

~~B. — it was open to an authorised officer to believe on reasonable grounds that the applicant had been on board a vessel when it was used in connection with the commission of an offence against a law in force in the whole or any part of Australia, within the meaning of s 250(1)(b) of the Migration Act;~~

(ix) during the whole of the period from the time of the DIAC Entry Interview until 30 March 2010, an authorised officer believed on reasonable grounds that the applicant had been on board a vessel when it was used in connection with the commission of an offence against a law in force in the whole or any part of Australia, within the meaning of s 250(1)(b) of the Migration Act;

## PARTICULARS

~~It was open to~~ Relevantly, from 24 December 2009 until 30 March 2010, Craig Barnsley, who was an authorised officer, ~~to~~ believed on reasonable grounds that the applicant had been on board the vessel SIEV 86 when it was used in connection with the commission of an offence against s 232A of the Migration Act (organising or facilitating the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more non-citizens without a visa).

In addition to the applicant and other crew, SIEV 86 was carrying 55 non-citizens without a visa claiming to be from Afghanistan.

~~C. — by reason of the matters pleaded in sub-paragraphs (A) and (B) above, the applicant:~~

(x) by reason of the matters pleaded in sub-paragraphs (viii) and (ix) above, the applicant:

(1) A. ~~was capable of being~~ a suspect within the meaning of s 250(1) of the Migration Act;

(2) B. ~~by operation of s 250(2) of the Migration Act, any officer who in fact detained the applicant under s 189(1) and s 189(3) was deemed to hold the suspicion described in s 189(1) and s 189(3), was able to be detained under s 189 of the Migration Act;~~

C. ~~by operation of s 250(3) of the Migration Act, any obligation under s 198(2) of the Migration Act in respect of the applicant was suspended and the applicant could be kept in immigration detention for:~~

~~(3)~~ pursuant to ~~s 250(3)~~ of the Migration Act, could be kept in immigration detention for:

I. such period as was required for:

1. the making of a decision whether to prosecute the suspect in connection with the offence concerned; or
2. instituting such a prosecution; and

II. if such a prosecution was instituted within that period—such further period as was required for the purposes of the prosecution;

~~(iv)~~ (xi) further, on 19 January 2010, the AFP applied for a Criminal Justice Stay Certificate in respect of the applicant; and

~~(v)~~ (xii) further, on 25 January 2010, a delegate of the Commonwealth Attorney-General issued a Criminal Justice Stay Certificate in respect of the applicant, pursuant to s 147 of the Migration Act;

~~(vi)~~ (xiii) by reason of the matters pleaded in sub-paragraph ~~(v)~~ (xii) above:

- A. by operation of s 150 of the Migration Act, the applicant was not to be removed or deported and any obligation under s 198(2) of the Migration Act in respect of the applicant was suspended;
- B. by operation of s 152 of the Migration Act, the Criminal Justice Stay Certificate did not limit any power under the Migration Act relating to the detention of the applicant;
- C. by operation of s 154 of the Migration Act, an officer is not liable to any civil action for doing in good faith, or failing in good faith to do, any act or thing for the purpose of exercising a power under the Migration Act to keep the applicant in immigration detention;

~~(vii)~~ (xiv) further, on 7 May 2010, the Acting Director, Character Operations Section, Program Integrity Risks Branch, of DIAC issued the applicant with a criminal justice stay visa (**Criminal Justice Stay Visa**) under s 159(2) of the Migration Act;

~~(viii)~~ (xv) by reason of the matters pleaded in sub-paragraph ~~(vii)~~ (xiv) above, and by operation of ss 13(1) and 161(2)(a) of the Migration Act, on 7 May 2010, the applicant became a lawful non-citizen; and



~~(ix)~~ (xvi) further, at all material times whilst the applicant was being detained pursuant to s 189 of the Migration Act, the applicant was required to be detained in immigration detention pursuant to s 196(1) of the Migration Act until he was removed from Australia under s 198 or s 199, deported under s 200 or granted a visa; and

(b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

48. As to paragraph 48, it:

(a) in relation to the claims made by the applicant on his own behalf, denies the paragraph; and

(b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

49. As to paragraph 49, it:

(a) in relation to the claims made by the applicant on his own behalf:

(i) as to sub-paragraph (a):

A. admits the applicant was not removed from Australia after his DIAC Entry Interview; and

B. otherwise denies the sub-paragraph;

(ii) as to sub-paragraph (b):

A. subject to sub-paragraph (B) below, admits that, following his DIAC Entry Interview, the applicant was not assisted by the respondent to make a written request to the Minister to be removed under s 198(1) of the Migration Act;

B. says further that:

(1) on 24 December 2009, the applicant indicated to DIAC in writing that he did not want DIAC to notify the Indonesian Consulate that the applicant was in immigration detention, that he did not want to contact a consular officer and that he did not want a consular officer to visit him;

### **PARTICULARS**

This was set out in a DIAC Form 1360 Request for consular access for people in immigration detention signed by the applicant on 24 December 2009. A copy of this document is in the possession of the respondent's solicitors and may be inspected by appointment.

- (2) on 20 January 2010, when being interviewed by the AFP, the applicant told the AFP that he did not want to speak to a solicitor;

**PARTICULARS**

The interview was conducted by Federal Agent Elizabeth Leigh and Federal Agent Liam Sherman on 20 January 2010 at Berrimah House, Darwin.

- (3) on 30 March 2010, the applicant received legal advice from a lawyer before declining to participate in a tape-recorded interview with the AFP and being arrested and charged under s 232A of the Migration Act;

**PARTICULARS**

The applicant received legal advice from lawyer George Christou.

- (4) on 31 March 2010, the applicant was represented by a lawyer at a hearing at the Magistrates Court of Western Australia; and

**PARTICULARS**

The applicant was represented by lawyer David McKenzie.

- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

**E.5 DIAC Non-Investigation Act**

50. As to paragraph 50, it:

- (a) in relation to the claims made by the applicant on his own behalf:
- (i) repeats paragraphs 16 to 18 above;
  - (ii) says that DIAC referred the applicant's case to the AFP by 8 January 2010 which undertook the age assessment processes described in paragraphs 58 and 74(b) below;
  - (iii) says that the applicant was treated as a minor while in immigration detention;
  - (iv) says that on 3 February 2010, DIAC case managers met with the applicant during which meeting:

- A. the DIAC case managers advised the applicant that the wrist x-ray results indicated that he was 19 and that while he would be treated as a minor while in immigration detention, the AFP would treat him as an adult;
- B. the applicant was asked if he was able to obtain any documents from home that would prove his age;
- C. the applicant stated that he may have but he could not get it sent to DIAC;
- D. a DIAC case manager suggested ways in which they could assist the applicant to get in touch with his family, however, the applicant expressed that he did not want his mother to know he was here as she would be upset;
- E. when a DIAC case manager attempted to pursue alternative ways of obtaining documents the applicant said he just wanted to leave it; and

#### **PARTICULARS**

The meeting was with DIAC case managers Rosaleen Mitchell and Florent Alcidi on 3 February 2010 at Berrimah House, Northern Territory.

- (v) otherwise denies the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

#### **E.6 Transfer to AFP custody**

51. As to paragraph 51, it:

- (a) objects to the paragraph on the grounds that it lacks proper particulars, fails to disclose a reasonable cause of action and is likely to cause prejudice, embarrassment or delay in the proceeding;

#### **PARTICULARS**

*Page 33 of the An age of uncertainty - Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, July 2012 of the Australian Human Rights Commission (AHRC) (Age of Uncertainty Report) does not say or suggest that at all material times during the Period, it was the practice of the respondent to transfer persons in immigration detention suspected of an offence of people smuggling under s 232A of the Migration Act to the AFP's custody for the purposes of investigation.*

- (b) under cover of that objection:

- (i) in the case of the applicant, repeats paragraph 53(a)(iii) below and otherwise denies the paragraph; and
  - (ii) says that, in the case of the other Group Members, whether or not the respondent in practice took or did not take the steps referred to in this paragraph cannot be answered without reference to the individual circumstances of each Group Member, and repeats paragraph 30A above; and
  - (c) otherwise denies the paragraph.
52. As to paragraph 52, the respondent:
- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
  - (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.
53. As to paragraph 53, it:
- (a) in relation to the claims made by the applicant on his own behalf:
    - (i) repeats paragraph 51 above;
    - (ii) admits sub-paragraph (a) and says that on 13 January 2010 the applicant was transferred from Christmas Island to Berrimah House in Darwin;
    - (iii) as to sub-paragraph (b), says that on 20 January 2010:
      - A. the applicant was interviewed at Berrimah House by AFP officers and gave his consent to carry out a wrist x-ray procedure pursuant to s 3ZQC(1) of the *Crimes Act 1914* (Cth) (**Crimes Act**);
      - B. pursuant to that consent, the applicant was subsequently conveyed to the Royal Darwin Hospital to undergo the wrist x-ray procedure in the presence of AFP officers and following the wrist x-ray, was returned to Berrimah House;
      - C. during the interview and procedure pleaded in sub-paragraphs (A) and (B) above, the applicant remained in immigration detention under the Migration Act; and

#### **PARTICULARS**

Pursuant to the definitions of “immigration detention” and “officer” in s 5(1) of the Migration Act, the applicant remained in immigration detention when in the company of and restrained by members of the AFP.

