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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Registrar

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Form 17
Rule 8.05(1)(a)

Consolidated Statement of Claim

No. VID328 of 2020

No. VID664 of 2020

Federal Court of Australia
Registry: Victoria
Division: General

ALI YASMIN

Applicant

THE COMMONWEALTH OF AUSTRALIA

Respondent

The applicants claim declarations, damages, interest and costs.

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A. THE PARTIES

A.1 The applicant

1. The applicant was born on 12 January 1996 at Balauring on the island of Flores in the Republic of Indonesia.
2. The applicant, at all material times:
 - (a) was and is of Indonesian race, national and ethnic origin;
 - (b) was a person who had a right to liberty in Indonesia;

PARTICULARS

The right to liberty in Indonesia is guaranteed to all citizens pursuant to Articles 5 and 20-27 of Law on Human Rights (No. 39 of 1999).

- (c) arrived in Australia on 18 December 2009 as an unlawful non-citizen in circumstances where he:
 - (i) was apprehended by officers of the respondent on a Suspected Illegal Entry Vehicle (**SIEV**) and brought to Christmas Island;
 - (ii) was suspected of being involved in an offence under s 232A of the *Migration Act 1958* (Cth) (**Migration Act**);
 - (iii) did not know that the SIEV intended to travel to Australia or would be used for people smuggling;
 - (iv) was under 18 years of age; and
 - (v) was unaccompanied by any adult who was able to act as his guardian;
- (d) was a child under 18 years of age;
- (e) accordingly:
 - (i) was a minor for the purposes of the Migration Act; and
 - (ii) was a human being below the age of 18 years for the purposes of Article 1 of the *Convention on the Rights of the Child* (the **CRC**).
- (f) was detained by or on behalf of the respondent;
- (g) was not immigration cleared for the purposes of the Migration Act;
- (h) did not apply for a visa or to otherwise remain in Australia;
- (i) was investigated for alleged offences under the Migration Act;

- (j) was incorrectly assessed by the respondent as being over the age of 18 based on Wrist X-Ray Analysis (defined below);
- (k) remained without a guardian while in Australia;
- (l) was ultimately removed to Indonesia by the respondent.

A.2 The respondent

3. The respondent:

- (a) detained the applicant and the other Group Members (defined below);
- (b) at all material times, was in the position and had power to substitute its authority for that of the applicant's, and each other Group Member's (defined below), natural parents over them pursuant to the doctrine of *parens patriae*;
- (c) is capable of being sued pursuant to Part IX of the *Judiciary Act 1903* (Cth).

4. The respondent is sued pursuant to:

- (a) Part IX of the *Judiciary Act 1903* (Cth) in respect of the conduct by officers of the Department of Home Affairs, formerly known as the Department of Immigration and Citizenship (**DIAC**), alleged herein;
- (b) s 64B of the *Australian Federal Police Act 1979* (Cth) in respect of the conduct by members of the Australian Federal Police (**AFP**) alleged herein; and
- (c) s 18A of the *Racial Discrimination Act 1975* (Cth) in respect of the conduct of DIAC, the AFP and/or the Commonwealth Director of Public Prosecutions (**CDPP**) in breach of ss 9, 9(1A) and 10 of the RDA as alleged herein.

B. GROUP MEMBERS

5. The applicant brings this proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) and rule 21.09.1 of the *High Court Rules 2004* (Cth) on his own behalf and on behalf of other persons who:

- (a) are persons of Indonesian race, national and ethnic origin;
- (b) arrived in Australia between 1 January 2007 and 31 December 2013 (the **Period**) as unlawful non-citizens in circumstances where they were:
 - (i) apprehended by officers of the respondent on SIEVs and brought to Australia;

- (ii) suspected by the respondent of being involved in an offence under s 232A of the Migration Act;
- (iii) under 18 years of age; and
- (iv) unaccompanied by any adult who was able to act as their guardian;
- (c) were detained by or on behalf of the respondent;
- (d) were not immigration cleared for the purposes of the Migration Act;
- (e) did not apply for a visa or to otherwise remain in Australia;
- (f) were investigated for alleged offences under the Migration Act;
- (g) remained without a guardian while in Australia;
- (h) were ultimately removed to Indonesia by the respondent; and
- (i) are not any of the persons mentioned in s 33E(2) of the *Federal Court of Australia Act 1976* (Cth),

(Group Members).

6. The Group Members are each a member of one or more of the following sub-groups:
- (a) a sub-group comprising Group Members, including the applicant, who were transferred into AFP custody from immigration detention on Christmas Island for the purpose of being investigated (**Investigation Sub-Group Members**);
 - (b) sub-groups comprising Group Members:
 - (i) including the applicant, who were subjected to a Wrist X-Ray Procedure (defined below) (**Wrist X-Ray Sub-Group Members**); or
 - (ii) who were not subjected to a Wrist X-Ray Procedure (defined below) (**Non-Wrist X-Ray Sub-Group Members**);
 - (c) a sub-group comprising Group Members, including the applicant, who were arrested by the AFP (**Arrest Sub-Group Members**);
 - (d) a sub-group comprising Group Members, including the applicant, who were charged in respect of offences under the Migration Act (**Charged Sub-Group Members**);

- (e) a sub-group comprising Group Members, including the applicant, who were charged and indicted in respect of offences under the Migration Act (**Indicted Sub-Group Members**);
- (f) a sub-group comprising Group Members, including the applicant, who were:
 - (i) charged in respect of offences under the Migration Act;
 - (ii) indicted in respect of those offences;
 - (iii) prosecuted and convicted in respect of those offences;
 - (iv) imprisoned in adult prison following conviction; and
 - (v) released from prison on licence or parole by the respondent, (**Prosecution Sub-Group Members**).

7. The claims of the Group Members:

- (a) arise out of the same, similar or related circumstances; and
- (b) give rise to substantial common questions of law and fact as identified in Section Q below.

8. As at the date of commencement of proceedings No. VID328 of 2020 and No. VID664 of 2020, there were seven or more persons who had claims against the respondent.

PARTICULARS

Group Members include, as far as is currently known, those persons listed in Annexure C to this claim. The applicant also refers to page 32 and Appendix 2 of the report of the Australian Human Rights Commission titled ‘An Age of Uncertainty’ dated July 2012 (**Age of Uncertainty Report**).

C. STATUTORY FRAMEWORK

9. At all material times, the following provisions of the Migration Act applied and were to the effect alleged:

Definitions

- (a) s 5 defined:
 - (i) an “excised offshore place” as, relevantly, Christmas Island;
 - (ii) “migration zone” as the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and included the sea within the limits of both a State or a Territory and a port;

- (iii) a “minor” as a person who is less than 18 years old;
- (iv) an “officer” as, relevantly, an officer of DIAC or a member of the AFP;
- (b) s 250(1) defined a “suspect” as a non-citizen who travelled, or was brought, to the migration zone and is believed by an authorised officer on reasonable grounds to have 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;

Detention and removal

- (c) s 273(1) provided that the Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained;
- (d) s 4AA affirmed the principle that a minor shall only be detained as a measure of last resort;
- (e) s 245F conferred power on an officer, in respect of a foreign ship outside the territorial sea of a foreign country, to:
 - (i) board and search the ship;
 - (ii) require all persons found on the ship to answer questions, including in relation to the identity and presence of those persons on the ship; and
 - (iii) detain the ship and bring it, or cause it to be brought, to a port or to another place;
- (f) s 189 relevantly provided:
 - (i) in subsection (2) that, if an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (A) is seeking to enter the migration zone (other than an excised offshore place); and
 - (B) would, if in the migration zone, be an unlawful non-citizen, the officer must detain the person;
 - (ii) in subsection (3) that, if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person;
- (g) s 250(1) provided that, for the purposes of that section, a ‘suspect’ means a non-citizen who:

- (i) travelled, or was brought, to the migration zone; and
 - (ii) is believed by an authorised officer on reasonable grounds to have been on board a vessel (not being an aircraft) 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.
- (h) s 250(2) provided that an officer has a suspicion about a person for the purposes of s 189 of the Migration Act if, but not only if, the person was a suspect for the purpose of s 250(1) of the Migration Act;
- (i) s 250(3) provided that a non-citizen detained under s 189 because of subsection 250(2) may be kept in immigration detention for:
 - (i) such period as is required for the making of a decision whether to prosecute the suspect in connection with the offence concerned, or instituting such a prosecution; and
 - (ii) if such a prosecution is instituted within that period – such further period as is required for the purposes of the prosecution;
- (j) s 256 provided that where a person is in immigration detention under the Migration Act, the person responsible for his or her immigration shall, at the request of the detained person, give to him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention;
- (k) s 257(1) provided that, for the purpose of determining whether a person who is in immigration detention under the Migration Act is an unlawful non-citizen, a removee or a deportee, an officer may put to that person such questions as the officer considers necessary and may move that person from place to place;
- (l) s 250(5) provided that if the period for which a suspect may be kept in immigration detention under s 250(3) ends, he or she:
 - (i) must (unless he or she has become the holder of a visa) be expeditiously removed from Australia under s 198; and
 - (ii) may, at the direction of an authorised officer, continue to be detained under s 189 until so removed;

- (m) s 196 provided that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed from Australia under s 198 or 199, or deported under s 200, or granted a visa;
- (n) s 198(1) provided that an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed;
- (o) s 198(2) provided that an officer must remove as soon as reasonably practicable an unlawful non-citizen:
 - (i) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and
 - (ii) who has not subsequently been immigration cleared; and
 - (iii) who either:
 - (A) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
 - (B) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

D. POLICIES OF THE RESPONDENT

D.1 Benefit of the Doubt Policy

10. On or about 17 December 1990, Australia ratified the CRC.
11. Article 43 of the CRC creates a General Committee for the Rights of the Child to oversee the implementation of the CRC.
12. In or around 1 September 2005, the Committee on the Rights of the Child issued General Comment 6 which, in part, contained an interpretation of the effect of Article 8 of the CRC.
13. General Comment 6 provides that, pursuant to Article 8:
 - (a) where a child is separated or unaccompanied at arrival at a port of entry, a state party should prioritise the identification of that individual, including an assessment of their age;
 - (b) in determining age, a state party should accord the individual the benefit of the doubt, such that if there is a possibility that the individual is a child, it should be treated as such,

(Benefit of the Doubt Principle).

14. At all material times, the respondent was bound by and/or propounded that it would abide by the Benefit of the Doubt Principle **(Benefit of the Doubt Policy)**.

PARTICULARS

- (a) Article 1 of CRC requires Australia, as a State Party, to ensure the rights set forth in the Convention;
 - (b) The respondent has accepted that it is bound by the Benefit of the Doubt Principle. The acceptance can be inferred from the following acts of the agencies of the respondent:
 - (i) advice dated 2 May 2011 from the Office of International Law at the Attorney-General's Department;
 - (ii) the contents of the DIAC Procedures Advice Manual 3 **(PAM3)** in force from 9 November 2009 which outlines the application of the policy identifying individuals in detention where there is doubt regarding the age of a person (see Chapter 2 - Client placement - Minors in detention at Section 11);
 - (iii) representations made by representatives of the AFP at their appearance at the Senate Legal and Constitutional Legislation Committee Inquiry into the *Crimes Amendment (Age Determination) Bill 2001*;
 - (iv) talking points prepared by the Attorney-General's Department on 30 June 2011;
 - (v) representations made by the Commonwealth Attorney-General to the Australian Human Rights Commission on 30 June 2011; and
 - (vi) representations made by the CDPP to other Commonwealth agencies in or about September 2011.
15. In the premises, at all material times, the Benefit of the Doubt Policy applied to the applicant and the other Group Members.

D.2 Youth Identification Policy

16. At all material times, the respondent maintained a policy in relation to identifying minors in immigration detention **(Youth Identification Policy)**.

PARTICULARS

The Youth Identification Policy is evidenced by or alternatively reflected in PAM3 - Chapter 2 - Client placement - Minors in detention at Section 11 dated 9 November 2009.

17. The Youth Identification Policy provided, *inter alia*, that:
- (a) all DIAC staff must take reasonable measures to identify any person in immigration detention who is under the age of 18; and if they are informed, or have a reasonable suspicion that a person in immigration detention may be under the age of 18, immediately escalate to the relevant Deputy State/Territory Director;
 - (b) after escalating the reasonable suspicion that a person is known to be or suspected to be under 18 years, all DIAC staff must seek to determine if the minor is accompanied and, if the minor is unaccompanied:
 - (i) separate the minor from the general immigration detention population with an appointed carer;
 - (ii) assess and address any immediate special needs of the minor, taking into account the minor's age, gender and background, for example, food, clothing, footwear, health requirements, religious needs, mental and emotional needs through age appropriate recreational activities;
 - (iii) treat the person suspected of being a minor, or claiming to be a minor, as though they are a minor until the actual age is established;
 - (c) where an officer suspects that the age given by the minor is not correct (for example, by assessing that an alleged minor is visibly more than 18 years old), that officer must:
 - (i) report the suspicion and reasons for the suspicion to the relevant Deputy State/Territory Director, who, on the available evidence, may refer the minor to the health services manager for a physical and psychological assessment;
 - (ii) treat the person suspected of being a minor, or claiming to be a minor as though they are a minor until the actual age is established;
 - (iii) inform the person that DIAC questions their claim that they are a minor and DIAC needs more information;
 - (iv) document the reasons for suspecting that the person is not a minor;
 - (v) progress the matter further by:
 - (A) requesting documentary evidence to support the minor's claim;

- (B) reference to relevant records and country of origin information;
- (C) requesting people in the community attest to the minor's alleged age; or
- (D) requesting agreement from the minor for an independent health clinician to undertake an assessment of their age,

(the matters alleged in paragraphs 17(a) and 17(c) are hereafter defined as the **Age Determination Assessment**).

18. At all material times, the Youth Identification Policy applied to the applicant and the other Group Members.

PARTICULARS

The applicant and the other Group Members were not a category of minors to which the DIAC Youth Identification Policy did not apply: PAM3 - Chapter 2 - Client placement - Minors in detention at Section 6 dated 9 November 2009.

D.3 Youth Treatment Policy

19. At all material times, the respondent maintained a policy in relation to the treatment of minors in immigration detention (**Youth Treatment Policy**).