- D. otherwise denies the sub-paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Investigation Sub-Group Members, repeats paragraph 30A above.

54. As to paragraph 54, it:

- (a) in relation to the claims made by the applicant on his own behalf:
  - (i) repeats paragraphs 47 and 53 above;
  - (ii) ~~says that the Transfer Detention was authorised and required by s 189(1) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and was for the purpose of removal of the applicant from Australia;~~  
says that:
    - A. the Transfer Detention was authorised and required by s 189(1) and s 196(1) of the Migration Act;
    - B. further or in the alternative to sub-paragraph (A) above, the Transfer Detention was authorised and required by s 189(1) and s 196(1) of the Migration Act in conjunction with s 250(3)(a) of the Migration Act; and
    - C. the Transfer Detention was for the purpose of removal of the applicant from Australia;
  - (iii) says that when the applicant was in immigration detention in the company of and restrained by AFP officers on 20 January 2010 as described in paragraph 53(a)(iii) above, that detention was authorised and required by s 189(1) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and was for the purpose of removal of the applicant from Australia; and
  - (iv) otherwise denies the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Investigation Sub-Group Members, repeats paragraph 30A above.

### **E.7 Wrist X-Ray**

55. As to paragraph 55, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

56. As to paragraph 56, it:

- (a) objects to the paragraph on the grounds that it lacks proper particulars, fails to disclose a reasonable cause of action and is likely to cause prejudice, embarrassment or delay in the proceeding;

#### **PARTICULARS**

Pages 33, 235 and 236 of the Age of Uncertainty Report do not say or suggest that at all material times until at least 8 July 2011 it was the practice of the AFP to take or not to take the steps alleged in this paragraph.

- (b) under cover of that objection:

- (i) says that:

- A. s 3ZQB(1) of the Crimes Act permitted an investigating official to arrange for the carrying out of a prescribed procedure in respect of a person if:

- (1) an investigating official suspected, on reasonable grounds, that a person may have committed a Commonwealth offence; and
- (2) it was necessary to determine whether or not the person is, or was, at the time of the alleged commission of the offence, under 18 because that question is relevant to the rules governing the person's detention, the investigation of the offence or the institution of criminal proceedings;

- B. the investigating official obtained, in accordance with s 3ZQC, the requisite consents to the carrying out of the procedure in respect of the person, or a magistrate ordered, on application by the investigating official, the carrying out of the procedure in respect of the person; and

- C. the prescribed procedure specified in s 6C of the *Crimes Regulations 1900* (Cth) was a radiograph of a hand and wrist;

- (ii) says that, in the case of the applicant:

- A. as to sub-paragraph (a):

- (1) on 20 January 2010 the AFP interviewed the applicant and in the course of the interview sought and received the consent of the applicant pursuant to s 3ZQC of the Crimes Act for a wrist x-ray procedure pursuant to s 3ZQB for the purpose of

determining whether or not the applicant was under 18; and

(2) on 28 January 2010 the AFP received an expert radiological analysis from Dr Glenn Drogemuller of the Radiology Department of Royal Darwin Hospital based on the wrist x-ray procedure;

B. as to sub-paragraph (b), admits that in the course of the interview, the AFP asked the applicant his date of birth;

C. as to sub-paragraph (c), admits that the AFP did not otherwise conduct an Age Determination Assessment for the applicant, as defined in the SOC;

(iii) says that, in the case of the other Group Members, whether or not the AFP in practice took or did not take the steps referred to in this paragraph cannot be answered without reference to the individual circumstances of each Group Member, and repeats paragraph 30A above; and

(c) otherwise denies the paragraph.

57. As to paragraph 57, it:

(a) repeats paragraph 56 above;

(b) in relation to the claims made by the applicant on his own behalf:

(i) as to sub-paragraph (a):

A. says that during the applicant's Wrist X-Ray Interview, AFP officers sought and received the applicant's consent to the Wrist X-Ray Procedure;

B. admits that that consent was sought and received in the absence of a guardian but says that it was sought and received in the presence of an independent adult person who was capable of representing the interests of the applicant and who, as far as was practicable in the circumstances, was acceptable to the applicant, pursuant to s 3ZQC(1)(b)(ii) of the Crimes Act; and

#### **PARTICULARS**

The independent adult person was Liz Pierre.

C. otherwise denies the sub-paragraph;

#### **PARTICULARS**

The applicant and the independent adult person present at the interview each signed a document titled 'Crimes Act 1914 (Cth), Section 3ZQC(1) Consent to Carry Out a Prescribed Procedure (Wrist X-Ray)'.

- (ii) as to sub-paragraph (b):
  - A. repeats sub-paragraph 56(b)(ii) above; and
  - B. otherwise denies the sub-paragraph; and

(c) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

58. As to paragraph 58, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

59. As to paragraph 59, it:

(a) in relation to the claims made by the applicant on his own behalf:

(i) repeats paragraphs 47 and 53 above and says that:

- A. the Wrist X-Ray Procedure was for the purpose of determining whether the applicant was under 18, pursuant to s 3ZQB(1)(b) of the Crimes Act;
- B. ~~the detention of the applicant during the Wrist X-Ray Procedure as described in paragraph 53(a)(iii) above, was authorised and required by s 189(1) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and was for the purpose of removal of the applicant from Australia; and~~

the Wrist X-Ray Procedure took place when the applicant was being lawfully detained;

C. while the applicant underwent the Wrist X-Ray Procedure his detention remained for the purpose of removal; and

(ii) otherwise denies the paragraph; and

(b) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

60. As to paragraph 60, it:



- (a) in relation to the claims made by the applicant on his own behalf, repeats paragraph 53(a)(iii) and 54(a)(iii) above and otherwise admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

61. As to paragraph 61, it:

- (a) in relation to the claims made by the applicant on his own behalf, subject to reference to the full terms and effect of report of Dr Drogemueller, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Wrist X-Ray Sub-Group Members, repeats paragraph 30A above.

### **E.8 Subsequent events**

62. Subject to reference at trial to the full terms and effect of Dr Drogemueller's report, it admits paragraph 62 and repeats paragraph 47(a)(iv) to (vi) above.

63. As to paragraph 63, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph and says that on 28 March 2010 the applicant was transferred from Berrimah House in Darwin to Ascot Quays in Perth; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

64. As to paragraph 64, it:

- (a) in relation to the claims made by the applicant on his own behalf, does not know and therefore cannot admit the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

65. As to paragraph 65, it:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b);
- (c) denies sub-paragraph (c) and says further that at the time Agent Eade signed the Prosecution Notice:
  - (i) says she had observed that the date of birth entered on the AFP's PROMIS case management system was 12 October 1990; and

- (ii) says she had been provided with the report of Dr Drogemuller referred to at paragraph 61 above, which was consistent with a date of birth of 12 October 1990.

66. As to paragraph 66, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Arrest Sub-Group Members, repeats paragraph 30A above.

67. As to paragraph 67, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph and says that:
  - (i) after the applicant was remanded in custody by the Magistrates Court of Western Australia on 31 March 2010, he was transferred to and held on remand at Hakea Prison;
  - (ii) at various times in the course of 2010, the applicant was held on remand at either Hakea Prison or Albany Regional Prison; and
- (b) in relation to the claims made by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

68. Except to say that the respondent issued the applicant with a Criminal Justice Stay Visa under s 159(2) of the Migration Act, it admits paragraph 68 and repeats paragraphs 47(a)(vii) and (viii) above.

69. As to paragraph 69, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

70. It admits paragraph 70.

### **E.9 Applicant's documentary evidence**

71. As to paragraph 71, it:

- (a) admits that on 24 August 2010, the Indonesian Consulate in Western Australia faxed to DIAC a copy of a document purporting to be the applicant's birth certificate (**Purported Birth Certificate**); and
- (b) otherwise does not know and therefore cannot admit paragraph 71.

72. As to paragraph 72, it:
- (a) admits that the Purported Birth Certificate stated that the applicant was born on 12 January 1996;
  - (b) says that, if correct, this would have made the applicant 13 years old at the date he was apprehended; and
  - (c) otherwise does not know and therefore cannot admit the paragraph.
73. As to paragraph 73, it:
- (a) repeats paragraph 71;
  - (b) admits that later on 24 August 2010, DIAC provided a copy of the Purported Birth Certificate to the CDPP; and
  - (c) otherwise does not know and therefore cannot admit the paragraph.
74. As to paragraph 74, it:
- (a) repeats paragraph 71;
  - (b) says that, on 2 August 2010, after the future provision of the Purported Birth Certificate had been foreshadowed by counsel for the applicant at a mention before the District Court of Western Australia on 30 July 2010, but before the Purported Birth Certificate was provided, the CDPP made a request to the AFP that once the Purported Birth Certificate was received, the AFP make enquiries through the AFP liaison officer in Jakarta regarding:
    - (i) the agency that provided the certificate, and the process by which births were registered;
    - (ii) when, and by whom, and in what circumstances the birth was first registered;
    - (iii) when, by whom and in what circumstances the birth certificate was obtained; and
  - (c) otherwise denies the paragraph.
75. As to paragraph 75, it:
- (a) as to sub-paragraph (a):
    - (i) repeats paragraph 74 above;
    - (ii) says that:

- A. the CDPP did not, and was not obliged to, simply accept the Purported Birth Certificate at face value;
  - B. the Purported Birth Certificate appeared to have been created on 9 August 2010;
  - C. the Purported Birth Certificate was incongruous with the skeletal age referred to in the report of Dr Drogemuller referred to in paragraph 61 above;
  - D. the CDPP was seeking a further expert report from radiologist Dr Vincent Low; and
- (iii) otherwise denies the sub-paragraph;
- (b) as to sub-paragraph (b):
- (i) repeats paragraphs 13 and 74 and sub-paragraph (a) above;
  - (ii) says that, following receipt of the Purported Birth Certificate, age assessment of the applicant, within the meaning of General Comment 6, was continuing; and
  - (iii) otherwise denies the sub-paragraph;
- (c) as to sub-paragraph (c)(i):
- (i) admits that, following receipt of the Purported Birth Certificate, the CDPP did not withdraw the indictment;
  - (ii) repeats paragraphs 27 and 28 above; and
  - (iii) otherwise denies the sub-paragraph; and
- (d) admits sub-paragraph (c)(ii) and repeats sub-paragraphs 47(a) above.

76. As to paragraph 76, it:

- (a) admits that on or about 12 October 2010 the Indonesian National Police provided a document which purported to be a legalised copy of the applicant's birth certificate to the AFP liaison officer in Denpasar (**Purported Legalised Birth Certificate**); and
- (b) otherwise does not know and therefore cannot admit the paragraph.

77. As to paragraph 77, it:

- (a) repeats paragraph 76;

- (b) admits that the Purported Legalised Birth Certificate recorded the applicant's date of birth as 12 January 1996; and
- (c) otherwise does not know and therefore cannot admit the paragraph.

78. As to paragraph 78, it:

- (a) repeats paragraph 76; and
- (b) admits that on 20 October 2010, the AFP provided the Purported Legalised Birth Certificate to the CDPP; and
- (c) otherwise does not know and therefore cannot admit the paragraph.

79. As to paragraph 79, it:

- (a) repeats paragraph 76;
- (b) says that the CDPP requested the AFP to source a translated version of the covering letter from the Indonesian National Police;
- (c) says that the Purported Legalised Birth Certificate was relevantly identical to the Purported Birth Certificate and therefore was not separately translated; and
- (d) otherwise denies the paragraph.

80. As to paragraph 80, it:

- (a) repeats paragraph 79;
- (b) says that a translated version of the covering letter from the Indonesian National Police was provided; and
- (c) otherwise denies the paragraph.

81. As to paragraph 81, it:

- (a) as to sub-paragraph (a):
  - (i) says that:
    - A. the CDPP did not, and was not obliged to, simply accept the Purported Legalised Birth Certificate at face value;
    - B. the Purported Legalised Birth Certificate appeared to have been created on 9 August 2010;
    - C. the Purported Legalised Birth Certificate was incongruous with the skeletal age referred to in the report of Dr Drogemuller referred to in paragraph 61 above;

- D. on 22 September 2010, the expert report of Dr Low had been provided, which was consistent with the report of Dr Drogemuller;
  - E. the proceeding had been listed for an age determination hearing in the District Court of Western Australia on 8 December 2010; and
- (ii) otherwise denies the sub-paragraph;
- (b) as to sub-paragraph (b):
    - (i) repeats paragraph 13 and sub-paragraph (a) above;
    - (ii) says that, following receipt of the Purported Legalised Birth Certificate, age assessment of the applicant, within the meaning of General Comment 6, was continuing; and
    - (iii) otherwise denies the sub-paragraph;
  - (c) as to sub-paragraph (c)(i):
    - (i) admits that, following the receipt of the Purported Legalised Birth Certificate, the CDPP did not withdraw the indictment;
    - (ii) repeats paragraphs 27 and 28 above; and
    - (iii) otherwise denies the sub-paragraph; and
  - (d) admits sub-paragraph (c)(ii) and repeats sub-paragraphs 47(a) above.

#### **E.10 AFP Non-Investigation Act**

82. As to paragraph 82, it:

- (a) in relation to the claims made by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

83. As to paragraph 83, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

84. As to paragraph 84, it:

- (a) in relation to the claims made by the applicant on his own behalf:
  - (i) admits sub-paragraph (a); and
  - (ii) admits sub-paragraph (b) except to say that the applicant was sentenced to the minimum mandatory sentence pursuant to s 233C(2)(b), not s 236, of the Migration Act;
  - (iii) says further that the applicant's conviction and sentencing followed:
    - A. a contested hearing before the District Court of Western Australia on 8 December 2010 on the question of whether the applicant was at least 18 years old when the offence was committed, at which the applicant was legally represented;
    - B. a decision by Keen DCJ on 22 December 2010 that the applicant was at least 18 years old when the offence was committed; and

#### **PARTICULARS**

*R v Jasmin* [2010] WADC 189 (Keen DCJ)

- C. following that decision, a plea of guilty by the applicant to the charge; and
- (b) in relation to the claims made by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

85. As to paragraph 85, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

#### **E.11 Release and removal**

86. As to paragraph 86, it:

- (a) in relation to the claims made by the applicant on his own behalf, admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

87. It admits paragraph 87.

## **F. SUMMARY OF DETENTION**

88. As to paragraph 88, it:

- (a) in relation to claims made by the applicant on his own behalf:
  - (i) repeats paragraphs 2(b) and (c)(i) and 47(a) above; and
  - (ii) denies the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

89. As to paragraph 89, it:

- (a) admits that the applicant was detained for approximately:
  - (i) 102 days in Immigration Detention;
  - (ii) 780 days in adult detention facilities; and

### **PARTICULARS**

Western Australian Police Perth Watch House, Hakea Prison and Albany Regional Prison.

- (b) otherwise denies the paragraph.

90. As to paragraph 90, it:

- (a) repeats paragraph 88 above; and
- (b) denies the paragraph.

## **G. ABSENCE OF GUARDIAN**

91. As to paragraph 91, it:

- (a) in relation to the claims made by the applicant on his own behalf, repeats paragraphs 49(a)(ii) and 50(a)(iv) above and otherwise admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

## **H. NO ADVICE**

92. As to paragraph 92, it:

- (a) in relation to the claims made by the applicant on his own behalf:



- (i) repeats paragraphs 49(a)(ii)(C) and 50(a)(iv) above;
  - (ii) says that the applicant was legally represented in the proceedings before the District Court of Western Australia, and in subsequent appeal proceedings in 2011 before the Court of Appeal of Western Australia (CACR22/2011); and
  - (iii) otherwise admits the paragraph; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

#### I. RESPONDENT'S KNOWLEDGE OF WRIST X-RAY DEFICIENCIES

93. As to paragraph 93, it:

- (a) objects to the paragraph, pursuant to s 16 of the *Parliamentary Privileges Act 1987* (Cth) (**Parliamentary Privileges Act**), to the extent that it refers (by the cross-reference to the matters pleaded in Section I) to materials covered by parliamentary privilege;
- (b) objects further to the paragraph on the ground that it lacks proper particulars and is likely to cause prejudice, embarrassment or delay in the proceeding;
- (c) under cover of those objections, repeats paragraphs 94 and 95 below; and
- (d) denies the paragraph.

94. As to paragraph 94, it:

- (a) objects to the paragraph, pursuant to s 16 of the *Parliamentary Privileges Act*, on the ground that it refers to material covered by parliamentary privilege; and
- (b) by reason of that objection, denies the paragraph.

95. As to paragraph 95, it:

- (a) objects to the paragraph, pursuant to s 16 of the *Parliamentary Privileges Act*, on the ground that it refers to material covered by parliamentary privilege; and
- (b) by reason of that objection, denies the paragraph.

96. As to paragraph 96, subject to reference at trial to the full terms and effect of the respective decisions:

- (a) admits that certain limitations associated with the Wrist X-ray Analysis were noted in the cases referred to in paragraph; and
- (b) says that there were other decisions between 2000 and 2003 in which courts accepted Wrist X-Ray Analysis.

## PARTICULARS

For example, *R v Jus Balu* (Supreme Court of Northern Territory, 2 November 2000). *R v Roland & Darmawan* [2002] NTSC SC20112892 & 20113890.