PARTICULARS

The Youth Treatment Policy is evidenced by or alternatively reflected in PAM3 - Chapter 2 - Client placement - Minors in detention dated 9 November 2009 and PAM3 - Chapter 2 - Client placement model at paragraph 7.1 dated 19 September 2008.

20. The Youth Treatment Policy provided, *inter alia*, that:
- (a) a minor is to be detained under the Migration Act only as a measure of last resort for the shortest practicable time and in the least restrictive form appropriate to a minor's circumstances in order to progress the prompt resolution of the minor's immigration status;
 - (b) minors must not be detained in an immigration detention centre established under s 273 of the Migration Act;
 - (c) unaccompanied minors are only to be accommodated in alternative detention with a DIAC-approved guardian;

- (d) the placements referred to in the preceding subparagraph are temporary arrangements until a community detention placement can be approved and implemented, a visa is granted, or repatriation is effected;
- (e) a comprehensive and integrated compliance, detention and removal plan must be prepared by a removals officer in consultation with all internal stakeholders prior to detention of the minor. The removal plan must be approved by the State or Territory Director, and cleared by the Assistant Secretary, Case Management and Review Branch, who will brief the Minister of Immigration and Citizenship's office before the detention is effected;
- (f) a clear plan for resolution of the minor's immigration status must be in place and be actively progressed by the case manager;
- (g) the best interests of the child should be a primary consideration in the placement of the minor (**Best Interests of the Child Principle**);
- (h) in line with the Best Interests of the Child Principle, the treatment of minors in detention is to be humane and managed to have as little adverse impact as possible. That means, *inter alia*, that:
 - (i) minors will have access to health, welfare and other support services appropriate to a minor's individual needs, subject to available resources;
 - (ii) minors will have access to compulsory education;
 - (iii) meaningful recreational activities and opportunities for excursions will be provided on a regular basis by the detention services provider;
 - (iv) reasonable access to friends/supporters is facilitated whenever practicable, balanced by need to protect the minor from any form of exploitation;
- (i) in accordance with the Best Interests of the Child Principle, minors must not be co-located in immigration residential housing or immigration transit accommodation with persons who may pose a threat to the well-being and safety of minors;
- (j) the minor's best interests include long-term and short-term welfare concerns, consideration of physical and emotional well-being, financial, moral, religious and health interests. The following factors are to be taken into account when

determining the best interests of the minor. The list is not exhaustive and other factors may be considered in particular cases. The factors include:

- (i) the minor's wishes and feelings (and factors which are relevant to the weight to be accorded to these wishes, for example maturity and level of understanding);
- (ii) the minor's relationship with people;
- (iii) the minor's personal characteristics (such as maturity, sex, background, culture);
- (iv) the need to protect the minor from harm or the risk of suffering harm now and in the future;
- (v) the minor's physical, emotional and/or educational needs now and in the future;
- (vi) the likely effect on the minor of any change in the circumstances now and in the future.

21. At all material times, the Youth Treatment Policy applied to the applicant and the other Group Members.

PARTICULARS

The applicant and the other Group Members were not a category of minors to which the Youth Treatment Policy did not apply: PAM3 - Chapter 2 - Client placement - Minors in detention at Section 6 dated 9 November 2009.

D.4 AFP Youth Policy

22. At all material times, the AFP maintained guidelines in relation to upholding the rights of children during investigations (**AFP Youth Investigation Guidelines**).

PARTICULARS

The AFP Youth Investigation Guidelines are evidenced by or alternatively reflected in an undated document styled "AFP National Guideline on upholding the rights of children during investigations", which document was published on or around 13 November 2012.

23. The AFP Youth Investigation Guidelines provided, *inter alia*, that:
- (a) where a person claims to be under 18 years of age, an AFP officer was required to have a high degree of certainty, based on reliable documentary evidence or other reliable evidence, that a person is 18 years or older before treating them as an adult;

- (b) if an officer had a strong suspicion that a person was an adult despite their claims that they are a child, in the absence of reliable evidence demonstrating that person was an adult, the benefit of the doubt should be applied,

(**AFP Youth Policy**).

PARTICULARS

The AFP Youth Investigation Guidelines at cl 7.1.

24. In the premises, at all material times, the AFP Youth Policy applied to the applicant and the other Group Members.

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

25. At all material times, the CDPP was the authority responsible for prosecuting indictable offences against the laws of the Commonwealth.

PARTICULARS

The power is conferred by s 6 of the *Director of Public Prosecutions Act 1983* (Cth) (**DPPA**).

26. At all material times, the decision of the CDPP to initiate proceedings was governed by the prosecution policy of the Commonwealth (**Prosecution Policy**) under which the CDPP has a discretion in relation to whether or not to prosecute (**Prosecutorial Discretion**).

PARTICULARS

The Prosecution Policy is evidenced by or alternatively reflected in a document styled “Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process”, which document was published in or around March 2009. The Prosecution Policy is made under s 8 of the DPPA.

27. At all material times, the CDPP, in giving effect to the Prosecution Policy, and in exercising the Prosecutorial Discretion in respect of the prosecution of juveniles, were required to consider:
- (a) the welfare of the juvenile;
 - (b) the seriousness of the alleged offence;
 - (c) the age and apparent maturity and mental capacity of the juvenile;
 - (d) the available alternatives to prosecution, such as a caution, and their efficacy;
 - (e) the juvenile’s family circumstances;

- (f) the juvenile's antecedents, if any; and
- (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or be inappropriate,

and was required to act on the basis that:

- (i) prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution;
- (ii) ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious; and
- (iii) the practice of the CDPP is for any decision to proceed with a prosecution in respect of a juvenile to be made by a senior lawyer,

(CDPP Youth Prosecution Policy).

PARTICULARS

Paragraphs 2.15 to 2.18 of the Prosecution Policy.

28. In the premises, at all material times, the CDPP Youth Prosecution Policy applied to the applicant and the other Group Members.

D.6 Youth People Smuggling Policy

29. At all material times, the CDPP and/or the AFP had a policy or practice that, in respect of minors alleged to have contravened s 232A of the Migration Act, it would not:
- (a) oppose bail;
 - (b) prosecute unless there were exceptional circumstances,

(Youth People Smuggling Policy).

PARTICULARS

The Youth People Smuggling Policy is referred to at pages 28, 305-306 and 423 in the Age of Uncertainty Report.

30. In the premises, at all material times, the Youth People Smuggling Policy applied to the applicant and the other Group Members.

E. DETENTION AND RELATED EVENTS

E.1 Apprehension and processing

31. The applicant and the other Group Members:
- (a) were born and grew up in remote fishing communities on the Indonesian coast in conditions of poverty;
 - (b) at all material times had low levels of education;
 - (c) at all material times had little to no English language ability; and
 - (d) were minors under the age of 18 during the Period.
32. At material times during the Period, each of the applicant and the other Group Members boarded a boat in Indonesia (**the relevant SIEV**).

PARTICULARS

By way of example, on or about 9 December 2009, the applicant boarded a boat (**SIEV 86**) at Makassar, Indonesia. Further particulars may be provided after discovery.

33. The applicant and the other Group Members:
- (a) were informed that they would be paid to work as crew members on the relevant SIEV; and
 - (b) were not accompanied on the relevant SIEV by any adult who was able to act as their guardian.

PARTICULARS

By way of example, the applicant was informed by unknown persons that he would be paid to work as a cook on SIEV 86 while the boat transported goods between Indonesian islands. Further particulars may be provided after discovery.

34. At material times during the Period:
- (a) the relevant SIEV was intercepted by agents of the respondent in waters between Indonesia and Christmas Island or Ashmore Reef;
 - (b) the applicant and the other Group Members were apprehended by agents of the respondent and transferred to vessels controlled by the respondent;

PARTICULARS

By way of example, SIEV 86 was intercepted, and the applicant was apprehended and transferred to Christmas Island, on 18 December 2009. Further particulars may be provided after discovery.

- (c) the applicant and the other Group Members were subsequently transferred to the Christmas Island Immigration Reception and Processing Centre, a facility run by or on behalf of the respondent in the Territory of Christmas Island (**Christmas Island**), for immigration processing (the date of each such transfer is hereafter referred to as the **Processing Date**).

PARTICULARS

By way of example, the Processing Date in respect of the applicant is 18 December 2009. Further particulars may be provided after discovery.

35. On or about the Processing Date, the applicant and the other Group Members:

- (a) each told officers of the respondent that they were under 18 years old; and

PARTICULARS

By way of example, on or about 18 or 19 December 2009, the applicant informed an officer of the respondent that he was 14 years old. The nominal roll completed by DIAC in respect of SIEV 86, dated 19 December 2009, notes the applicant's age as 14. Further particulars may be provided after discovery.

- (b) each had an appearance that was not obviously inconsistent with being a minor under 18 years old.

PARTICULARS

The applicant relies on a photograph of him taken by DIAC officers on a date known to the defendant on or soon after the Processing Date, which depicts his appearance.

E.2 Christmas Island Detention

36. Following the Processing Date, each of the applicant and the other Group Members were detained by or on behalf of the respondent at Christmas Island (**Christmas Island Detention**).

PARTICULARS

By way of example, the applicant was in Christmas Island Detention between 18 December 2009 and a date in January 2010. Further particulars may be provided after discovery.

E.3 Biodata Forms and DIAC Entry Interviews

37. At material times during the Period, on or following the Processing Date, officers of the respondent provided the applicant and the other Group Members with a "Biodata" form for them to complete and sign (**Biodata Form**).

38. The Biodata Form required, *inter alia*, the following information:
- (a) date of birth;
 - (b) place of birth;
 - (c) citizenship;
 - (d) educational history;
 - (e) employment history;
 - (f) English language ability (self-rating);
 - (g) marital status;
 - (h) details of any children;
 - (i) date of birth of the person's father and mother and siblings.
39. Each of the applicant and the other Group Members completed and signed the Biodata Form.

PARTICULARS

By way of example, the applicant filled out and signed a Biodata Form on or about the Processing Date. Further particulars may be provided after discovery.

40. The applicant and each Group Member stated in the Biodata Form that he was under 18 years of age at the date of executing the Biodata Form.
41. On or shortly after each Processing Date, officers of the respondent conducted an entry interview with each of the applicant and the other Group Members (**DIAC Entry Interviews**).

PARTICULARS

By way of example, the applicant's entry interview was conducted on 8 January 2010 (the **Applicant's DIAC Entry Interview**). Further particulars may be provided after discovery.

42. During the DIAC Entry Interviews, the applicant and the other Group Members each told the respondent's officers:
- (a) that they were aged under 18 years;
 - (b) that they were born in Indonesia and lived in Indonesia; and
 - (c) that they wanted to return to Indonesia.

PARTICULARS

By way of example, during the Applicant's DIAC Entry Interview, the applicant told the respondent's officers that:

- (i) his date of birth was 12 October 1993;
- (ii) he was born in Balauring, Lembata, Larantuka, Indonesia;
- (iii) his mother lived in Makassar in Indonesia;
- (iv) his brother, who was 22 years old, lived in Balauring in Indonesia;
- (v) one of his sisters, who was 18 years old, lived in Maumere in Indonesia with her husband;
- (vi) his younger sister, who was 11 years old, lived in Balauring in Indonesia;
- (vii) his English language ability was poor;
- (viii) no family members came with him on SIEV 86;
- (ix) there was nobody onboard SIEV 86 that he knew prior to boarding it;
- (x) he was told he could work on SIEV 86 as a cook in return for money;
- (xi) he wanted to return to Indonesia;
- (xii) at the time he agreed to crew SIEV 86 he had not been aware that the SIEV 86 was intending to travel to Australia or involved in people smuggling.

The record of the Applicant's DIAC Entry Interview is contained in a document styled "Immigration-In-Confidence" and dated 8 January 2010. Further particulars may be provided after discovery.

43. The information provided by the applicant and the other Group Members to the respondent's officers in the Biodata Form and in the DIAC Entry Interviews:
- (a) provided an account of their circumstances that was consistent with them being under the age of 18;
 - (b) presented an explanation of themselves and how they came to be on the relevant SIEV that was:
 - (i) consistent with:
 - (A) their appearance, as pleaded in paragraph 35(b) above;
 - (B) what was known about them, viz the circumstances in which they had been apprehended and detained;

- (C) the respondent's knowledge of the operation of People Smuggling Businesses as alleged in paragraphs 101 and 102 below; and
- (ii) on its face credible.

PARTICULARS

By way of example, the Applicant's DIAC Entry Interview took place on 8 January 2010, in which interview he made a number of statements which were consistent with him being under 18 years of age and, on their face, credible:

- (i) he had finished school at year nine in 2019, indicating he was under the age of 18;
 - (ii) he lived with his mother;
 - (iii) his siblings were aged between 22 and 11, making it likely he was aged between those years;
 - (iv) following finishing year nine schooling, he travelled from his home town of Flores to Makassar looking for work as a fisherman;
 - (v) two days after his arrival at Makassar he was approached by a man to assist on a ship as a cook in return for payment; and
 - (vi) the applicant was not aware the boat would be used for people smuggling.
44. The DIAC Entry Interviews were recorded and transcribed and the respective transcripts were signed by the applicant or other Group Members (as the case may be).

PARTICULARS

In respect of the applicant, document styled "Immigration-In-Confidence" and dated 8 January 2010.

45. The respondent, at the conclusion of the relevant DIAC Entry Interview:
- (a) had evidence that the applicant or each of the other Group Members was under 18 years of age, which evidence comprised at least their statements in the Biodata Forms, the statements in the DIAC Entry Interviews and their appearance;
 - (b) did not have evidence which determined that the applicant or each of the other Group Members was over 18 years old.
46. In the premises, by no later than the date of the relevant DIAC Entry Interview, the respondent knew or ought to have known that:

- (a) each of the applicant and the other Group Members:
- (i) was a person of Indonesian race, national origin and ethnic origin;
 - (ii) claimed to be a person under the age of 18 years (**Age Claim**);
 - (iii) wanted to return to Indonesia;
 - (iv) had an appearance that was not inconsistent with their Age Claim;
 - (v) was, or alternatively should reasonably have been suspected of being, a child;
 - (vi) was, or alternatively should reasonably have been suspected of having been, born and raised in Indonesia;
 - (vii) had low levels of education;
 - (viii) had little to no English language ability;
 - (ix) was separated from parents and family;
 - (x) was, or alternatively should reasonably have been suspected of being, a child brought to Australia unaccompanied by any adult who was able to act as their guardian;
 - (xi) had signed a copy of a record of the DIAC Entry Interview in which they had asked to be returned to Indonesia;
- (b) DIAC did not have evidence that determined the applicant or any of the other Group Members was over 18 years of age.