97. As to paragraph 97, it:
- (a) repeats paragraphs 98 to 100 below; and
  - (b) otherwise denies paragraph 97.
98. As to paragraph 98, it:
- (a) admits that on 11 June 2010 DIAC made a submission to the then Minister for Immigration and Citizenship in relation to the subject “Assessment of Disputed Minor Claims” (**Submission**);
  - (b) says that the Submission stated that:
    - (i) “[d]etermining the age of a person who claims to be a minor in the absence of documentation or any other objective evidence is difficult and relatively controversial”;
    - (ii) “the question of the means by which to determine whether or not a person is over 18 for the purposes of refugee status determinations is relatively controversial, particularly when it comes to physical evidence such as bone scans and dental examinations”;
    - (iii) “[t]here are at least a couple of cases where age determination on the basis of bone scans has been disputed in Australia”; and
    - (iv) it recommended that the Minister “[a]gree to the proposed pilot approach to assessing disputed minor claims”, which involved interviewing individuals;
  - (c) will refer at trial to the full terms and effect of the Submission; and
  - (d) otherwise denies the paragraph.
99. As to paragraph 99, it:
- (a) admits that between approximately late 2010 and late 2011, detailed discussions about the use of Wrist X-ray Analysis, including its reliability, took place between DIAC and other Commonwealth agencies; and
  - (b) otherwise denies the paragraph.
100. As to paragraph 100, it:
- (a) admits sub-paragraph (a);

- (b) as to sub-paragraph (b):
  - (i) admits that on 5 October 2010, the AFP sent an email to DIAC in which it provided some research that had been undertaken in relation to approaches taken in New Zealand and the United Kingdom in relation to age determination, in particular, in relation to the use of dental x-rays;
  - (ii) says that it was stated in the email that the AFP was still waiting for some further research, but that it appeared the AFP's likely preferred option would be a combination of DIAC's interview and the wrist x-ray;
  - (iii) will refer at trial to the full terms and effect of the email; and
  - (iv) otherwise denies the sub-paragraph;
- (c) save that it will refer at trial to the full terms and effect of the email and says that the email attached the then current "Assessing Age" document on the UK Home Office's website, it admits sub-paragraph (c);
- (d) admits sub-paragraph (d); and
- (e) otherwise denies the paragraph.

## **J. OVERRIDING DISRUPTION OBJECTIVE**

### **J.1 Disruption Objective**

101. It admits paragraph 101.

102. It admits paragraph 102 and says further that:

- (a) the People Smuggling Businesses also:
  - (i) involved transporting persons seeking asylum in Australia from countries other than Indonesia, and
  - (ii) used individuals from countries other than Indonesia to crew boats;
- (b) another primary source of boats was from Sri Lanka; and
- (c) not all People Smuggling Businesses used young, poor and unsophisticated crew.

103. As to paragraph 103, it:

- (a) objects to the paragraph, pursuant to s 16 of the Parliamentary Privileges Act, on the ground that it refers (in the particulars) to material covered by parliamentary privilege; and

- (b) under cover of that objection, admits the paragraph and repeats paragraph 102 above.

104. As to paragraph 104, it:

- (a) objects to the paragraph, pursuant to s 16 of the Parliamentary Privileges Act, to the extent that it refers (by the reference in the particulars to Annexure D) to material covered by parliamentary privilege; and
- (b) under cover of that objection, admits the paragraph and repeats paragraph 102 above.

105. As to paragraph 105, it:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b); and
- (c) except to say that the Ministerial Direction was issued on 1 July 2010, admits sub-paragraph (c).

106. As to paragraph 106, it:

- (a) objects to the paragraph, pursuant to s 16 of the Parliamentary Privileges Act, to the extent that it refers (by the reference to Annexure E) to material covered by parliamentary privilege;
- (b) under cover of that objection, subject to reference at trial to the full terms and effect of the media statements referred to in Annexure E, admits that on the dates specified in Annexure E, the media statements referred to in Annexure E were made by the persons named in them, in relation to the People Smuggling Businesses and the approach taken by the Commonwealth Government, as then constituted, to the issue of the People Smuggling Businesses; and
- (c) otherwise does not know and therefore cannot admit the paragraph.

107. As to paragraph, 107, it:

- (a) repeats paragraph 106 above; and
- (b) otherwise does not know and therefore cannot admit the paragraph.

108. As to paragraph 108, it:

- (a) repeats paragraphs 104 and 106 above;
- (b) admits that people smuggling, the Disruption Objective, and the steps taken, and proposed to be taken, by the Commonwealth Government, as then constituted, to implement the Disruption Objective, was a contested political issue in Australia during the Period; and

(c) otherwise does not know, and therefore cannot admit, the paragraph.

109. It admits paragraph 109.

110. It admits paragraph 110, except to say decisions relating to prosecutions for persons involved in People Smuggling Businesses for offences in connection with that conduct were the subject of the policies and practices referred to in paragraph 26-28 and 29(b) above.

111. As to paragraph 111, it:

- (a) objects to the paragraph, pursuant to s 16 of the Parliamentary Privileges Act, to the extent that it refers (by the reference to Annexure D) to material covered by parliamentary privilege; and
- (b) under cover of that objection:
  - (i) subject to reference to the full terms and effect of the media statements referred to in Annexure D, admits that the media statements contained in Annexure D were made by the persons named in them; and
  - (ii) otherwise denies the paragraph.

112. As to paragraph 112, it:

- (a) repeats paragraphs 104, 110 and 111 above;
- (b) admits that officers of the respondent from DIAC, the AFP and the CDPP were responsible for performing functions, in accordance with relevant legislation and policy, that would contribute to the Deterrence Effect and help fulfil the Disruption Objective; and

#### **PARTICULARS**

- (i) Relevant legislation: Migration Act, Crimes Act and DPP Act.
- (ii) Relevant policy: Paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30 and 105(b) and (c) above are repeated.
- (c) otherwise denies the paragraph.

113. As to paragraph 113, it:

- (a) repeats paragraphs 101 – 112 above;
- (b) admits that it knew of the Disruption Objective and Deterrence Effect; and
- (c) otherwise denies the paragraph.

## **J.2 Pressure in relation to age issues**

114. It denies paragraph 114 and repeats paragraphs 101 – 112 above.

115. It admits paragraph 115, and:

- (a) repeats paragraph 102 above; and
- (b) says further that prosecuting boat crew members from other countries for offences under the Migration Act would also have such an effect.

116. As to paragraph 116, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 14 – 18, 101 – 112 and 114 – 115 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 14 – 15, 22 – 24, 29 – 30, 101 – 112 and 114 – 115 above; and
- (c) denies sub-paragraph (c) and repeats paragraphs 14 – 15, 25 – 30, 101 – 112 and 114 – 115 above.

## **J.3 Pressure in relation to removal**

117. As to paragraph 117, it says that at material times removing from Australia person apprehended on suspicion of people smuggling might or might not be an act of the kind described in sub-paragraphs 117(a) and/or (b), depending on the circumstances of the individual case, and otherwise denies the paragraph.

118. It denies paragraph 118 and repeats paragraph 101 – 112 above.

## **J.4 Pressure in relation to removal assistance**

119. As to paragraph 119, it says that at material times assisting persons apprehended on suspicion of people smuggling to make a request of the kind described in that paragraph might or might not be an act of the kind described in sub-paragraphs 119(a) and/or (b), depending on the circumstances of the individual case, and otherwise denies the paragraph.

120. It denies paragraph 120 repeats paragraphs 101 – 112 above.

## **J.5 Pressure in relation to advice**

121. It denies paragraph 121.

122. It denies paragraph 122 and repeats paragraphs 101 – 112 and 121 above.

## **K. UNLAWFULNESS OF IMMIGRATION DETENTION**

123. As to paragraph 123, it:

- (a) admits that the Immigration Detention of the applicant and Group Members would be lawful if it were for one of the purposes set out in paragraph 123 of the SOC; but
- (b) says that those were not the only purposes for which a person could be lawfully detained;
- (c) repeats paragraphs 9(m) and 47 above; and
- (d) otherwise denies the paragraph.

124. It denies paragraph 124.

125. As to paragraph 125, it:

- (a) in relation to the claims made by the applicant on his own behalf:
  - (i) repeats sub-paragraph 49(a)(i); and
  - (ii) otherwise denies the paragraph; and
  - (iii) says further, if (which is denied) the applicant was not removed as soon as reasonably practicable, that state of affairs would not render detention unlawful because s 189 and s 196(1) of the Migration Act authorised and required the applicant's detention; and
- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

126. As to paragraph 126, it:

- (a) says that paragraph 48(b) of the SOC does not make the allegation said to be made in paragraph 126 of the SOC;
- (b) in relation to the claims made by the applicant on his own behalf, otherwise:
  - (i) admits sub-paragraph (a);
  - (ii) admits sub-paragraph (b); and
- (c) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

127. As to paragraph 127, it:

- (a) in relation to the claims made by the applicant on his own behalf:
  - (i) denies sub-paragraph (a)(i);

(ii) ~~as to sub-paragraph (a)(ii), repeats paragraph 47 above, says that the Christmas Island Detention was authorised by s 189(3) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and was for the purpose of removal of the applicant from Australia, and otherwise denies the sub-paragraph;~~

as to sub-paragraph (a)(ii):

- A. repeats paragraph 47 above;
- B. says that the Christmas Island Detention was authorised and required by s 189(3) and s 196(1) of the Migration Act;
- C. further or in the alternative to sub-paragraph (B) above, says that the Christmas Island Detention was authorised and required by s 189(3) and s 196(1) in conjunction with s 250(3)(a) of the Migration Act;
- D. says that the Christmas Island Detention was for the purpose of removal of the applicant from Australia; and
- E. otherwise denies the sub-paragraph;

(iii) ~~as to sub-paragraph (b), repeats paragraph 47 above, says that the Transfer Detention, the Investigation Detention and the X-Ray Detention (as those terms are defined in the SOC, without admitting the accuracy of those definitions) were authorised and required by s 189(1) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and were for the purpose of removal of the applicant from Australia, and otherwise denies the sub-paragraph and repeats paragraph 53 above;~~

as to sub-paragraph (b):

- A. repeats paragraph 47 above;
- B. says that the Transfer Detention, the Investigation Detention and the X-Ray Detention (as those terms are defined in the SOC, without admitting the accuracy of those definitions) were authorised and required by s 189(1) and s 196(1) of the Migration Act;
- C. further or in the alternative to sub-paragraph (B) above, says that the Transfer Detention, the Investigation Detention and the X-Ray Detention (as those terms are defined in the SOC, without admitting the accuracy of those definitions) were authorised and required by s 189(1) and s 196(1), in conjunction with s 250(3)(a) of the Migration Act;
- D. says that the Transfer Detention, the Investigation Detention and the X-Ray Detention (as those terms are defined in the



SOC, without admitting the accuracy of those definitions) was for the purpose of removal of the applicant from Australia; and

E. otherwise denies the sub-paragraph;

- (iv) ~~as to sub-paragraph (c), repeats paragraph 47 above, and says that the Regional Immigration Detention was authorised and required by s 189(1) and s 196(1) of the Migration Act, in conjunction with s 250(3)(a), and was for the purpose of removal of the applicant from Australia, and otherwise denies the sub-paragraph; and~~

as to sub-paragraph (c):

A. repeats paragraph 47 above;

B. says that the Regional Immigration Detention was authorised and required by s 189(1) and s 196(1) of the Migration Act;

C. further or in the alternative to sub-paragraph (B) above, says that the Regional Immigration Detention was authorised and required by s 189(1) and s 196(1) in conjunction with s 250(3)(a) of the Migration Act;

D. says that the Regional Immigration Detention was for the purpose of removal of the applicant from Australia; and

E. otherwise denies the sub-paragraph; and

- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above.

128. As to paragraph 128, it:

- (a) in relation to the claims made by the applicant on his own behalf:

- (i) denies sub-paragraph (a), repeats paragraphs 54(a)(ii) and (iii), 59(a)(i)(B) and 127(a)(ii), (iii) and (iv) above, and says that the Immigration Detention since the date of the DIAC Entry Interview was for the purpose of removal of the applicant from Australia;
- (ii) denies sub-paragraph (b);
- (iii) denies sub-paragraph (c) and repeats paragraphs 9(m) and 47 above; and
- (iv) says further that if, which is denied, during the Immigration Detention, the respondent was obliged to but did not remove the applicant under s 198(1) or s 198(2) of the Migration Act, this did not render the Immigration Detention unlawful;

- (b) in relation to the claims made by the applicant on behalf of other Group Members, repeats paragraph 30A above;
- (c) says further that the claims made by the applicant on his own behalf (which are denied) are statute-barred by operation of:
  - (i) s 16(d) of the *Limitation Act 2005* (WA) (3 years); and/or
  - (ii) s 12(b) of the *Limitation Act 1981* (NT) (3 years); and/or
  - (iii) cognate provisions in other State and/or Territory statutes of limitation, to the extent applicable; and
- (d) says further that the claims made by the applicant on behalf of Group Members are also subject to the limitation periods referred to in sub-paragraph (c) above.

**L. UNLAWFULNESS OF ARREST DETENTION**

129. It admits paragraph 129, subject to reference to the full terms and effect of s 3W(1) of the Crimes Act.

130. As to paragraph 130, it:

- (a) in relation to the claims made by the applicant on his own behalf:
  - (i) admits sub-paragraph (a); and
  - (ii) denies sub-paragraph (b);
- (b) in relation to the claims made by the applicant on behalf of other Group Members:
  - (i) does not know and therefore cannot admit that the Arrest Sub-Group Members were in Immigration Detention at the time of their arrest; and
  - (ii) otherwise denies the paragraph.

131. It denies paragraph 131 and says further that:

- (a) claims made by the applicant on his own behalf (which are denied) are statute-barred by operation of s 16(d) of the *Limitation Act 2005* (WA) (3 years) and/or cognate provisions in other State and/or Territory statutes of limitation, to the extent applicable; and
- (b) claims made by the applicant on behalf of Group Members are also subject to the limitation periods referred to in sub-paragraph (a) above.

## M. RESPONDENT'S DUTIES OF CARE

### Risk of Harm

132. As to paragraph 132, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) denies sub-paragraph (a) and repeats sub-paragraph 2(c)(i) and paragraphs 13 – 18 and 88 above;
  - (ii) denies sub-paragraph (b) and repeats sub-paragraph 2(c)(i) and paragraphs 47(a), 48(a), 49(a) and 88 above; and
  - (iia) says further that “loss of liberty” is not a form of harm that is capable at law of being the subject of a claim in negligence;
  - (iii) as to sub-paragraph (c), it:
    - A. admits that there is a risk of bodily or psychological injury if children are detained with adults; but says there is also a risk:
      - (1) if children are detained with children; and
      - (2) if adults are detained in juvenile facilities with children;
    - B. repeats sub-paragraphs 2(d) and 50(a)(iii) above; and
    - C. otherwise denies the sub-paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of Group Members, repeats paragraph 30A above.

133. As to paragraph 133, it:

- (a) objects to the paragraph, pursuant to s 16 of the Parliamentary Privileges Act, on the ground that it refers (in the particulars) to material covered by parliamentary privilege; and
- (b) under cover of that objection:
  - (i) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraph 132 above; and
  - (ii) in relation to the claims pleaded by the applicant on behalf of Group Members, repeats paragraph 30A above.

134. As to paragraph 134, it:

(a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and:

(i) repeats paragraphs 49(a)(ii) and 92 above; and

(ii) says further that:

A. on 21 November 2011, following the publication of numerous media articles on the subject, the President of the AHRC announced that she would conduct an inquiry into the treatment of individuals suspected of people smuggling offences who said that they were children, and published terms of reference;

#### **PARTICULARS**

*Age of Uncertainty* Report, pp 18-21.

B. as part of the inquiry, the AHRC received public submissions and conducted public hearings;

#### **PARTICULARS**

*Age of Uncertainty* Report, pp 22-26.

C. as part of the inquiry, the applicant was interviewed by the AHRC on 26 April 2012;

#### **PARTICULARS**

The applicant was interviewed by the AHRC at the Albany Regional Prison: *Age of Uncertainty* Report, pp 26 and 324.

D. in July 2012, the AHRC published the *Age of Uncertainty* Report; and

E. Appendix 1 of the *Age of Uncertainty* Report contained a case study of the applicant;

(iii) says further that the applicant was legally represented from at least April 2012 by Legal Aid Western Australia in connection with a request for pardon or referral of the applicant's conviction to the Court of Appeal of Western Australia;

#### **PARTICULARS**

*Yasmin v Attorney-General of the Commonwealth of Australia* (2015) 236 FCR 169; [2015] FCAFC 145 at [14]-[15].

(iv) says further that the applicant has been legally represented by his present solicitors since at least 2014, including in connection with:

- A. a letter dated 16 July 2014 requesting that the Commonwealth Attorney-General refer the applicant's conviction to the Court of Appeal of Western Australia;

### **PARTICULARS**

*Yasmin v Attorney-General of the Commonwealth of Australia* (2015) 323 ALR 419; [2015] FCA 91 at [2].

- B. Federal Court proceedings ACD117/2014 (commenced on 9 December 2014) and ACD18/2015 (commenced on 12 March 2015) (*Ali Yasmin v Attorney-General of the Commonwealth of Australia*);
  - C. proceedings in the Court of Appeal of Western Australia CACR 151 of 2016 commenced in 2016 (*Ali Jasmin v The Queen*); and
  - D. a complaint of race discrimination to the Australian Human Rights Commission (2017-11493) commenced on 29 August 2017 on the applicant's behalf and behalf of other persons;
- (v) says further that the rights alleged by the applicant in this proceeding constitute bare rights to litigate and do not constitute property; and
  - (b) in relation to the claims pleaded by the applicant on behalf of Group Members, repeats paragraph 30A above.