PARTICULARS

In respect of the applicant:

- (i) the matters alleged in subparagraphs (a)(i)-(iv) were told by the applicant to the respondent's officers during the Applicant's DIAC Entry Interview;
- (ii) the matters alleged in subparagraphs (a)(v)-(xi) are to be inferred from the circumstances including the matters told by the applicant to the respondent's officers in the Applicant's DIAC Entry Interview;
- (iii) the matters alleged in subparagraph (a)(xii) is evidenced by or alternatively reflected in a document styled "Immigration-In-Confidence" and dated 8 January 2010.

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

47. By reason of the matters alleged in paragraphs 2(f), 2(g), 2(h), 5(c), 5(d), 5(e), 34 to 46 above, pursuant to s 198(2) of the Migration Act, the respondent was required to remove the applicant and the other Group Members as soon as reasonably practicable after the DIAC Entry Interview, on the basis that by that date, the respondent knew or ought to have known that they:

- (a) were covered by subsection 193(1)(b), (c) or (d) of the Migration Act for the purposes of subsection 198(2)(a) of the Migration Act;
- (b) had not been immigration cleared for the purposes of s 198(2)(b) of the Migration Act; and
- (c) had not made valid applications for visas for the purposes of s 198(2)(c)(i) of the Migration Act.

PARTICULARS

Removal of the Group Members as soon as reasonably practicable required removal within the period reasonably necessary to make administrative arrangements. Having regard to the detention of the Group Members who were all children, or ought to have been assumed to be children, that period would ordinarily comprise not more than a few days.

48. Further and alternatively, by reason of the matters pleaded in paragraphs 42(c), 44 and 46(a)(xi) above, pursuant to s 198(1) of the Migration Act, the respondent was required to remove the applicant and the other Group Members as soon as reasonably practicable after the relevant DIAC Entry Interview, on the basis that:

- (a) on or about the date of the relevant DIAC Entry Interview, they asked the Minister in writing to be removed to Indonesia for the purposes of s 198(1) of the Migration Act;
- (b) further or alternatively, the Minister or his delegate knew or ought to have known by that date that the applicant and the other Group Members wanted to be removed to Indonesia.

PARTICULARS

The applicant refers to and repeats the particulars subjoined to paragraph 47.

49. The applicant and the other Group Members:
- (a) were not removed by the respondent as soon as reasonably practicable after their DIAC Entry Interviews in accordance with s 198(1) or s 198(2) of the Migration Act (**DIAC Non-Removal Act**);
 - (b) alternatively, were not assisted by the respondent to make a written request to the Minister to be removed under s 198(1) of the Migration Act (**DIAC Non-Assistance Act**).

E.5 DIAC Non-Investigation Act

50. The respondent's officers at DIAC did not at any time at or following the DIAC Entry Interviews:
- (a) perform an Age Determination Assessment in respect of the applicant or other Group Members; or
 - (b) take any measures, or alternatively adequate measures, to investigate the applicant's or the other Group Members' ages,
- (**DIAC Non-Investigation Act**).

E.6 Transfer to AFP custody

51. 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.

PARTICULARS

Page 33 of the Age of Uncertainty Report.

52. The applicant and the other Group Members were suspected by the respondent of being involved in offences of people smuggling under s 232A of the Migration Act.
53. Following their DIAC Entry Interviews, the respondent or persons acting on its behalf, in accordance with the practice pleaded at paragraph 51 above:
- (a) transferred and detained in another immigration detention facility each of the applicant and the other Investigation Sub-Group Members (**Transfer Detention**);
 - (b) subsequently transferred each of the applicant and the other Investigation Sub-Group Members to the AFP's custody (**Investigation Detention**),
- without their consent.

PARTICULARS

By way of example, the applicant was:

- (i) in or around January 2010, transferred to the Northern Immigration Detention Centre (Berrimah House Detention Centre for Children) in Darwin;
- (ii) on 20 January 2010, transferred to the AFP's custody.

54. The Transfer Detention and the Investigation Detention by or on behalf of the respondent was in connection with and for the purpose of investigations by the AFP into whether the applicant and other Investigation Sub-Group Members had committed an offence under s 232A of the Migration Act (**Investigations**).

PARTICULARS

The purpose of the Transfer Detention and the Investigation Detention is to be inferred from the circumstances of the transfer and the functions of the AFP, and where relevant from the content of the AFP Wrist X-Ray Interview (defined below) for each of the applicant and other Investigation Sub-Group Members. Further particulars may be provided after discovery.

E.7 Wrist X-Ray

55. The applicant and the other Wrist X-Ray Sub-Group Members were each interviewed by AFP officers (**AFP Wrist X-Ray Interview**) in connection with the Investigations and for the purpose of obtaining their permission to take an x-ray of their wrist (**Wrist X-Ray Procedure**).

PARTICULARS

By way of example, the applicant was interviewed by Federal Agents Elizabeth Leigh and Liam Sherman of the AFP on 20 January 2010 (**Applicant's Wrist X-Ray Interview**).

56. At material times until at least 8 July 2011, it was the practice of the AFP to:
- (a) purport to seek and receive consent by the interviewee for a Wrist X-ray Procedure pursuant to s 3ZQC of the *Crimes Act 1914* (Cth) (**Crimes Act**) for the purpose of obtaining purported expert radiologic analysis about their likely age (**Wrist X-Ray Analysis**);
 - (b) ask the interviewee for their date of birth;
 - (c) not conduct an Age Assessment Determination.

PARTICULARS

Pages 33, 235 and 236 of the Age of Uncertainty Report.

Media release by the Hon Robert McClelland MP (Attorney-General) and the Hon Brendan O'Connor MP (Minister for Home Affairs & Justice) dated 8 July 2011 titled "Improved Process for Age Determination in People Smuggling Matters".

57. In accordance with the practice alleged in the preceding paragraph, during the AFP Wrist X-Ray Interviews, AFP officers:
- (a) purported to seek and receive (in the absence of a guardian) each of the applicant's and the Wrist X-Ray Sub-Group Members' consent to the Wrist X-ray Procedure;
 - (b) did not conduct an Age Assessment Determination.

PARTICULARS

By way of example, the Applicant's Wrist X-Ray Interview is evidenced by or alternatively reflected in an undated document styled 'Taped Record of Interview between F/A Elizabeth LEIGH and ALI JASMIN'. The applicant signed a 'Consent to Release of Patient Medical Information' for the Wrist X-ray Procedure to be carried out. Further particulars may be provided after discovery.

58. Each of the applicant and the other Wrist X-Ray Sub-Group Members:
- (a) were removed from their place of detention by AFP officers;
 - (b) were taken by AFP officers to a place where the Wrist X-Ray Procedure could be carried out, usually a hospital;
 - (c) had the Wrist X-ray Procedure performed on them;
 - (d) were returned by the AFP officers to detention by or on behalf of the respondent, **(X-Ray Period)**.

PARTICULARS

By way of example, the X-Ray Period in respect of the applicant was on 20 January 2010. The applicant's Wrist X-Ray Procedure was performed at the Royal Darwin Hospital after which he was returned by AFP officers to the Northern Immigration Detention Centre. Further particulars may be provided after discovery.

59. The Wrist X-Ray Procedure was undertaken as part of, and to support, the Investigations.
60. During the X-Ray Period, each of the applicant and the other Wrist X-Ray Sub-Group Members were detained by AFP Officers **(X-Ray Detention)**.

PARTICULARS

By way of example, the X-Ray Detention in respect of the applicant was on 20 January 2010. Further particulars may be provided after discovery.

61. Following the Wrist X-Ray Procedure, a radiologist or other medical practitioner:
- (a) provided an opinion that, according to a comparison between the standards identified in the Greulich and Pyle Atlas, and the results of the Wrist X-Ray Procedure, the applicant's or other X-Ray Sub-Group Member's (as the case may be) skeletal age was incongruous with their stated chronological age; but
 - (b) did not determine their chronological age,
- (Wrist X-Ray Opinion).**

PARTICULARS

By way of example, in respect of the applicant, the radiologist was Dr Glenn Drogemuller whose Wrist X-Ray Opinion to the effect stated was given on 22 January 2010. Further particulars may be provided after discovery.

E.8 Subsequent events

62. On or about 25 January 2010, following the issue of the Wrist X-Ray Opinion regarding the applicant, 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.
63. Each of the applicant and the other Group Members was transferred by the respondent to a State or Territory and detained (**Regional Immigration Detention**) following which:
- (a) each of the applicant and the other Charged Sub-Group Members were charged by the AFP with an offence under s 232A of the Migration Act (**AFP Charging Act**); and
 - (b) Group Members who were not Charged Sub-Group Members were removed from Australia.

PARTICULARS

By way of example, on a date between 3 February and 30 March 2010, the applicant was transferred by the respondent from the Northern Immigration Detention Centre to the Perth Immigration Centre in Western Australia.

The applicant was in Regional Immigration Detention until 30 March 2010. Further particulars may be provided after discovery.

64. For each of the applicant and the other Charged Sub-Group Members, the prosecution notice issued against them did not accurately record their date of birth.

65. In respect of the applicant:
- (a) on 30 March 2010, Agent Eade of the AFP signed a Prosecution Notice charging the applicant with an offence under s 232A of the Migration Act.
 - (b) the Prosecution Notice in respect of the applicant stated his date of birth as 12 October 1990;
 - (c) at the time she signed the Prosecution Notice, Agent Eade held no evidence to suggest that the applicant's date of birth was 12 October 1990.
66. Following the AFP Charging Act, each of the applicant and the other Arrest Sub-Group Members were:
- (a) arrested; and
 - (b) placed in an adult police facility (**Arrest Detention**).

PARTICULARS

By way of example, on 30 March 2010, the applicant was transferred by the respondent to AFP Headquarters in Perth, and was arrested by AFP agents, including Agent Eade, and placed in a police watch house in Perth.

The applicant was in Arrest Detention between 30 and 31 March 2010.

67. After being charged, each of the applicant and the other Charged Sub-Group Members were transferred to the relevant State or Territory adult prison and held on remand (**Remand Detention**).

PARTICULARS

On 31 March 2010, the applicant was remanded in custody by the Magistrates Court of Western Australia and held at the maximum-security prison known as Albany Regional Prison, an adult prison.

From 7 May 2010 to 22 December 2010, the applicant was held in the maximum-security prison known as Hakea Prison, an adult prison operated by the Western Australian Department of Corrections.

Accordingly, the applicant was in Remand Detention from 31 March 2010 to 22 December 2010.

68. On or about 7 May 2010, the respondent issued the applicant with a Criminal Justice Stay Visa under s 155 of the Migration Act.

PARTICULARS

The Criminal Justice Stay Visa in respect of the applicant was issued on 7 May 2010 by the acting director of Character Operations Section, Program Integrity Risks Branch, at DIAC.

69. The CDPP filed an indictment against each of the applicant and the other Indicted Sub-Group Members alleging counts of acting contrary to s 232A of the Migration Act (**CDPP Indictment Act**).
70. In respect of the applicant:
- (a) on 2 July 2010, the CDPP filed an indictment against the applicant in the District Court of Western Australia alleging one count of acting contrary to s 232A of the Migration Act; and

PARTICULARS

The indictment was dated 2 July 2010 and signed by Allan Sharpe, Assistant Director of the CDPP.

- (b) the indictment stated the applicant's birth date as 12 October 1990.

E.9 Applicant's documentary evidence

71. On 24 August 2010, the Indonesian Consulate in Western Australia provided DIAC with a copy of the applicant's birth certificate (**Birth Certificate**).

PARTICULARS

The Birth Certificate is referred to at page 343 of the Age of Uncertainty Report. Further particulars may be provided after discovery.

72. The Birth Certificate stated that the applicant was born on 12 January 1996, making him 14 years old at the date he was apprehended.
73. Later on 24 August 2010, DIAC provided a copy of the Birth Certificate to the CDPP.
74. In response, the CDPP made a request to the AFP to investigate the provenance of the Birth Certificate.

PARTICULARS

The request is referred to at page 343 of the Age of Uncertainty Report. Further particulars may be provided after discovery.

75. Following receipt of the Birth Certificate, the CDPP:
- (a) did not believe or rely upon the Birth Certificate;

- (b) did not apply the Benefit of the Doubt Principle,
- (c) declined to exercise its discretion to:
 - (i) withdraw the indictment in compliance with the CDPP Youth Prosecution Policy; and
 - (ii) request that DIAC take the applicant into immigration detention in anticipation of him being returned to Indonesia pursuant to s 198 of the Migration Act,

(CDPP Discretion Act).

76. On 12 October 2010, Indonesian National Police faxed a legalised copy of the applicant's birth certificate to the AFP liaison officer in Denpasar (**Legalised Birth Certificate**).

PARTICULARS

The Legalised Birth Certificate is referred to at page 343 of the Age of Uncertainty Report. Further particulars may be provided after discovery.

77. The Legalised Birth Certificate recorded the applicant's date of birth as 12 January 1996.
78. On 20 October 2010, the AFP provided the Legalised Birth Certificate to the CDPP.
79. In response, the CDPP requested the AFP to source a translated version of the Legalised Birth Certificate.
80. Subsequently, the AFP provided a translated version of the Legalised Birth Certificate.
81. Following receipt of the translated Legalised Birth Certificate, the CDPP:
- (a) did not believe or rely upon the Legalised Birth Certificate;
 - (b) did not apply the Benefit of the Doubt Principle; and
 - (c) declined to exercise its discretion to:
 - (i) withdraw the indictment in compliance with the CDPP Youth Prosecution Policy; and
 - (ii) request that DIAC take the applicant into immigration detention in anticipation of him being returned to Indonesia pursuant to s 198 of the Migration Act,

(Second CDPP Discretion Act).

E.10 AFP Non-Investigation Act

82. The AFP determined that it would not use its staff in Indonesia to investigate, or alternatively to investigate sufficiently to determine, the age of the applicant or any of the other Charged Sub-Group Members (**AFP Non-Investigation Act**).

PARTICULARS

By way of example, the AFP Non-Investigation Act in respect of the applicant is evidenced in correspondence dated 24 November 2010 sent by an AFP Officer in charge of the applicant's case to a Principle Legal Officer at the CDPP in Perth. Further particulars may be provided after discovery.

83. The CDPP prepared the prosecution of, then prosecuted, each of the applicant and the other Prosecution Sub-Group Members in respect of the relevant indictments (**CDPP Prosecuting Act**).

PARTICULARS

By way of example, the CDPP prepared the prosecution of, then prosecuted the applicant between approximately 2 July 2010 and 22 December 2010, including on 22 December 2010 at the hearing of the trial. Further particulars may be provided after discovery.

84. Each of the applicant and the other Prosecution Sub-Group Members were:
- (a) convicted of charges of breaching s 232A of the Migration Act; and
 - (b) sentenced to the minimum mandatory sentence pursuant to s 236 of the Migration Act, being 5 years imprisonment.

PARTICULARS

The applicant was convicted and sentenced by Keen DCJ in the District Court of Western Australia on 22 December 2010.

85. Following their conviction, each of the applicant and the other Prosecution Sub-Group Members were imprisoned in adult prison (**Imprisonment**).

PARTICULARS

By way of example, following his conviction, the applicant was imprisoned at Hakea prison and thereafter at Albany Regional Prison, both being adult prisons. Further particulars may be provided after discovery.

E.11 Release and removal

86. Each of the Group Members were eventually removed to Indonesia by the respondent.

PARTICULARS

In respect of the applicant and the other Prosecution Sub-Group Members, they were, following conviction, released on licence and removed to Indonesia. Further particulars may be provided after discovery.

87. In respect of the applicant, on or about 18 May 2012:
- (a) the applicant was released pursuant to a licence from the Commonwealth Attorney-General;
 - (b) the respondent took the applicant into immigration detention; and
 - (c) the respondent removed the applicant from Australia to Indonesia.

F. SUMMARY OF DETENTION

88. Each of the Group Members suffered loss of liberty arising from their detention:
- (a) by or on behalf of the respondent, being the Christmas Island Detention, the Transfer Detention, the Investigation Detention, the X-Ray Detention, the Regional Immigration Detention (together **Immigration Detention**) and the Arrest Detention;
 - (b) by or on behalf of State or Territory Governments, being the Remand Detention and the Imprisonment,
- as the case may be.

PARTICULARS

Particulars of the loss and damage suffered by individual Group Members will be supplied after the determination of common issues in the applicant's case.

89. As a consequence of the matters set out in Section E above, the applicant was detained for approximately:
- (a) 102 days purportedly in Immigration Detention; and
 - (b) 780 days in an adult prison.
90. In the premises, the applicant suffered loss of his liberty for approximately:
- (a) 102 days arising from his detention in Immigration Detention; and
 - (b) 780 days arising from his detention in an adult prison.

G. ABSENCE OF GUARDIAN

91. At all material times, the applicant and the other Group Members:

- (a) were not offered; and
- (b) did not have access to,
a legal guardian.

H. NO ADVICE

92. The respondent, did not, before removing the applicant or the other Group Members to Indonesia, obtain on behalf of any of them independent legal advice with respect to the possible existence of a cause of action arising out of the circumstances in which they had been detained and/or imprisoned as alleged above.

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

93. Since at least 2001, the respondent knew that Wrist X-Ray Analysis is incapable of reliably determining a person's age.

PARTICULARS

Page 217 of the Age of Uncertainty Report and the matters pleaded in this Section I.

94. On 23 March 2001, the Commonwealth Senate Legal and Constitutional Legislation Committee, 'Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001', heard evidence that questioned the usefulness of Wrist X-ray Analysis for the purposes of age assessment.
95. In a report titled 'Report of the Inquiry into the Provisions of the Crimes Amendment (Age Determination) Bill 2001' (**Report of Senate Committee 2001**), the Commonwealth Senate Legal and Constitutional Legislation Committee of the Parliament of Australia reported [at para 3.62] that:
- (a) it accepted the evidence that questioned the usefulness of Wrist X-ray Analysis for the purposes of age assessment; and
 - (b) there is no real correlation between bone age and chronological age.
96. Four cases decided in Australian courts between 2000 and 2003, in which the respondent was a party, raised concerns about the extent to which Wrist X-ray Analysis is informative of chronological age, namely:
- (a) *The Queen v Astar Udin and Sania Aman* (District Court of Western Australia, Jackson DCJ, 3 October 2000);

- (b) *The Police v Henry Mazela* (Children’s Court of Western Australia, O’Brien J, 12 February 2002);
- (c) *The Queen v Herman Safrudin and Lukman Muhamad* (Supreme Court of the Northern Territory, Riley J, 10 April 2002); and
- (d) *Applicant VFAY v Minister for Immigration* [2003] FMCA 289.

97. By no later than early to mid-2010, the respondent had concerns about the appropriateness of relying on Wrist X-ray Ray Analysis to determine chronological age.

PARTICULARS

The applicant refers to and repeats the matters pleaded in paragraphs 98 to 100 below. Further particulars may be provided after discovery.

98. On 11 June 2010, DIAC made a submission to the then Minister for Immigration and Citizenship stating, *inter alia*, that:
- (a) there was controversy surrounding the use and reliability of Wrist X-ray Analysis for age determination;
 - (b) age determination on the basis of bone scans had been disputed in Australian courts;
 - (c) a pilot program should be established to assess an alternative technique for age determination, namely an age assessment interview.

PARTICULARS

The submission is referred to at page 105 of the Age of Uncertainty Report.

99. From late-2010, detailed discussions about the unreliability of Wrist X-ray Analysis for age assessments took place between DIAC and other Commonwealth agencies.

PARTICULARS

The discussions are referred to at page 104 of the Age of Uncertainty Report.

100. From September 2010, DIAC officers made concentrated efforts to ensure that information questioning the appropriateness of using Wrist X-ray Analysis for age assessment purposes was provided to other agencies of the respondent with a role in the investigation and prosecution of people smuggling offences:
- (a) on 3 September 2010, senior officials from DIAC, the AFP and the CDPP attended a meeting to discuss approaches to age determination and at, or soon

after, the meeting the AFP and CDPP representatives were provided with the following documents:

- (i) a summary of the cases *Applicant VFAY v Minister for Immigration* [2003] FMCA 289 and *V0504672* [2007] MRTA 385;
 - (ii) an extract relating to puberty and age determination from a publication *Guidelines for Paediatricians* (UK);
 - (iii) a copy of the publication 'The Health of Refugee Children: Guidelines for Paediatricians' published by the Royal College of Paediatrics and Child Health (UK);
- (b) on 5 October 2010, the AFP:
- (i) was in possession of a substantial amount of information concerning international approaches to using x-rays to determine age;
 - (ii) presented the results of its own research to DIAC and indicated that its preferred option for determining age would be a combination of the focused age interview recommended by DIAC and a wrist x-ray;
- (c) on 14 October 2010, DIAC officers replied to the AFP expressing their continued concern about the use of wrist x-rays to determine age and:
- (i) referred to:
 - (A) the strong views expressed by authoritative bodies in other jurisdictions about the margin of error associated with the assessment of wrist x-rays;
 - (B) the extent to which that margin of error was reflected in the wrist x-ray reports presented to courts;
 - (ii) provided the AFP with a number of research reports about the reliability of wrist x-rays for assessing age, including the UK Guidelines on Assessing Age and a letter dated 23 May 2007 from the President of the Royal College of Radiologists to the UK Unaccompanied Asylum Seeking Children Reform Programme that questioned how useful x-rays were to determine the age of unaccompanied asylum seeking children;

- (d) on 26 October 2010, a meeting described as a ‘People Smuggling Brief Management Conference’ was held by representatives of the CDPP, the AFP, DIAC and the Attorney-General’s Department:
- (i) which focused on the evidence which needed to be collected in people smuggling matters generally in order for them to be properly put before the court; and
 - (ii) at which, it was noted:
 - (A) that there were increasing levels of difficulties in using x-ray machines to determine bone density age readings;
 - (B) there were cases where courts had expressed a lack of credibility in analysis of individuals.

PARTICULARS

Pages 107-108 of the Age of Uncertainty Report.

J. OVERRIDING DISRUPTION OBJECTIVE

J.1 Disruption Objective

101. In and before mid-2009, organised criminals had established businesses (**People Smuggling Businesses**) transporting to Australia non-citizens who did not hold a visa to enter Australia, but who wished to enter Australia for the purpose of attempting to seek asylum in Australia, such as in connection with Australia’s obligations under the 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol (**Refugee Convention**).
102. The People Smuggling Businesses involved, *inter alia*:
- (a) transporting persons seeking asylum in Australia, from Indonesia to Australia or to Australian territorial waters, using small boats which were not properly equipped for the journey;
 - (b) using young, poor and unsophisticated Indonesian nationals to crew the boats (**Indonesian Boat Crew Members**).
103. The respondent has known the matters pleaded in paragraphs 101 and 102 since at least March 2001.

PARTICULARS

Second Reading Speech by Dr Sharman Stone MP for the *Crimes Amendment (Age Determination) Bill 2001* dated 7 March 2001. Further particulars may be provided after discovery.

104. At material times from approximately 2000, it was the objective of the Commonwealth Government to seek disrupt the People Smuggling Businesses to deter persons contemplating using those businesses (**Disruption Objective**).

PARTICULARS

The Disruption Objective is evidenced by, or alternatively can be inferred from, the statements and conduct of the Commonwealth Government appearing in Annexure D hereof. Further particulars may be provided after discovery.

105. In accordance with the Disruption Objective, the Commonwealth Government:
- (a) maintained a whole of government approach to ‘unauthorised arrivals’;
 - (b) on 27 September 2000, gave a supplementary direction to the AFP under s 37(2) of the *Australian Federal Police Act 1979* (Cth) stating that:
 - (i) the Government expected the AFP to give special emphasis to countering and otherwise investigating organised people smuggling; and
 - (ii) the AFP was required to ensure that it provided an effective contribution to the implementation of the Government's whole of government approach to unauthorised arrivals;

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The supplementary direction was contained in Ministerial Direction dated 27 September 2000 executed by Senator Amanda Vanstone, then Minister for Justice and Customs. The Ministerial Direction referred to the whole of government approach to unauthorised arrivals.

- (c) on 1 July 2011, gave a direction to the AFP under s 37(2) of the *Australian Federal Police Act 1979* (Cth) stating that the Government expected the AFP to contribute effectively to Australia’s border management and security, particularly protecting Australia from people smuggling, including prevention, deterrence and disruption.

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The direction was contained in Ministerial Direction dated 1 July 2010 executed by Brendan O’Connor MP, Minister for Home Affairs and Customs.

106. On the dates specified in Annexure E hereof, (and at other times that the applicant cannot presently particularise) the Federal Opposition made various statements in the media and in the Commonwealth Parliament 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.

107. By its conduct as alleged in Annexure E, the Federal Opposition (*inter alia*) raised doubts about whether the Commonwealth Government, as then constituted, could or would give effect to the Disruption Objective.
108. The effect of the conduct set out in Annexures D and E was to make 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, a highly contested political issue in Australia during the Period.
109. During the Period, the Disruption Objective, and the determination of the Commonwealth Government, as then constituted, to implement it, were controversial topics that received widespread media attention in Australia.
110. The Disruption Objective depended in part on a deterrence effect or perceived deterrence effect (**Deterrence Effect**), associated with the respondent being seen to send a strong message that Australia would not tolerate the People Smuggling Businesses and would, *inter alia*, whenever possible prosecute persons involved in People Smuggling Businesses for offences in connection with that conduct.
111. By the conduct alleged in Annexure D, the Commonwealth Government, as then constituted, had made statements in the Parliament and in the media that expressed a strong preference for all alleged people smugglers to be treated in a way that would create the Deterrence Effect, *inter alia*, by prosecuting persons suspected of involvement with People Smuggling Businesses with offences (**Government Preference**).
112. Officers of the respondent from DIAC, the AFP and the CDPP were the persons responsible for taking the steps that the Commonwealth Government had contended would create the Deterrence Effect and help fulfil the Disruption Objective.
113. By reason of the matters alleged in paragraphs 101 to 112 above, the respondent knew of the Disruption Objective, the Deterrence Effect and the Government Preference.

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The respondent was aware of the matters alleged in paragraphs 101 to 105 above.

Additionally, it is to be inferred that the relevant knowledge was held, *inter alia*, by those officers of the respondent who had operational responsibility for giving effect to the Disruption Objective and the Deterrence Effect and

that those persons with operational responsibility for the Disruption Objective and the Deterrence Effect came to know of the media statements alleged in Annexures D and E hereof, or their substance. Further and alternatively, it is to be inferred that the persons with operational responsibility for the Disruption Objective and the Deterrence Effect were separately briefed about the Disruption Objective and the Deterrence Effect, or their substance. Particulars of those briefings may be supplied after discovery.

J.2 Pressure in relation to age issues

114. By reason of the Disruption Objective, and the matters alleged in paragraphs 101 to 112 above, officers of the respondent, being representatives of DIAC, the AFP and the CDPP, were, at material times from mid-2009 and following, under express or implied pressure to act in ways that would have the effect of disrupting the People Smuggling Businesses and deterring persons contemplating using the People Smuggling Businesses.
115. At material times, prosecuting Indonesian Boat Crew Members for offences under the Migration Act was an act that would have the effect of disrupting the People Smuggling Businesses and deterring persons contemplating using the People Smuggling Businesses.
116. In the premises, and in particular by reason of the matters alleged in paragraphs 101 to 112 above, at material times:
- (a) DIAC officers were, in respect of Indonesian Boat Crew Members who were not clearly under 18 years of age, under express or implied pressure:
 - (i) not to conduct an Age Determination Assessment;
 - (ii) not to apply the Benefit of the Doubt Principle;
 - (iii) to permit those persons to be investigated by the AFP in respect of people smuggling offences;
 - (b) AFP officers were, in respect of Indonesian Boat Crew Members who were not clearly under 18 years of age, under express or implied pressure not to:
 - (i) accept claims by Indonesian Boat Crew Members that they were under 18 years old;
 - (ii) investigate claims by Indonesian Boat Crew Members that they were under 18 years old;
 - (iii) apply the Benefit of the Doubt Principle;
 - (iv) apply the AFP Youth Policy;

- (v) apply the Youth People Smuggling Policy.
- (c) CDPP officers were, in respect of Indonesian Boat Crew Members who were not clearly under 18 years of age, under express or implied pressure not to:
 - (i) apply the Benefit of the Doubt Principle;
 - (ii) apply the CDPP Youth Prosecution Policy;
 - (iii) apply the Youth People Smuggling Policy.