135. As to paragraph 135, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, repeats paragraph 134 above and denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of Group Members, repeats paragraph 30A above.

### **Salient features**

136. As to paragraph 136, it:

- (aa) as to the matters alleged in Sections A to E and G to I above, repeats paragraphs 1 – 87 and 91 – 131 above;
- (a) as to sub-paragraph (a):
  - (i) admits that the respondent, by its officers under the Migration Act, exercised control over decisions whether to detain the Group Members in Immigration Detention and to remove them from Australia, subject to the requirements of the Migration Act and decisions of courts and tribunals; and

- (ii) otherwise denies the sub-paragraph;
- (b) as to sub-paragraph (b):
  - (i) as to sub-paragraph (i), repeats paragraphs 56(b)(i) and 93 – 100 above and denies the sub-paragraph;
  - (ii) denies sub-paragraph (ii);
  - (iii) denies sub-paragraph (iii) and repeats paragraph 132 above; and
  - (iv) denies sub-paragraph (iv) and repeats paragraphs 16 – 18 above;
- (c) denies sub-paragraph (c) and repeats paragraph 132 above;
- (d) as to sub-paragraph (d):
  - (i) in relation to the claims pleaded by the applicant on his own behalf, denies the sub-paragraph and repeats paragraph 134 above; and
  - (ii) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above;
- (e) as to sub-paragraph (e):
  - (i) as to sub-paragraph (i):
    - A. in relation to the claims pleaded by the applicant on his own behalf, denies the sub-paragraph and repeats paragraph 132 above; and
    - B. in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats sub-paragraph 30A above;
  - (ii) as to sub-paragraph (ii):
    - A. in relation to the claims pleaded by the applicant on his own behalf, denies the sub-paragraph and repeats paragraph 134 above; and
    - B. in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats sub-paragraph 30A above;
- (f) denies sub-paragraph (f);
- (g) as to sub-paragraph (g):
  - (i) admits that, while the applicant and Group Members were in held immigration detention, the respondent had a non-delegable duty of care to exercise such care for the applicant's and Group Members' health and

safety as is reasonable in all the circumstances, and to that extent, there was a relationship of proximity; and

- (ii) otherwise denies the sub-paragraph;
- (h) denies sub-paragraph (h) and repeats paragraphs 16 – 18 above; and
- (i) denies sub-paragraph (i) and repeats paragraphs 132 and 134 above.

137. As to paragraph 137, it:

- (a) admits that while the applicant and Group Members were in immigration detention, it assumed responsibility for the care, supervision or control of the applicant and Group Members; and
- (b) otherwise denies the paragraph.

### **Youth Duty**

138. It denies paragraph 138 and:

- (a) repeats paragraphs 16 – 21, 132, 133, 136(b), (e)(i), (f), (g), (h), (i) and 137 above; and
- (b) says further that, in the circumstances, the imposition of a common law duty, as alleged (or otherwise):
  - (i) would constrain the defendant in the exercise of its powers to make and implement policy in the national interest, including in relation to foreign affairs, immigration and border security;
  - (ii) improperly seeks to make justiciable the merits of the adoption and/or implementation of government policy, when it is in fact, not; and/or
  - (iii) would be inconsistent and/or incoherent with the statutory scheme set out in paragraphs 9, 47 and 56 above.

139. It denies paragraph 139 and repeats paragraphs 13 – 18 and 138 above.

140. It denies paragraph 140 and repeats paragraphs 138 and 139 above.

### **Removal Duty**

141. It denies paragraph 141 and:

- (a) repeats paragraphs 47 – 49, 91, 132, 133, 136(c), (e)(i), (f), (g), (h), (i), 137 and 138(b) above; and
- (b) says further that, in the circumstances, the imposition of a common law duty, as alleged (or otherwise):

- (i) would constrain the defendant in the exercise of its powers to make and implement policy in the national interest, including in relation to foreign affairs, immigration and border security;
- (ii) improperly seeks to make justiciable the merits of the adoption and/or implementation of government policy, when it is in fact, not; and/or
- (iii) would be inconsistent and/or incoherent with the statutory scheme set out in paragraphs 9 and 47 above.

142. It denies paragraph 142 and repeats paragraph 141 above.

### **Advice Duty**

143. It denies paragraph 143 and repeats paragraphs 134, 135, 136(d), (e)(ii), (f), (g), (h), (i) and 137 above.

144. It denies paragraph 144 and repeats paragraph 143 above.

## **N. RESPONDENT'S BREACH OF DUTY**

### **N.1 Breach of Youth Duty**

145. As to paragraph 145, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, it:
  - (i) repeats paragraphs 35, 42, 45 and 93 – 100 above;
  - (ii) further, repeats paragraphs 49, 50, 53, 56, 57 and 59 above;
  - (iii) says that, while the applicant was in immigration detention, age assessment of the applicant, within the meaning of General Comment 6, was continuing; and
  - (iv) otherwise denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

146. As to paragraph 146, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) denies the paragraph; and
  - (ii) repeats paragraphs 13 – 18, 22 – 24, 26 – 30, 56(b)(i) and 93 – 100 above; and



- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

147. As to paragraph 147, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf denies the paragraph and repeats paragraphs 13 – 18, 132 and 133 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

148. As to paragraph 148, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) denies sub-paragraph (a) and repeats paragraphs 16 – 18, 50(a)(iv) and 138 above;
  - (ii) denies sub-paragraph (b), repeats paragraphs 13 – 15 and 138 above, and says that, while the applicant was in immigration detention, age assessment of the applicant, within the meaning of General Comment 6, was continuing; and
  - (iii) denies sub-paragraph (c) and repeats paragraphs 132 and 138 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

149. As to paragraph 149, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that the applicant:
    - A. was charged, indicted and prosecuted under s 232A of the Migration Act as an adult; and
    - B. was sentenced and imprisoned as an adult;
  - (ii) repeats paragraphs 13 – 18, 22 – 24, 26 – 30 and 148 above; and
  - (iii) otherwise denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

150. As to paragraph 150, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 21 and 148 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

151. As to paragraph 151, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and:
  - (i) repeats paragraphs 2(c)(i), 88 and 148(a) above;
  - (ii) says further that loss of liberty is not a form of loss that is capable at law of being the subject of a claim in negligence;
  - (iii) says further that:
    - A. to the extent that the applicant makes a claim in respect of mental harm to which the *Civil Liability Act 2002* (WA) applies, it will rely on ss 5S and 5T of that Act;
    - B. to the extent that the applicant makes a claim for personal injury damages to which the *Civil Liability Act 2002* (WA) applies, it will rely on Part 2 of that Act;
    - C. to the extent that the applicant makes a claim for damages to which the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) applies, it will rely on Part 4 of that Act; and
    - D. to the extent that cognate provisions in other State and/or Territory civil liability legislation apply to the applicant's claims, it will rely on those provisions;
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above;
- (c) says further that the claims made by the applicant on his own behalf (which are denied) are statute-barred by operation of:
  - (i) s 13(1) of the *Limitation Act 2005* (WA) (6 years); and/or
  - (ii) s 14(1) of the *Limitation Act 2005* (WA) (3 years); and/or
  - (iii) s 12(b) of the *Limitation Act 1981* (NT) (3 years); and/or
  - (iv) cognate provisions in other State and/or Territory statutes of limitation, to the extent that they apply to the applicant's claims; and
- (d) says further that the claims made by the applicant on behalf of Group Members:

- (i) are also subject to the limitation periods referred to in sub-paragraph (c) above; and
- (ii) are also subject to the relevant provisions in civil liability legislation referred to in sub-paragraph (a)(iii) above.

## **N.2 Breach of Removal Duty**

152. As to paragraph 152, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 47(a), 48(a) and 49(a) above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

153. As to paragraph 153, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 47(a), 48(a), 49(a), 132(a) and 133 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

154. As to paragraph 154, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that it did not treat the applicant's DIAC Interview Record as a written request to be removed under s 198(1) of the Migration Act;
  - (ii) does not know and therefore cannot admit whether it provided a Removal Form to the applicant;
  - (iii) says that the DIAC Entry Interview was also attended by a responsible adult from the organisation Life Without Barriers; and

### **PARTICULARS**

The responsible adult from Life Without Barriers was Steven Smyth.