J.3 Pressure in relation to removal

117. Further and alternatively, at material times removing from Australia a person apprehended on suspicion of people smuggling was:
- (a) not an act that would have the effect of disrupting the People Smuggling Businesses and deterring persons contemplating using the People Smuggling Businesses;
 - (b) an act that would tend to undermine the Disruption Objective.
118. In the premises, and in particular by reason of the matters alleged in paragraphs 101 to 112 above, at material times DIAC officers were under express or implied pressure not to remove from Australia persons apprehended on suspicion of people smuggling.

J.4 Pressure in relation to removal assistance

119. Further and alternatively, at material times, assisting persons apprehended on suspicion of people smuggling to ask the Minister in writing to be removed from Australia for the purposes of s 198(1) of the Migration Act, was:
- (a) not an act that would have the effect of disrupting the People Smuggling Businesses and deterring persons contemplating using the People Smuggling Businesses;
 - (b) an act that would tend to undermine the Disruption Objective.
120. In the premises, and in particular by reason of the matters alleged in paragraphs 101 to 112 above, at material times, the respondent's officers at DIAC were under express or implied pressure not to assist persons apprehended on suspicion of people smuggling to ask the Minister in writing to be removed from Australia.

J.5 Pressure in relation to advice

121. Further and alternatively, at material times, obtaining independent legal advice on behalf of persons apprehended on suspicion of people smuggling with respect to the possible

existence of a cause of action arising out of the circumstances in which they had been detained and imprisoned was:

- (a) not an act that would have the effect of disrupting the People Smuggling Businesses and deterring persons contemplating using the People Smuggling Businesses;
- (b) an act that would tend to undermine the Disruption Objective.

122. In the premises, and in particular by reason of the matters alleged in paragraphs 101 to 112 above, at material times, the respondent's officers at DIAC were under express or implied pressure not to obtain independent legal advice on behalf of Indonesian Boat Crew Members with respect to the possible existence of a cause of action arising out of the circumstances in which they had been detained and/or imprisoned.

K. UNLAWFULNESS OF IMMIGRATION DETENTION

123. On its proper construction, the Migration Act provided that the Immigration Detention of the applicant and the other Group Members by or on behalf of the respondent would only be lawful if it were for one of the following three purposes:

- (a) the purpose of removing the applicant or other Group Members from Australia;
- (b) the purpose of receiving, investigating and determining an application for a visa by the applicant or other Group Members to enter and/or remain in Australia;
- (c) the purpose of determining whether to permit the applicant or other Group Members to make a valid application for a visa.

124. Further, on its proper construction, the Migration Act provided that the detention of the applicant and the other Group Members by or on behalf of the respondent would only be lawful if one of the purposes identified in the preceding paragraph was being carried into effect as soon as reasonably practicable.

125. As alleged in paragraph 49(a) above, the applicant and other Group Members were not removed as soon as reasonably practicable.

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Instead of the applicant being removed within days of 8 January 2010, the applicant was held in detention in the circumstances and for the purpose alleged above.

126. As alleged in paragraphs 2(h), 5(e), 42(c) and 48(b) above, the applicant and the other Group Members:

- (a) did not apply for a visa or to otherwise remain in Australia; and
- (b) told the respondent they wanted to return to Indonesia.

127. Further to the matters alleged in paragraphs 123 to 126 above:

- (a) the Christmas Island Detention, since the date of the relevant DIAC Entry Interview, was:
 - (i) an application of an undifferentiated policy in accordance with the Disruption Objective, applicable to all persons suspected of people smuggling offences;
 - (ii) further and alternatively, for the purpose of facilitating the Investigations;
- (b) the Transfer Detention, the Investigation Detention and the X-Ray Detention were for the purpose of facilitating the Investigations; and
- (c) the Regional Immigration Detention was for the purpose of:
 - (i) facilitating the Investigations;
 - (ii) further and alternatively, the charging of the Charged Sub-Group Members by the AFP.

128. In the premises, the Immigration Detention since the date of the relevant DIAC Entry Interview:

- (a) was not for:
 - (i) the purpose identified in paragraph 123(a);
 - (ii) the purpose identified in paragraph 123(b);
 - (iii) the purpose identified in paragraph 123(c);
- (b) alternatively to (a), if, which is denied, it was for a purpose alleged in paragraph 123 above, it was for longer than the period required to give effect to that purpose as soon as reasonably practicable; and
- (c) was therefore unlawful.

L. UNLAWFULNESS OF ARREST DETENTION

129. On its proper construction, s 3W(1) of the Crimes Act provided that an arrest of person would only be lawful if an officer purporting to make an arrest believed on reasonable grounds that:

- (a) the person has committed or is committing the offence; and
- (b) proceedings by summons against the person would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;
 - (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence in respect of the offence;
 - (vi) preserving the safety or welfare of the person,

(Arrest Purposes).

130. By reason of the matters pleaded in paragraphs 63, 66 and 67:
- (a) the applicant and the other Arrest Sub-Group Members were in Immigration Detention at the time of their arrest; and
 - (b) accordingly, an officer of the respondent purporting to effect an arrest of the applicant and the Arrest Sub-Group Members could not have believed, or alternatively believed on reasonable grounds, that proceedings by summons against the person would not achieve one or more of the Arrest Purposes.
131. In the premises, each arrest was unlawful and there was no lawful basis for the Arrest Detention.

M. RESPONDENT'S DUTIES OF CARE

M.1 Risk of Harm

132. At all material times:
- (a) there was a risk that a failure or delay by the respondent to perform an Age Determination Assessment and/or apply the Benefit of the Doubt Policy would subject the applicant and the other Group Members to a loss of liberty for longer than the period for which the applicant and the other Group Members would be

detained if an Age Determination Assessment was performed and the Benefit of the Doubt Policy was applied;

- (b) further and alternatively, there was a risk that a failure by the respondent to remove the applicant and the other Group Members as soon as reasonably practicable in accordance with s 198(1) or (2) of the Migration Act would subject them to a loss of liberty in excess of the period required to provide for their removal from Australia as soon as reasonably practicable,

(the matters alleged in subparagraphs (a) and (b) are hereafter defined as the **Risk of Undue Loss of Liberty**); and

- (c) there was a risk of bodily or psychological injury arising from children being detained with adults (**Risk of Injury**).

133. Each of the Risk of Undue Loss of Liberty and the Risk of Injury:

- (a) was not remote or insignificant; and
- (b) was reasonably foreseeable by the respondent.

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Explanatory Memorandum, Revised Explanatory Memorandum, and Second Reading Speech by Dr Sharman Stone MP dated 7 March 2001, to the *Crimes Amendment (Age Determination) Bill 2001* (Cth). Further particulars may be provided after discovery.

134. At material times before removing the Group Members to Indonesia, there was a risk that failure by the respondent to obtain on their behalf independent legal advice with respect to the possible existence of a cause of action arising out of the circumstances in which they had been detained and/or imprisoned would result in the Group Members becoming precluded from exercising rights they held against the respondent, namely the rights alleged in this proceeding (save for rights arising by reason of a breach of the Advice Duty (defined below)), by reason of the passage of time (**Risk of Loss of Rights**).

135. The Risk of Loss of Rights:

- (a) was not remote or insignificant; and
- (b) was reasonably foreseeable by the respondent.

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The applicant refers to and repeats the allegations in paragraphs 5, 31, 42 and 46 above and the particulars to paragraph 136(d) below. Further particulars may be provided after discovery.

M.2 Salient features

136. By reason of the matters alleged in Sections A to E and G to I above:

- (a) the respondent exercised complete control over the decisions whether to detain the Group Members in Immigration Detention and to remove them from Australia;
- (b) with respect to the Youth Duty (defined below), the respondent knew that:
 - (i) Wrist X-Ray Analysis was scientifically discredited and could not reliably determine a person's age;
 - (ii) if a child was deemed to be an adult by either or both of DIAC and the AFP, the child would be treated as an adult for the purposes of detention placement, investigation, prosecution, sentencing and imprisonment;
 - (iii) accordingly, the applicant and the other Group Members were at Risk of Undue Loss of Liberty and/or Risk of Injury if the respondent did not take reasonable steps to protect against those risks;
 - (iv) the respondent could take reasonable steps to mitigate those risks by conducting an Age Determination Assessment;
- (c) with respect to the Removal Duty (defined below), the respondent knew that:
 - (i) if the Group Members were not removed as soon as reasonably practicable in accordance with s 198 of the Migration Act, they would be at Risk of Undue Loss of Liberty; and
 - (ii) the longer the Group Members were detained, the greater the Risk of Injury while in detention or prison;
- (d) with respect to the Advice Duty (defined below), by reason of the matters alleged in Sections E.1 and E.3 above, the respondent knew or ought to have known that each of the Group Members was being removed to a place where it was difficult or impossible for them to get legal advice in relation to the circumstances of their detention or imprisonment in Australia;

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The knowledge alleged in subparagraph (d) is to be inferred from the fact that Group Members were from, and were being removed to, parts of Indonesia that were poor and had limited resources, which facts were generally known to the

respondent by dint of its operations in and relations with Indonesia and which facts are to be inferred from the matters disclosed by the Group Members in their DIAC Entry Interviews.

- (e) with respect to the Group Members' vulnerability:
 - (i) the Group Members were completely vulnerable to the Risk of Undue Loss of Liberty and/or Risk of Injury, and were unable to take any steps to protect themselves from that risk of harm;
 - (ii) the Group Members were completely vulnerable to the Risk of Loss of Rights in circumstances where they were children, had been born in and grew up in conditions of poverty in Indonesia, had low levels of education, had little to no English language ability and, accordingly, had no means of determining their rights against the respondent within the limitation period stipulated by the *Limitation Act 2005* (WA) without assistance;
- (f) the Group Members were entirely reliant on the respondent to take reasonable care to avoid harm to them;
- (g) there was a relationship of proximity between the respondent and the Group Members:
 - (i) arising from the respondent's physical control of them and admitted non-delegable duty of care to take reasonable care for the safety of persons in immigration detention under which the respondent must ensure that reasonable care is taken to avoid harm to those persons;

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The respondent's admission against interest is contained in *S v Department of Immigration* (2005) 143 FCR 217, *SBEG v The Commonwealth* (2012) 208 FCR 235 and *AS v Minister for Immigration and Border Protection* [2014] VSC 593, among other cases, and in PAM3 - Detention Services Manual - Chapter 1 - Legislative and principles overview - Duty of care to persons in immigration detention dated 15 March 2009.

- (ii) that was analogous to the relationship of gaoler and prisoner, further and alternatively, to the relationship of school and pupil, further and alternatively to the relationship between guardian and ward; and
- (iii) arising from the Group Members' status as unaccompanied minors and/or the doctrine of *parens patriae*;

- (h) the liability alleged herein is determinate in that it is limited to liability for harm suffered by persons unduly detained by the respondent under the Migration Act to whom the Youth Identification Policy should have been, but was not, applied; and
- (i) the respondent could have avoided the harm by ensuring that:
 - (i) with respect to the Youth Duty (defined below), an Age Determination Assessment was conducted in respect of, further and alternatively that the Benefit of the Doubt Policy was applied to, the Group Members as soon as reasonably practicable;
 - (ii) with respect to the Removal Duty (defined below), the Group Members were removed from Australia as soon as reasonably practicable in accordance with s 198(1) or (2) of the Migration Act; and/or
 - (iii) with respect to the Advice Duty (defined below), by obtaining on the Group Members' behalf independent legal advice with respect to the possible existence of a cause of action arising out of the circumstances in which they had been detained and/or imprisoned.

137. Further, the respondent assumed responsibility for the care, supervision and control of each of the applicant and the other Group Members.

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PAM3 - Detention Services Manual - Chapter 1 - Legislative and principles overview - Duty of care to persons in immigration detention dated 15 March 2009.

M.3 Youth Duty

138. In the premises of the matters pleaded in paragraphs 136 and 137 above, the respondent owed a direct and non-delegable duty to Group Members:

- (a) to take reasonable care in the assessment of the Group Members' age; and
- (b) to ensure that reasonable care was taken by any third party engaged by or on behalf of the respondent to assess the Group Members' age,

to avoid or minimise each of the Risk of Undue Loss of Liberty and the Risk of Injury, including arising from:

- (i) the failure to conduct an Age Determination Assessment;

- (ii) the failure to apply the Youth Treatment Policy, including by detaining Group Members other than as a measure of last resort, in detention facilities, and accommodated with unrelated adults;
- (iii) charging Charged Sub-Group Members as adults for the offence of people smuggling under s 232A of the Migration Act,

(Youth Duty).

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The Youth Duty is reflected in the terms of PAM3 in force at 18 December 2009, in particular:

- (i) Chapter 1 - Legislative and principles overview - Duty of care to persons in immigration detention; and
- (ii) Chapter 2 - Client placement - Minors in detention; and
- (iii) Chapter 2 - Client placement - Placement options within the immigration detention network.

139. The Youth Duty required that:

- (a) as soon as reasonably practicable, an Age Determination Assessment was conducted that independently assessed whether the Group Members were aged over 18 years of age; and
- (b) further and alternatively to subparagraph (a), the Benefit of the Doubt Policy was applied to the Group Members.

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PAM3 - Chapter 2 - Client placement - Minors in detention at Section 11 dated 9 November 2009.

The requirement further arises from the fact that the respondent, in order to discharge its statutory functions of detention placement, needed to know whether a person taken into detention was, or was reasonably suspected to be, under 18 years of age, and can be inferred from the fact that from a date after 2011 that the applicant cannot presently further particularise, DIAC effected a policy that a person suspected of being a crew member of a SIEV engaged in people smuggling, would be referred to the AFP for investigation if, and only if, he or she:

- (i) was assessed as being over 18 years of age; or
- (ii) self-identified as being over 18 years of age; or
- (iii) had been to Australia as a crew member of a SIEV on a previous occasion or been removed as an illegal foreign fisher.

140. The Youth Duty:

- (a) required that the respondent act personally through DIAC officers in conducting an Age Determination Assessment and/or in applying the Benefit of the Doubt Policy; and
- (b) could not be discharged by the delegation by DIAC of its responsibility for conducting an Age Determination Assessment and/or applying the Benefit of the Doubt Policy to the AFP or third parties.

M.4 Removal Duty

141. In the premises of the matters pleaded in paragraphs 136 and 137 above, the respondent owed a direct and non-delegable duty to Group Members:

- (a) to take reasonable care in assessing whether the signed record of the DIAC Entry Interview in which the Group Members stated that they wanted to return to Indonesia (**DIAC Interview Record**) constituted a written request to be removed for the purposes of s 198(1) of the Migration Act;
- (b) alternatively to subparagraph (a), to take reasonable care in assessing whether the Group Members needed assistance to make a written request to be removed for the purposes of s 198(1) of the Migration Act; and
- (c) to ensure that reasonable care was taken by any third party engaged by or on behalf of the respondent to perform the acts in subparagraph (a) or (b) above,

to avoid or minimise each of the Risk of Undue Loss of Liberty and the Risk of Injury, arising from:

- (i) the failure of the Minister to treat the DIAC Interview Record as a written request to be removed for the purposes of s 198(1) of the Migration Act;
- (ii) alternatively to subparagraph (i), the inability of the Group Members to make a written request to be removed for the purposes of s 198(1) of the Migration Act without assistance; and
- (iii) the failure of the respondent to remove the Group Members as soon as reasonably practicable after the relevant DIAC Entry Interview, pursuant to s 198(1) of the Migration Act,

(Removal Duty).

142. The Removal Duty required that:
- (a) each Group Members' DIAC Interview Record be treated as a written request to be removed under s 198(1) of the Migration Act;
 - (b) alternatively, each Group Member be provided with:
 - (i) a copy of the standard form ordinarily provided by the respondent to persons seeking to be removed from immigration detention to a country of origin (**Removal Form**), which the respondent would treat as a written request to be removed under s 198(1) of the Migration Act;
 - (ii) further and alternatively, a legal guardian or other person to assist them to make a written request to be removed under s 198(1) of the Migration Act.

M.5 Advice Duty

143. In the premises of the matters pleaded in paragraphs 136 and 137 above, the respondent owed a duty to Group Members to take reasonable care when preparing to remove the Group Members to Indonesia to avoid the Risk of Loss of Rights (**Advice Duty**).
144. The Advice Duty required that, before removing them to Indonesia, the respondent procure on behalf of the applicant and the other Group Members independent legal advice with respect to the possible existence of a cause of action arising out of the circumstances in which they he had been detained and/or imprisoned as alleged herein (**Advice**).

N. RESPONDENT'S BREACHES OF DUTY

N.1 Breach of Youth Duty

145. By reason of the matters pleaded in paragraphs 35, 42, 45 and in Section I, there was doubt as to whether the Group Members were above the age of 18.
146. In the circumstances pleaded in Sections D, E and I above:
- (a) the respondent's failure to conduct an Age Determination Assessment and/or apply the Benefit of the Doubt Policy to the Group Members;
 - (b) further or alternatively to (a), the respondent's failure to ensure that an Age Determination Assessment was conducted and/or the Benefit of the Doubt Policy was applied to the Group Members; and
 - (c) the effective delegation of DIAC's responsibility for assessing the Group Members' ages to the AFP,

in circumstances where it was a known policy of the AFP to rely solely on Wrist X-Ray Analysis to determine a person's age and where the respondent knew that Wrist X-Ray Analysis was incapable of reliably determining age (as alleged in paragraph 93 above), created a significant risk that:

- (i) the Group Members would be treated as adults for the purpose of their detention;
- (ii) the Charged Sub-Group Members would be treated as adults for the purpose of the AFP's decision whether or not to charge and prosecute them for offences under s 232A of the Migration Act;
- (iii) the AFP Youth Policy, CDPP Youth Prosecution Policy and the Youth People Smuggling Policy would not be applied to the Group Members; and
- (iv) if found guilty, the Prosecution Sub-Group Members would be sentenced and imprisoned as adults.

147. Further, by reason of the matters pleaded at Sections D and M.1 above, a reasonably prudent DIAC officer would have ensured that:

- (a) an Age Determination Assessment was conducted in respect of each Group Member to independently ascertain whether they were aged over 18 years;
- (b) further and alternatively to subparagraph (a), the Benefit of the Doubt Policy was applied to each Group Member.

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A reasonably prudent DIAC officer would have complied with
PAM 3 - Chapter 2.

148. In breach of the Youth Duty:

- (a) no measures were taken by the respondent's officers at DIAC to independently ascertain whether the applicant or the other Group Members were aged over 18 years (**Age Determination Assessment Breach**);
- (b) the Benefit of the Doubt Policy was not applied to the applicant or the other Group Members (**Benefit of the Doubt Breach**); and
- (c) the respondent failed to avoid the Risk of Undue Loss of Liberty and/or Risk of Injury from materialising and harm being suffered by the applicant and the other Group Members.

149. By reason of the Age Determination Assessment Breach, further or alternatively the Benefit of the Doubt Breach:

- (a) the applicant and the other Group Members were treated as adults for the purpose of their detention by or on behalf of the respondent;
- (b) the AFP Youth Policy, CDPP Youth Prosecution Policy and the Youth People Smuggling Policy were not applied to the applicant or the other Group Members;
- (c) the applicant and the other Investigation Sub-Group Members were investigated, the applicant and the other Charged Sub-Group Members were charged, the applicant and the other Indicted Sub-Group Members were indicted, and the applicant and the other Prosecution Sub-Group Members were prosecuted, in connection with offences under s 232A of the Migration Act as adults;
- (d) the applicant and the other Prosecution Sub-Group Members were sentenced and imprisoned as adults.

150. But for:

- (a) the Age Determination Assessment Breach;
- (b) further or alternatively, the Benefit of the Doubt Breach,

the respondent would have:

- (i) concluded the Group Members were less than 18 years of age;
- (ii) further or alternatively, concluded that it was not determined that the Group Members were over 18 years of age and applied the Benefit of the Doubt Policy;
- (iii) applied the Youth Treatment Policy; and
- (iv) removed the Group Members to Indonesia as soon as reasonably practicable.

PARTICULARS

By way of example, in respect of the applicant:

- (i) an Age Determination Assessment would have revealed the matters in the particulars to paragraph 42 above; and
- (ii) the respondent would have removed the applicant to Indonesia as soon as reasonably practicable, that is within days of the Applicant's DIAC Entry Interview on 8 January 2010.

151. In the premises, by reason of:

- (a) the Age Determination Assessment Breach;
- (b) further or alternatively, the Benefit of the Doubt Breach;

the applicant and the other Group Members have suffered loss and damage.

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The applicant's loss and damage is constituted by:

- (i) undue loss of liberty for the time spent in Immigration Detention and adult prison after the date constituting removal as soon as reasonably practicable after 8 January 2010; and
- (ii) sexual assault while he was imprisoned in Albany Regional Prison at the beginning of the second year of his imprisonment at that prison, during which the applicant was subjected to unwanted fondling and sexual touching by an adult prisoner. The applicant still feels distress over this incident, and it continues to cause him to have nightmares.

Group Members have suffered (at least) damage similar to that alleged in subparagraph (i) above. Particulars of the loss and damage suffered by individual Group Members will be supplied after the determination of common issues in the applicant's case.

N.2 Breach of Removal Duty

152. In the circumstances pleaded in Section E above:

- (a) the respondent's failure to treat each Group Members' DIAC Interview Record as a written request to be removed under s 198(1) of the Migration Act;
- (b) alternatively, the respondent's failure to provide assistance, or ensure that assistance was provided, to the Group Members to make a written request to be removed under s 198(1) of the Migration Act,

created a significant risk that they would not be removed by the respondent as soon as reasonably practicable after the relevant DIAC Entry Interview.

153. Further, by reason of the matters pleaded at Sections D and M.1 above, a reasonably prudent DIAC officer would have ensured that:

- (a) each Group Members' DIAC Interview Record was presented to the Minister as a written request to be removed under s 198(1) of the Migration Act;
- (b) alternatively, each Group Member was provided with either a Removal Form, or a legal guardian or other person to assist, so that the Group Member could make a

compliant written request to be removed under s 198(1) of the Migration Act during or soon after their DIAC Entry Interview.

PARTICULARS

The applicant refers to and repeats the matters in paragraph 147 above.

154. In breach of the Removal Duty the respondent failed to:
- (a) treat each Group Members' DIAC Interview Record as a written request to be removed under s 198(1) of the Migration Act (**Primary Removal Breach**);
 - (b) alternatively, provide a Removal Form or person to assist the Group Members to make a written request to be removed under s 198(1) of the Migration Act (**Alternative Removal Breach**).
155. By reason of the Primary Removal Breach or the Alternative Removal Breach, the Group Members were not removed as soon as reasonably practicable after their respective DIAC Entry Interviews.

PARTICULARS

The applicant refers to and repeats the matters in paragraph 125 above.

156. But for the Primary Removal Breach or the Alternative Removal Breach, the respondent would have removed each Group Member as soon as reasonably practicable after their respective DIAC Entry Interviews.
157. In the premises, by reason of the Primary Removal Breach or the Alternative Removal Breach, the applicant and the other Group Members have suffered loss and damage.

PARTICULARS

The applicant refers to and repeats the particulars to paragraphs 125 and 151 above.

N.3 Breach of Advice Duty

158. In the circumstances pleaded in Sections A to C, E, G and H above, a failure by the respondent to procure the Advice has created a risk that the applicant and the Group Members will be barred from bringing the instant proceedings under the *Limitation Act 2005* (WA) or cognate legislation in other States or Territories.
159. Further, by reason of the matters pleaded at Section M.1 and paragraph 136(d) above, and the fact that the removal of each Group Member followed a period of prolonged detention as alleged herein, a reasonably prudent officer of the respondent would have ensured that

the Advice was procured for or on behalf of each Group Member prior to their removal to Indonesia.

160. In breach of the Advice Duty, the respondent did not procure any Advice for or on behalf of the Group Members prior to their removal to Indonesia (**Advice Breach**).
161. By reason of the Advice Breach:
- (a) the Group Members were removed to Indonesia without obtaining the Advice;
 - (b) in the circumstances pleaded in paragraphs 5, 31 and 42 above, the Group Members were denied the opportunity to commence a proceeding analogous to the instant proceeding in connection with the circumstances in which they had been detained and/or imprisoned in Australia;
 - (c) the applicant filed these proceedings (No. VID328 of 2020 and No. VID664 of 2020) after the period stipulated by the *Limitation Act 2005* (WA).
162. But for the Advice Breach, the applicant or another Group Member would have commenced a proceeding, either personally or in the nature of a Representative Proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth), in connection with the circumstances in which the applicant and the other Group Members were detained by or on behalf of the respondent and/or imprisoned, within a reasonable period of being released from prison on 18 May 2012, that is, following the period sufficient to obtain instructions, draw up documents, and commence proceedings analogous to the instant proceeding and in any event prior to the applicant and the other Group Members' causes of action becoming precluded by the effluxion of time.

PARTICULARS

Further particulars may be provided after discovery and in the event that the respondent purports to rely on any defence relating to the effluxion of time or delay by the applicant or other Group Members.

163. In the premises, by reason of the Advice Breach, if the applicant is precluded from commencing or bringing the instant proceedings, or any part of the instant proceedings, under the *Limitation Act 2005* (WA) or cognate legislation in other States or Territories, or is otherwise barred from remedy by the effluxion of time, the applicant and the other Group Members will suffer loss and damage.

PARTICULARS

The applicant's loss and damage is constituted by the lost opportunity to seek relief against the respondent in connection with their detention and imprisonment as alleged herein.

O. RDA CLAIM

O.1 Background to the RDA Claim

164. During the Period, persons recruited to crew boats used for people smuggling as part of the People Smuggling Businesses:

- (a) were predominately of Indonesian race, national or ethnic origin;
- (b) were known by the respondent to be predominately of Indonesian race, national or ethnic origin.

PARTICULARS

The recruitment and prevalence of Indonesian Boat Crew Members is outlined in:

- (i) the report of Ms Cat Baker of the Department of Foreign Affairs and Trade titled 'The people smugglers' business model' dated 28 February 2013; and
- (ii) the report of the United Nations Office of Drugs and Crime titled 'Migrant Smuggling in Asia and the Pacific: Current Trends and Challenge' dated July 2018.

The respondent's knowledge is to be inferred from the matters alleged in Section J, and the fact the respondent had devoted significant resources to analysing the People Smuggling Businesses.

Further particulars may be provided following discovery.

165. By reason of the matters alleged in Section J above, during the Period, all persons detained by the respondent on suspicion that they had breached s 232A of the Migration Act were intended by the respondent to be dealt with in a way that was consistent with the Disruption Objective and the Government Preference.

166. By reason of the matters alleged in Section J and paragraph 164 above, during the Period all persons, or predominantly all persons, detained by the respondent on the suspicion that they had breached s 232A of the Migration Act, were expected by the respondent to be, and were, of Indonesian race, national or ethnic origin.

PARTICULARS

The fact that persons detained were expected to be, and were, of Indonesian race, national or ethnic origin, follows necessarily from the matters alleged in paragraph 164.

167. By reason of the matters alleged in Section J and paragraph 164 above, during the Period all persons, or predominantly all persons, detained by the respondent on the suspicion that they had breached s 232A of the Migration Act, were not expected to have, and predominantly did not have, a race, national or ethnic origin other than Indonesian.
168. By reason of the matters alleged in paragraphs 164 and 167 above, the Disruption Objective, Government Preference and the Deterrence Effect, insofar as they were directed at persons crewing boats used as part of People Smuggling Businesses, were directed at, and were intended by the respondent to be directed at, exclusively or predominantly, persons of Indonesian race, national or ethnic origin.

O.2 DIAC Non-Removal and Non-Assistance Acts

169. Each of the DIAC Non-Removal Act and DIAC Non-Assistance Act alleged in Section E.4 above, was an act in respect of each Group Member involving a distinction for the purposes of s 9(1) of the RDA, namely whether or not to:
- (a) remove the applicant and other Group Members;
 - (b) further or alternatively, assist the applicant and other Group Members to make a written request to the Minister to be removed under s 198(1) of the Migration Act.
170. At the time it performed each DIAC Non-Removal Act and/or the DIAC Non-Assistance Act, the respondent knew that the applicant and other Group Members had made credible claims to have been less than 18 years of age at the date they were apprehended.