- (iv) otherwise denies the paragraph and repeats paragraphs 47(a), 48(a), 49(a) and 141 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

155. As to paragraph 155, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, admits that the applicant was not removed from Australia after his DIAC Entry Interview, otherwise denies the paragraph and repeats paragraphs 47(a), 48(a), 49(a) and 154 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

156. As to paragraph 156, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 47(a), 48(a), 49(a), 125(a) and 154 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

157. As to paragraph 157, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 47(a), 48(a), 49(a), 125(a), 151(a) and 154 above;
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above;
- (c) says further that the claims made by the applicant on his own behalf (which are denied) are statute-barred by operation of:
  - (i) s 13(1) of the *Limitation Act 2005* (WA) (6 years); and/or
  - (ii) s 14(1) of the *Limitation Act 2005* (WA) (3 years); and/or
  - (iii) s 12(b) of the *Limitation Act 1981* (NT) (3 years); and/or
  - (iv) cognate provisions in other State and/or Territory statutes of limitation, to the extent that they apply to the applicant's claims; and
- (d) says further that the claims made by the applicant on behalf of Group Members:
  - (i) are also subject to the limitation periods referred to in sub-paragraph (c) above; and
  - (ii) are also subject to the relevant provisions in civil liability legislation referred to in sub-paragraph 151(a)(iii) above.

### **N.3 Breach of Advice Duty**

158. As to paragraph 158, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 49(a)(ii) 92 and 134 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

159. As to paragraph 159, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 134 and 136(d) above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

160. As to paragraph 160, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, admits that it did not procure for the applicant "Advice" as defined in the SOC, otherwise denies the paragraph and repeats paragraphs 92 and 143 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

161. As to paragraph 161, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that the applicant filed these proceedings after the period stipulated by the *Limitation Act 2005 (WA)*;
  - (ii) repeats paragraphs 49(a)(ii), 92, 134 and 160 above;
  - (iii) does not know and therefore cannot admit what advice the applicant did or did not obtain from his legal representatives or other persons before or after he was removed to Indonesia; and
  - (iv) otherwise denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

162. As to paragraph 162, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, repeats paragraph 160 and otherwise does not know and therefore cannot admit the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

163. As to paragraph 163, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf denies the paragraph and repeats paragraph 160 above;
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above;
- (c) says further that the claims made by the applicant on his own behalf (which are denied) are statute-barred by operation of:
  - (i) s 14(1) of the *Limitation Act 2005* (WA) (3 years); and/or
  - (ii) s 12(b) of the *Limitation Act 1981* (NT) (3 years); and/or
  - (iii) cognate provisions in other State and/or Territory statutes of limitation, to the extent that they apply to the applicant's claims; and
- (d) says further that the claims made by the applicant on behalf of Group Members are also subject to the limitation periods referred to in sub-paragraph (c) above.

## **O. RDA CLAIM**

### **O.1 Background to the RDA Claim**

164. As to paragraph 164, it:

- (a) repeats paragraphs 102 and 103 above;
- (b) as to sub-paragraph (a):
  - (i) admits that during the Period, persons who crewed boats, used for people smuggling as part of the People Smuggling Businesses, that came from Indonesia were predominately of Indonesian national origin; and
  - (ii) otherwise does not know, and therefore cannot admit, that they were also predominately of Indonesian race or Indonesian ethnic origin;
- (c) as to sub-paragraph (b):
  - (i) admits that during the Period, it knew that persons who crewed boats, used for people smuggling as part of the People Smuggling Businesses, that came from Indonesia were predominately of Indonesian national origin; and
  - (ii) denies that it knew that they were also predominately of Indonesian race or Indonesian ethnic origin; and
- (d) otherwise denies the paragraph.

165. It denies paragraph 165 and repeats paragraphs 101 – 122 above.

166. As to paragraph 166, it:

- (a) repeats paragraphs 101 – 122 and 164 above;
- (b) admits that during the Period persons detained by the respondent from boats that had come from Indonesia, on the suspicion that they had breached s 232A of the Migration Act, were predominately of Indonesian national origin;
- (c) does not know and therefore cannot admit that they were also predominately of Indonesian race or ethnic origin; and
- (d) otherwise denies the paragraph.

167. It denies paragraph 167 and repeats paragraphs 101 – 122 and 164 above.

168. It denies paragraph 168 and repeats paragraphs 102 – 104, 110, 111, 164, 166 and 167 above.

## **O.2 DIAC Non-Removal Act and DIAC Non-Assistance Act**

169. As to paragraph 169, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 47(a), 48(a) and 49(a) above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

170. As to paragraph 170, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

171. As to paragraph 171, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and:
  - (i) repeats paragraphs 13 – 15, 47(a), 48(a), 49(a), 101 – 122 and 169 above; and
  - (ii) says that the DIAC Youth Policy is not defined in the SOC; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

172. As to paragraph 172, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) as to the allegation that it performed the DIAC Non-Removal Act and the DIAC Non-Assistance Act in respect of the applicant, repeats paragraph 49(a) above and otherwise denies the allegation;
  - (ii) as to the allegation that the applicant was of Indonesian race, national or ethnic origin, admits that the applicant was of Indonesian national origin and otherwise does not know and cannot admit the allegation; and
  - (iii) otherwise denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

173. As to paragraph 173, it:

- (a) subject to reference at trial to the full terms and effect of the Migration Act, admits sub-paragraph (a) and repeats paragraphs 47 – 49 above;
- (b) subject to reference at trial to the full terms and effect of the Migration Act, admits sub-paragraph (b) but says that obligation was subject to other provisions of the Migration Act and repeats paragraphs 47 – 49 above;
- (c) denies sub-paragraph (c) and repeats paragraphs 101 – 122 above; and
- (d) as to sub-paragraph (d):
  - (i) in relation to the claims pleaded by the applicant on his own behalf, admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph; and
  - (ii) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

174. As to paragraph 174, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 2(a), 102, 103, 164 – 168 and 169 – 173 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

### **O.3 DIAC Non-Investigation Act**

175. As to paragraph 175, it:



- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 16 – 18 and 50 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

176. As to paragraph 176, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

177. As to paragraph 177, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and:
  - (i) repeats paragraphs 13 – 15, 50 and 101 – 122 above; and
  - (ii) says that the DIAC Youth Policy is not defined in the SOC; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

178. As to paragraph 178, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) as to the allegation that it performed the DIAC Non-Investigation Act in respect of the applicant, repeats paragraph 50 above and otherwise denies the paragraph; and
  - (ii) as to the allegation that the applicant was of Indonesian race, national or ethnic origin, admits that the applicant was of Indonesian national origin and otherwise does not know and cannot admit the allegation; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

179. As to paragraph 179, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 164 – 168 and 175 – 178 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

#### **O.4 AFP Charging Act**

180. As to paragraph 180, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 15 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of Charged Sub-Group Members, repeats paragraph 30A above.

181. As to paragraph 181, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

182. As to paragraph 182, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 15, 22 – 24, 29 – 30 and 101 – 122 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

183. As to paragraph 183, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that:
    - A. it performed the AFP Charging Act in respect of the applicant;
    - B. the applicant was of Indonesian national origin; and
  - (ii) otherwise does not know and therefore cannot admit the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

184. As to paragraph 184, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above;
- (c) as to sub-paragraph (c):

- (i) in relation to the claims pleaded by the applicant on his own behalf, admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph; and
- (ii) in relation to the claims pleaded by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

185. As to paragraph 185, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 164 – 168 and 180 – 184 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Charged Sub-Group Members, repeats paragraph 30A above.

### **O.5 CDPP Indictment Act**

186. As to paragraph 186, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 15 and 29 – 30 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

187. As to paragraph 187, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

188. As to paragraph 188, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 15, 26 – 30, 101 – 122 and 186 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

189. As to paragraph 189, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that the applicant was of Indonesian national origin;

- (ii) says that the CDPP performed the CDPP Indictment Act in respect of the applicant;
  - (iii) repeats the pleading at sub-paragraph 4(c)(ii) above; and
  - (iv) otherwise does not know and therefore cannot admit the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

190. As to paragraph 190, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above;
- (c) as to sub-paragraph (c):
  - (i) in relation to the claims pleaded by the applicant on his own behalf, admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph; and
  - (ii) in relation to the claims pleaded by the applicant on behalf of other Indicted Sub-Group Members, repeats paragraph 30A above.

191. As to paragraph 191, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 164 – 168 and 186 – 190 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

## **O.6 CDPP Discretion Act**

192. It denies paragraph 186 and repeats paragraphs 13 – 16, 29 – 30 and 75 above.

193. It denies paragraph 193 and repeats paragraphs 4(c)(ii), 71, 74 and 75 above.

194. As to paragraph 194, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 71, 74 and 75 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) denies sub-paragraph (c) and repeats paragraphs 13 – 15 and 26 – 30 above.

195. As to paragraph 195, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) as to sub-paragraph (c), admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph.

196. It denies paragraph 196 and repeats paragraphs 164 – 168 and 192 – 195 above.

#### **O.7 Second CDDP Discretion Act**

197. It denies paragraph 197 and repeats paragraphs 13 – 16, 29 – 30 and 81 above.

198. It denies paragraph 198 and repeats paragraphs 4(c)(ii), 76, 81 and 193 above.

199. As to paragraph 199, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 76 and 81 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) denies sub-paragraph (c) and repeats paragraphs 13 – 15 and 26 – 30 above.