PARTICULARS

The claims were made by the applicant and the other Group Members in their respective DIAC Entry Interviews as alleged in paragraphs 37 to 42 above.

The fact that the claims were credible, and were known to be credible, is to be inferred from the matters alleged in paragraphs 42 to 43 above.

The relevant knowledge was held by, *inter alia*, those officers of the respondent with responsibility for each DIAC Non-Removal Act and/or DIAC Non-Assistance Act, who can be inferred to have had knowledge of the matters alleged in paragraphs 42 to 43 above by reason of their role and functions as an officer of the respondent.

Further particulars may be provided after discovery.

171. Each of the DIAC Non-Removal Act and/or the DIAC Non-Assistance Act were performed:

- (a) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
- (b) despite:
 - (i) the Benefit of the Doubt Principle; and
 - (ii) the DIAC Youth Policy.

172. The respondent performed the DIAC Non-Removal Act and/or the DIAC Non-Assistance Act in respect of the applicant and other Group Members, all of whom were of Indonesian race, national or ethnic origin.

PARTICULARS

Each Group Member was of Indonesian race, national or ethnic origin and had so claimed in their DIAC Entry Interviews. Each was ultimately removed to Indonesia.

173. At material times, the respondent, knew:
- (a) of the obligation on the respondent under s 198(1) of the Migration Act to remove as soon as reasonably practical, an unlawful non-citizen following a request to be removed;
 - (b) of the obligation on the respondent under s 198(2) of the Migration Act to remove as soon as reasonably practical, an unlawful non-citizen where that subsection applied;
 - (c) of the matters alleged in Section J above, or alternatively the substance of those matters;
 - (d) that the applicant and other Group Members were alleged to be Indonesian Boat Crew Members.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those officers of the respondent with responsibility for each DIAC Non-Removal Act and/or DIAC Non-Assistance Act, who can be inferred to have had knowledge of the matters alleged in paragraphs 42 to 43 above by reason of their role and functions as an officer of the respondent.

Knowledge of the requirements of the Migration Act is to be inferred from the status and employment duties of the persons responsible for the DIAC Non-Removal Act and DIAC Non-Assistance Act as DIAC officers.

In respect of knowledge of the matters alleged in Section J the applicant refers to and repeats the matters alleged in paragraphs 101 to 113 above.

Knowledge that the applicant and the Group Members were alleged to be Indonesian Boat Crew Members is to be inferred from the content of the DIAC Entry Interviews and from the circumstances generally.

174. In the premises alleged in Section O.1 and paragraphs 169 to 173 above, the DIAC Non-Removal Act and/or the DIAC Non-Assistance Act involved a distinction based on the –

- (a) race;
- (b) further or alternatively, ethnic origin;
- (c) further or alternatively, national origin –

of the applicant and the Group Members for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the matters alleged in Section I, Section J and Section O.1 above.

Further, the applicant relies on the fact that:

- (i) PAM 3 provided for an Age Determination Assessment to be performed as a means by which DIAC could assess the age of each Group Member, including the applicant;
- (ii) contrary to requirements of PAM 3, DIAC officers:
 - (A) did not perform an Age Determination Assessment on the applicant and the Group Members;
 - (B) relied on the AFP to arrange for Wrist X-Ray Analysis, notwithstanding that matters alleged in Section I.

Insofar as there was more than one reason for each DIAC Non-Removal Act, the applicant and the Group Members rely upon the effect of s 18 of the RDA.

O.3 DIAC Non-Investigation Act

175. The DIAC Non-Investigation Act alleged in Section E.5 above was an act in respect of the applicant and each Group Member involving a distinction for the purposes of s 9(1) of the RDA, namely whether or not to investigate the applicant and other Group Member's claims that they were less than 18 years of age.

176. At the time it performed each DIAC Non-Investigation Act, the respondent knew that the applicant and the other Group Members had made credible claims to have been less than 18 years of age at the date they were apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those officers of the respondent with responsibility for each DIAC Non-Investigation Act, who can be inferred to have had knowledge of the matters alleged in paragraphs 42 to 43 above by reason of their role and functions as an officer of the respondent.

The applicant otherwise refers to and repeats *mutatis mutandis* the particulars to paragraph 170 above.

177. The DIAC Non-Investigation Act was performed:
- (a) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
 - (b) despite:
 - (i) the Benefit of the Doubt Principle; and
 - (ii) the DIAC Youth Policy.
178. The respondent performed the DIAC Non-Investigation Act in respect of the applicant and the other Group Members, all of whom were of Indonesian race, national or ethnic origin.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 172 above.

179. In the premises alleged in Section O.1 and paragraphs 175 to 178 above, the DIAC Non-Investigation Act involved a distinction based on the –
- (a) race;
 - (b) further or alternatively, ethnic origin;
 - (c) further or alternatively, national origin –
- of the applicant and the Group Members for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars under paragraph 174 above.

Insofar as there was more than one reason for the DIAC Non-investigation Act, the applicant and the Group Members rely upon the effect of s 18 of the RDA.

O.4 AFP Charging Act

180. The AFP Charging Act alleged in paragraphs 63 to 66 above, was an act in respect of the applicant and each Charged Sub-Group Member involving a distinction for the purposes of s 9(1) of the RDA, namely whether to charge the applicant and the Charged Sub-Group Members with an offence under the Migration Act or apply the Benefit of the Doubt Principle.
181. At the time it performed each AFP Charging Act, the respondent knew that the applicant and the Charged Sub-Group Members had made credible claims to have been less than 18 years of age at the date they were apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those AFP officers of the respondent with responsibility for each AFP Charging Act, who can be inferred to have had knowledge of the matters alleged in paragraphs 42 to 43 above by reason of their role and functions as an officer of the respondent.

The claims were made by each of the applicant and Charged Sub-Group Members in their respective DIAC Entry Interviews as alleged in paragraphs 37 to 42 and AFP Wrist X-Ray Interview as alleged in paragraph 55 above.

The fact that the claims were credible, and were known to be credible, is to be inferred from one or more of the following circumstances:

- (i) the matters alleged in paragraphs 42 to 43 above;
- (ii) the fact (where applicable) that during the AFP Wrist X-Ray Interview, AFP officers inquired about the age of the Charged Sub-Group Member;
- (iii) the fact (where applicable) that during the AFP Wrist X-Ray Interview, each Charged Sub-Group Member was requested to undergo the Wrist X-Ray Procedure pursuant to s 3ZQC of the Crimes Act for the purpose of a Wrist X-Ray Analysis, which would not have been appropriate if his claim to be under 18 years of age lacked credibility; and
- (iv) the fact that each Charged Sub-Group Member consented to his respective Wrist X-Ray Procedure in the belief that it would be determinative of his age.

Further particulars may be provided following discovery.

182. The AFP Charging Act was performed:
- (a) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and

- (b) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the AFP Youth Policy;
 - (iii) the Youth People Smuggling Policy.

183. The AFP performed the AFP Charging Act in respect of the applicant and the Charged Sub-Group Members, all of whom were of Indonesian race, national or ethnic origin.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 172 above.

184. At material times, the respondent knew:
- (a) of the matters alleged in Section I above;
 - (b) of matters alleged in Section J above, or alternatively the substance of those matters; and
 - (c) that the applicant and the Charged Sub-Group members were alleged to be Indonesian Boat Crew Members.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those AFP officers of the respondent with responsibility for each AFP Charging Act.

The applicant refers to and repeats the matters alleged in Section I above.

The applicant refers to and repeats the matters paragraphs 101 to 113 above.

Knowledge that the applicant and the Charged Sub-Group members were alleged to be Indonesian Boat Crew Members is to be inferred from the content of the DIAC Entry Interviews and the AFP Wrist X-Ray Interviews and from the circumstances generally.

185. In the premises, the AFP Charging Act involved a distinction based on the –
- (a) race;
 - (b) further or alternatively, ethnic origin;
 - (c) further or alternatively, national origin –
- of the applicant and the Charged Sub-Group Members for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 174 above.

Further, the applicant relies on the terms of:

- (i) the AFP Youth Policy; and
- (ii) the Youth People Smuggling Policy.

Insofar as there was more than one reason for the AFP Charging Act, the applicant and the Prosecution Charged Sub-Group Members rely upon the effect of s 18 of the RDA.

O.5 CDPP Indictment Act

186. The CDPP Indictment Act alleged in paragraph 69 above, was an act in respect of the applicant and each Indicted Sub-Group Member involving a distinction for the purposes of s 9(1) of the RDA, namely whether to indict the applicant for an offence under the Migration Act or apply:

- (a) the Benefit of the Doubt Principle;
- (b) the Youth People Smuggling Policy.

187. At the time it performed each CDPP Indictment Act, the respondent knew that the applicant and the Indicted Sub-Group Members had made credible claims to have been less than 18 years of age at the date they were apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for each CDPP Indictment Act.

In respect of the claims and the credibility of the claims the applicant otherwise refers to and repeats the particulars to paragraph 181 above. The CDPP officers with responsibility for each CDPP Indictment Act are to be inferred to have known of the matters alleged therein, or the substance of those matters, by reason of their role and functions as officers of the respondent.

Further particulars may be provided following discovery.

188. The CDPP Indictment Act was performed:

- (a) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
- (b) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the Youth People Smuggling Policy;

(iii) the CDPP Youth Prosecution Policy.

189. The respondent performed the CDPP Indictment Act in respect of the applicant and the Indicted Sub-Group Members, all of whom were of Indonesian race, national or ethnic origin.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 172 above.

190. At material times, the respondent knew:
- (a) of the matters alleged in Section I above;
 - (b) of the matters alleged in Section J above, or alternatively the substance of those matters;
 - (c) that the applicant and the Indicted Sub-Group Members were alleged to be an Indonesian Boat Crew Members.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for each CDPP Indictment Act.

The applicant refers to and repeats the matters alleged in Section I above.

The applicant refers to and repeats the matters paragraphs 101 to 113 above.

Knowledge that the applicant and the Indicted Sub-Group Members were alleged to be Indonesian Boat Crew Members is to be inferred from the content of the DIAC Entry Interviews and the AFP Wrist X-Ray Interviews and from the circumstances generally.

191. In the premises, the CDPP Indictment Act involved a distinction based on: –
- (a) race;
 - (b) further or alternatively, ethnic origin;
 - (c) further or alternatively, national origin –
- of the applicant and the Indicted Sub-Group Members for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 174 above.

Further, the applicant relies on:

- (i) the terms of the CDPP Youth Prosecution Policy; and

(ii) the terms of the Youth People Smuggling Policy.

Insofar as there was more than one reason for the CDPP Indictment Act, the applicant and the Indicted Sub-Group Members rely upon the effect of s 18 of the RDA.

O.6 CDPP Discretion Act

192. The CDPP Discretion Act alleged in Section E.9 above, was an act in respect of the applicant involving a distinction for the purposes of s 9(1) of the RDA, namely whether to continue the prosecution of the applicant for an offence under the Migration Act or to apply:

- (a) the Benefit of the Doubt Principle;
- (b) the Youth People Smuggling Policy.

193. At the time it performed the CDPP Discretion Act the respondent knew that the applicant had made credible claims to have been less than 18 years of age at the date he was apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for the CDPP Discretion Act.

In respect of the claims and the credibility of the claims the applicant otherwise refers to and repeats the particulars to paragraph 181 above. The CDPP officers with responsibility for the CDPP Discretion Act are to be inferred to have known of the matters alleged therein, or the substance of those matters, by reason of their role and functions as officers of the respondent.

The applicant otherwise relies on the fact that the claims were corroborated by the Birth Certificate provided to the CDPP on 24 August 2010.

Further particulars may be provided following discovery.

194. The CDPP Discretion Act was performed:

- (a) in circumstances where the CDPP:
 - (i) had in its possession the Birth Certificate;
 - (ii) did not rely on the Birth Certificate; and
 - (iii) applied a policy or adopted a position whereby it would not accept that documents relating to the applicant's birth produced by the Indonesian consulate were reliable on the basis that the documents were from Indonesia;

PARTICULARS

The policy or position can be inferred from the letter between the CDPP and solicitors for the applicant dated 18 October 2010 which is detailed at 343 of the Age of Uncertainty Report.

Further particulars may be provided following discovery.

- (b) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
- (c) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the Youth People Smuggling Policy;
 - (iii) the CDPP Youth Prosecution Policy.

195. At material times, the respondent knew:

- (a) of the matters alleged in Section I above;
- (b) of the matters alleged in Section J above, or alternatively the substance of those matters;
- (c) that the applicant was alleged to be an Indonesian Boat Crew Member.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for the CDPP Discretion Act.

The applicant refers to and repeats the particulars to paragraph 190 above.

196. In the premises, the CDPP Discretion Act involved a distinction based on the –

- (a) race;
- (b) further or alternatively, ethnic origin;
- (c) further or alternatively, national origin –
- (d) of the applicant for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 191 above.

Insofar as there was more than one reason for the CDPP Discretion Act, the applicant relies upon the effect of s 18 of the RDA.

O.7 Second CDPP Discretion Act

197. The Second CDPP Discretion Act alleged in Section E.9 above, was an act in respect of the applicant involving a distinction for the purposes of s 9(1) of the RDA, namely whether to continue the prosecution of the applicant for an offence under the Migration Act or to apply:
- (a) the Benefit of the Doubt Principle;
 - (b) the Youth People Smuggling Policy.
198. At the time it performed the Second CDPP Discretion Act the respondent knew that the applicant had made credible claims to have been less than 18 years of age at the date he was apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for the Second CDPP Discretion Act.

In respect of the claims and the credibility of the claims the applicant otherwise refers to and repeats the particulars to paragraph 181 above. The CDPP officers with responsibility for the Second CDPP Discretion Act are to be inferred to have known of the matters alleged therein, or the substance of those matters, by reason of their role and functions as officers of the respondent.

The applicant otherwise relies on the fact that the claims were corroborated by the Legalised Birth Certificate provided to the CDPP on 20 October 2010.

Further particulars may be provided following discovery.

199. The Second CDPP Discretion Act was performed:
- (a) in circumstances where the CDPP:
 - (i) had in its possession the Legalised Birth Certificate;
 - (ii) did not rely on the Legalised Birth Certificate; and
 - (iii) applied a policy or adopted a position whereby it would not accept that documents relating to the applicant's birth produced by the Indonesian consulate were reliable on the basis that the documents were from Indonesia;

PARTICULARS

The applicant refers to and repeats the particulars subjoined to paragraph 194(a)(iii) above.