200. As to paragraph 200, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) as to sub-paragraph (c), admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph.

201. It denies paragraph 201 and repeats paragraphs 164 – 168 and 197 – 200 above.

#### **O.8 AFP Non-Investigation Act**

202. It denies paragraph 202 and repeats paragraphs 13 – 15, 29 – 30, 71, 74, 76 and 82 above.

203. It denies paragraph 203 and repeats paragraphs 181 and 198 above.

204. As to paragraph 204, it:

- (a) as to sub-paragraph (a):
  - (i) denies sub-paragraph (i) and repeats paragraphs 76 and 81 above;
  - (ii) denies sub-paragraph (ii) and repeats paragraph 74 above; and

- (iii) denies sub-paragraph (iii);
- (b) denies sub-paragraph (b) and repeats paragraph 101 – 122 above; and
- (c) denies sub-paragraph (c) and repeats paragraphs 13 – 15 and 26 – 30 above.

205. As to paragraph 205, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) as to sub-paragraph (c), admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph.

206. It denies paragraph 206 and repeats paragraphs 164 – 168 and 202 – 205 above.

### **O.9 CDDP Prosecuting Act**

207. As to paragraph 207, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

208. As to paragraph 208, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 4(c)(ii), 187, 193 and 198 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

209. As to paragraph 209, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 13 – 15, 26 – 30, 101 – 122; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

210. As to paragraph 210, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf:
  - (i) admits that:

- A. the CDDP performed the CDDP Prosecuting Act in respect of the applicant; and
  - B. the applicant was of Indonesian national origin; and
- (ii) does not know and therefore cannot admit whether the applicant was of Indonesian race or ethnic origin; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

211. As to paragraph 211, it:

- (a) denies sub-paragraph (a) and repeats paragraphs 92 – 100 above;
- (b) denies sub-paragraph (b) and repeats paragraphs 101 – 122 above; and
- (c) as to sub-paragraph (c):
  - (i) in relation to claims made by the applicant on his own behalf, admits that it knew that the applicant was suspected to be an Indonesian national and had crewed SIEV 86 and otherwise denies the sub-paragraph; and
  - (ii) in relation to claims made by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

212. As to paragraph 212, it:

- (a) in relation to claims made by the applicant on his own behalf, denies paragraph 212 and repeats paragraphs 164 – 168 and 207 – 211 above; and
- (b) in relation to claims made by the applicant on behalf of other Prosecution Sub-Group Members, repeats paragraph 30A above.

#### **O.10 Impairment of a human right or a fundamental right**

213. As to paragraph 213, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 164 – 212 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other (as relevant) Group Members, Charged Sub-Group Members, Indicted Sub-Group Members and the Prosecution Sub-Group Members, repeats paragraph 30A above.

#### **O.11 Contravention of s 9(1) of the RDA**

214. It denies paragraph 214.

## **O.12 Contravention of s 9(1A) of the RDA**

215. As to paragraph 215, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 50(a)(iii), 53, 56(b), 74, 75, 79, 81 and 164 – 212 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other (as relevant) Group Members, Charged Sub-Group Members, Indicted Sub-Group Members and the Prosecution Sub-Group Members, repeats paragraph 30A above.

216. As to paragraph 216, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 49(a)(ii), 50(a)(iv), 74(b), 84(a)(iii)(A), 92(a)(ii) and 215 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

217. As to paragraph 217, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 215 and 216 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

218. As to paragraph 218, it:

- (a) in relation to the claims pleaded by the applicant on his own behalf, denies the paragraph and repeats paragraphs 164 – 168 and 215 – 217 above; and
- (b) in relation to the claims pleaded by the applicant on behalf of other Group Members, repeats paragraph 30A above.

219. It denies paragraph 219.

## **P. MISFEASANCE IN PUBLIC OFFICE**

220. It admits paragraph 220.

221. As to paragraph 221, it repeats paragraph 65 above.

222. It admits paragraph 222.

223. As to paragraph 223, it:



- (a) does not know and therefore cannot admit that the applicant's date of birth entered on the Prosecution Notice was false;
- (b) as to the materiality of that particular on the Prosecution Notice, says that:
  - (i) s 23(2)(b) of the *Criminal Procedure Act 2004 (WA)* relevantly provided that a prosecution notice must comply with Sch 1 Div 2 of that Act;
  - (ii) Sch 1 Div 2 cl 4(1)(a) of that Act (headed "Accused to be identified") relevantly provided that a prosecution notice must identify the accused, if the accused is an individual, by means of the accused's full name and, if known, date of birth; and
  - (iii) on a proper construction of these provisions, the inclusion of the accused's date of birth was only for the purpose of the identification of the accused, and was not a material particular; and
- (c) otherwise denies the paragraph.

224. As to paragraph 224, it:

- (a) denies sub-paragraph (a) and:
  - (i) repeats paragraph 56(b)(i) above; and
  - (ii) says further that the date of birth set out in the Prosecution Notice was consistent with the report of Dr Drogemuller, referred to in paragraph 61 above;
- (b) denies sub-paragraph (b), repeats paragraph 56(b)(i) above and says further that when Agent Eade signed the Prosecution Notice,
  - (i) she had observed that the date of birth contained in the AFP's PROMIS case management system for the applicant was 12 October 1990;
  - (ii) she had been provided with the report of Dr Drogemuller referred to at paragraph 61 above, which was consistent with a date of birth of 12 October 1990;
  - (iii) she had made her own observation of the applicant, and the applicant did not appear to her to be a minor; and
  - (iv) consistent with her normal practice, she had discussed the matter with her team leader; and
- (c) otherwise denies the paragraph.

225. It admits paragraph 225 and says further that s 21(3) of the *Criminal Procedure Act 2004 (WA)* addressed when a prosecution is commenced.

226. It admits paragraph 226.

227. It admits paragraph 227 and repeats paragraph 223(b) above.

228. As to paragraph 228, it:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b);
- (c) admits sub-paragraph (c);
- (d) as to sub-paragraph (d):
  - (i) repeats paragraph 224(b) above;
  - (ii) admits that Agent Eade did not otherwise undertake an Age Determination Assessment or similar process for the applicant, as defined in the SOC;
  - (iii) denies that Agent Eade was obliged to do so, and repeats paragraphs 16 to 18 above; and
  - (iv) otherwise denies the sub-paragraph;
- (e) as to sub-paragraph (e):
  - (i) repeats paragraph 224(b) above;
  - (ii) admits that Agent Eade had not been otherwise been provided with the results of an Age Determination Assessment or similar process conducted by any other person for the applicant, as defined in the SOC; and
  - (iii) repeats paragraphs 16 to 18 above; and
  - (iv) otherwise denies the sub-paragraph;
- (f) denies sub-paragraph (f) and repeats paragraph 224(b) above;
- (g) admits sub-paragraph (g);
- (h) admits sub-paragraph (h) and repeats paragraph 223(b) above;
- (i) denies sub-paragraph (i) and repeats paragraphs 223(b) and 224(b) above; and
- (j) denies sub-paragraph (j).

229. As to paragraph 229, it:

(a) denies sub-paragraph (a) and repeats paragraph 224(b) above;

(b) denies sub-paragraph (b); and

(c) denies sub-paragraph (c).

230. It denies paragraph 230.

231. It denies paragraph 231.

232. It denies paragraph 232.

233. It denies paragraph 233.

234. It denies paragraph 234 and says further that the applicant's claim (which is denied) is statute barred by operation of:

(a) s 13(1) of the *Limitation Act 2005* (WA) (6 years) and/or

(b) s 14(1) of that Act (3 years).

#### **Q. COMMON ISSUES OF FACT AND LAW**

235. As to paragraph 235, it:

(a) repeats paragraphs 3(a)(ii) and 7 above; and

(b) does not know and therefore cannot admit that the questions pleaded in paragraph 235 are common to the claims of Group Members.

#### **R. DAMAGES**

236. It denies paragraph 236 and says further that, by operation of s 64B(3) of the *Australian Federal Police Act 1979* (Cth), any liability of the respondent under s 64B(1) does not extend to a liability to pay damages in the nature of punitive damages.

237. The proceeding should be dismissed with costs.



Emma Gill  
AGS lawyer  
for and on behalf of the Australian Government Solicitor  
Lawyer for the Respondent

This pleading was settled by Patrick Knowles, Jonathan Kirkwood and Anna Batrouney of counsel.

## CERTIFICATE OF LAWYER

I, Emma Gill, certify to the Court that, in relation to the amended defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

1. each allegation in the pleading; and
  - (i) each denial in the pleading; and
  - (j) each non-admission in the pleading.

Date: 29 July 2022.

A handwritten signature in black ink, appearing to be 'EG', with a small dot at the end.

Lawyer for the Respondent