- (b) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
- (c) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the Youth People Smuggling Policy;
 - (iii) the CDPP Youth Prosecution Policy.

200. At material times, the respondent knew:

- (a) of the matters alleged in Section I above;
- (b) of the matters alleged in Section J above, or alternatively the substance of those matters;
- (c) that the applicant was alleged to be an Indonesian Boat Crew Member.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for the Second CDPP Discretion Act.

The applicant refers to and repeats the particulars subjoined to paragraph 190 above.

201. In the premises, the CDPP Discretion Act involved a distinction based on the –

- (a) race;
- (b) further or alternatively, ethnic origin;
- (c) further or alternatively, national origin –
- (d) of the applicant for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 191 above.

Insofar as there was more than one reason for the Second CDPP Discretion Act, the applicant relies upon the effect of s 18 of the RDA.

O.8 AFP Non-Investigation Act

202. The AFP Non-Investigation Act alleged in Section E.10 above, was an act involving a distinction for the purposes of s 9(1) of the RDA, namely whether to investigate the Age

Claim and the Birth Certificate or continue the prosecution of the applicant for an offence under the Migration Act, notwithstanding:

- (a) the Benefit of the Doubt Principle;
- (b) the Youth People Smuggling Policy.

203. At the time it performed the AFP Non-Investigation Act the respondent knew that the applicant had made credible claims to have been less than 18 years of age at the date he was apprehended.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those AFP and CDPP officers of the respondent with responsibility for the AFP Non-Investigation Act and the continuation of the prosecution.

In respect of the claims and the credibility of the claims the applicant otherwise refers to and repeats the particulars to paragraph 181 above. The AFP and CDPP officers with responsibility for the the AFP Non-Investigation Act are to be inferred to have known of the matters alleged therein, or the substance of those matters, by reason of their role and functions as officers of the respondent.

The applicant otherwise relies on the fact that the claims were corroborated by the Legalised Birth Certificate provided to the CDPP on 20 October 2010.

Further particulars may be provided following discovery.

204. The AFP Non-Investigation Act was performed:

- (a) in circumstances where:
 - (i) the AFP and the CDPP were in possession of the Legalised Birth Certificate;
 - (ii) the AFP had declined to take further steps to investigate the age of the applicant;
 - (iii) the AFP held a generalised views about Indonesia and Indonesian people, including that investigations conducted in Indonesia would not identify a person or authority that could accurately stipulate the applicant's date of birth, and consequently there was no utility in conducting investigations;

PARTICULARS

The applicant relies on the content of the correspondence dated 24 November 2010 particularised in paragraph 82 above.

- (b) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
- (c) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the Youth People Smuggling Policy;
 - (iii) the CDPP Youth Prosecution Policy.

205. At material times, the respondent knew:

- (a) of the matters alleged in Section I above;
- (b) of the matters alleged in Section J above, or alternatively the substance of those matters;
- (c) that the applicant was alleged to be an Indonesian Boat Crew Member.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those AFP and CDPP officers of the respondent with responsibility for the AFP Non-Investigation Act.

The applicant refers to and repeats the particulars subjoined to paragraph 190 above.

206. In the premises, the AFP Non-Investigation Act involved a distinction based on the –

- (a) race;
- (b) further or alternatively, ethnic origin;
- (c) further or alternatively, national origin –
- (d) of the applicant for the purposes of s 9(1) of the RDA.

PARTICULARS

The applicant refers to and repeats the particulars under paragraph 191 above.

Insofar as there was more than one reason for the AFP Non-Investigation Act, the applicant relies upon the effect of s 18 of the RDA.

O.9 CDPP Prosecuting Act

207. The CDPP Prosecuting Act alleged in paragraphs 83 to 85 above, was an act in respect of the applicant and each Prosecution Sub-Group Member involving a distinction for the purposes of s 9(1) of the RDA, namely whether or not to prosecute the applicant and the

Prosecution Sub-Group Members in respect of the charge set out in their respective indictments.

208. At the time it performed the CDPP Prosecuting Acts, the respondent knew that the applicant and the Prosecution Sub-Group Members had made credible claims to have been less than 18 years of age.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for the CDPP Prosecution Acts.

In respect of the claims and the credibility of the claims the applicant otherwise refers to and repeats the particulars to paragraph 181 above. The CDPP officers with responsibility for each CDPP Prosecuting Act are to be inferred to have known of the matters alleged therein, or the substance of those matters, by reason of their role and functions as officers of the respondent.

Further particulars may be provided following discovery.

209. The CDPP Prosecuting Act was performed:
- (a) in the context of and as a consequence of, or partly as consequence of, the matters alleged in Section J above; and
 - (b) despite:
 - (i) the Benefit of the Doubt Principle;
 - (ii) the Youth People Smuggling Policy;
 - (iii) the CDPP Youth Prosecution Policy.
210. The CDPP performed the CDPP Prosecuting Act in respect of the applicant and the Prosecution Sub-Group Members, all of whom were of Indonesian race, national or ethnic origin.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 172 above.

211. At material times, the respondent knew:
- (a) the matters alleged in section in Section I above;
 - (b) the matters alleged in Section J above, or alternatively the substance of those matters;

- (c) that the applicant and the Prosecution Sub-Group Members were alleged to be Indonesian Boat Crew Members.

PARTICULARS

The applicant refers to and repeats the particulars to paragraph 190 above.

212. In the premises, the CDPP Prosecuting Act involved a distinction based on the –
- (a) race;
 - (b) further or alternatively, ethnic origin;
 - (c) further or alternatively, national origin –
- of the applicant and the Prosecution Sub-Group Members for the purposes of s 9(1) of the RDA.

PARTICULARS

The relevant knowledge was held by, *inter alia*, those CDPP officers of the respondent with responsibility for each CDPP Prosecuting Act.

The applicant refers to and repeats the matters alleged in Section I above.

The applicant refers to and repeats the matters paragraphs 101 to 113 above.

Knowledge that the applicant and the Prosecution Sub-Group Members were alleged to be Indonesian Boat Crew Members is to be inferred from the content of the DIAC Entry Interviews and the AFP Wrist X-Ray Interviews and from the circumstances generally.

O.10 Impairment of a human right or fundamental freedom

213. Each of:
- (a) the DIAC Non-Removal Act and/or the Non-Assistance Act;
 - (b) the DIAC Non-investigation Act;
 - (c) the AFP Charging Act;
 - (d) the CDPP Indictment Act;
 - (e) the CDPP Discretion Act;
 - (f) the Second CDPP Discretion Act;
 - (g) the AFP Non-Investigation Act; and
 - (h) the CDPP Prosecuting Act;

had the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom of the applicant and (as relevant) the Group Members, Charged Sub-Group Members, Indicted Sub-Group Members and the Prosecution Sub-Group Members, in the political, economic, social, cultural or other field of public life, in that:

- (i) the effect of each of the matters alleged in subparagraphs (a) to (h) above was that the applicant and the Group Members, Charged Sub-Group Members, Indicted Sub-Group Members and the Prosecution Group suffered the matters alleged in paragraph 151 above; and
- (ii) consequently, the rights of the applicant, the Group Members, Charged Sub-Group Members, Indicted Sub-Group Members and the Prosecution Group were nullified or impaired as set out in Annexure A.

PARTICULARS

The fact that the recognition, enjoyment or exercise of the rights or freedoms in Annexure A was not “on an equal footing” can be inferred from the following:

- (i) the matters alleged in paragraph 215 below;
- (ii) the fact the respondent imposed the Age Requirement (as defined in paragraph 215 below) in circumstances where it did not use an alternative and available means by which to assess the age of each Group Member, namely an Age Determination Assessment; and
- (iii) the Age Requirement is not routinely used in other prosecutions brought by the AFP and/or the CDPP, and in those prosecutions the AFP and/or the CDPP apply the policies alleged in Section D above.

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

214. As a result of the matters set out in paragraphs 169 to 213 above, the respondent contravened s 9(1) of the RDA.

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

215. In the alternative, each of:

- (a) the DIAC Non-investigation Act;
- (b) the DIAC Non-Removal Act;
- (c) the AFP Charging Act;
- (d) the CDPP Indictment Act;

- (e) the CDPP Discretion Act;
- (f) the Second CDPP Discretion Act;
- (g) the AFP Non-Investigation Act; and
- (h) the CDPP Prosecuting Act; and

had the effect of requiring any or all of the following:

- (i) the applicant; or
- (ii) the Charged Sub-Group Members;
- (iii) the Indicted Sub-Group Members;
- (iv) the Prosecution Sub-Group Members; or
- (v) the Group Members,

to comply with a term, condition or requirement, being that in order to be treated as a child they had to prove to the respondent that they were over the age of 18 (**Age Requirement**).

216. The Age Requirement was not reasonable having regard to the circumstances of the case.

PARTICULARS

At the time of the acts or omissions alleged in paragraph 215 above, each of the Group Members (including the applicant):

- (i) were either in detention or imprisoned;
- (ii) by virtue of (i), had limited contact with any person who could assist in proving their age, such as family;
- (iii) had limited or no documentation regarding their date of birth;
- (iv) had claimed to be under 18 years of age; and
- (v) did not have the resources to prove their age to the respondent.

Conversely, at the time of the acts or omissions alleged in paragraph 215 above, the respondent had at its disposal through the AFP and DIAC, the resources available to investigate and/or determine the age of the Group Members (including the applicant).

Those resources included:

- (vi) the resources to undertake an Age Determination Assessment on all Group Members;
- (vii) various AFP Officers stationed in Indonesia, including AFP Officers who are members of the Regional Cooperation Teams and AFP

Officers who acted as part of the People Smuggling Strike Team as outlined in the AFP Annual Report 2010-2011;

- (viii) various DIAC officers stationed in Indonesia, including taking part in DIAC's assistance to the Indonesian Border Control Management Project as outlined in the DIAC Annual Report 2010-2011; and
- (ix) other investigative resources such as diplomatic and security connections with authorities in Indonesia, including the Consulate-General of the Republic of Indonesia, the Indonesian Embassy in Canberra and Australian consular and diplomatic services located locally in the Republic of Indonesia.

217. The Group Members (which includes the applicant) could not comply with the Age Requirement.

PARTICULARS

The Group Members refer to and repeat the particulars subjoined to the paragraph above.

218. The requirement to comply with the Age Requirement had the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing by persons of Indonesian national or ethnic origin, of the human rights or fundamental freedoms set out in Annexure B.

PARTICULARS

The Group Members (which includes the applicant) refer to and repeat the allegations contained in paragraphs 169 to 191 and 207 to 212 above.

The fact that the recognition, enjoyment or exercise of the rights or freedoms in Annexure B was not "on an equal footing" can be inferred from the following:

- (i) the Age Requirement was required of persons, during the Period, suspected of breaching s 232A of the Migration Act who were predominately of Indonesian race, national or national origin;
- (ii) the respondent insisted on the Age Requirement in circumstances where it did not use an alternative and available means by which to assess the age of each Group Member, namely an Age Determination Assessment; and
- (iii) the Age Requirement is not routinely used in other prosecutions brought by the AFP and/or the CDPP.

219. As a result of the matters set out in paragraphs 215 to 218 above, the respondent contravened s 9(1A) of the RDA.

P. MISFEASANCE IN PUBLIC OFFICE

220. At all relevant times, Agent Eade:

- (a) was an officer of the AFP; and
 - (b) by virtue of being an officer of the AFP, held public office.
221. The applicant repeats the matters alleged in paragraph 65 above, in which it is alleged Agent Eade signed a Prosecution Notice charging the applicant with an offence under s 232A of the Migration Act (**Prosecution Notice**).
222. The Prosecution Notice alleged that the applicant's date of birth was 12 October 1990.
223. The Prosecution Notice was false in a material particular in that the applicant's date of birth was not 12 October 1990 (**Material Falsity**).
224. Further, the Prosecution Notice falsely represented that:
- (a) the AFP held material to suggest that the applicant's date of birth was 12 October 1990, when it did not hold any such material;
 - (b) Agent Eade had a proper basis to believe that the applicant's date of birth was 12 October 1990, when she did not have that proper basis;
- (**Misleading Representations**).
225. By signing the Prosecution Notice, Agent Eade caused a prosecution to commence against the applicant.

PARTICULARS

Section 22 of the *Criminal Procedure Act 2004* (WA).

226. By signing the Prosecution Notice, Agent Eade exercised a public power that was an incident of her office as an AFP officer (**Prosecution Power**).

PARTICULARS

The Prosecution Power is a public power by virtue of one or more of the following:

- (i) section 20(1) and (5) of the *Criminal Procedure Act 2004* (WA) read in conjunction with s 9 of the *Australian Federal Police Act 1979* (Cth);
 - (ii) section 8(1)(b) and/or 9(1)(c) of the *Australian Federal Police Act 1979* (Cth); or
 - (iii) the common law powers of the police to initiate a prosecution.
227. In exercising the Prosecution Power, Agent Eade was required to have a bona fide belief in the truth of the material particulars contained in the Prosecution Notice.

PARTICULARS

At the time Agent Eade signed the Prosecution Notice, it was an offence under section 133A of Appendix B of the *Criminal Code Compilation Act 1913* (WA) to knowingly sign a Prosecution Notice that was false in any material particular.

228. On 30 March 2010, Agent Eade knew that:
- (a) the applicant had told AFP officers that he was born in 1996;
 - (b) she did not have a birth certificate for the applicant that supported the date of birth alleged in the Prosecution Notice;
 - (c) she had taken no steps to obtain a birth certificate or other documentation that would verify the age of the applicant;
 - (d) she had not undertaken an Age Determination Assessment or similar process for the applicant;
 - (e) she had not been provided with the results of an Age Determination Assessment or similar process conducted by any other person for the applicant;
 - (f) she did not have any material, whether admissible evidence or otherwise, that suggested that the applicant's date of birth was 12 October 1990;
 - (g) the Criminal Justice Stay Certificate, pleaded in paragraph 62 above, had stated that the applicant's date of birth was 12 October 1996;
 - (h) in exercising the Prosecution Power, she was required to have a bona fide belief in the truth of the material particulars contained in the Prosecution Notice;
 - (i) she did not hold material based on which she was able to form a bona fide belief in the truth of one of the material particulars contained in the Prosecution Notice, namely that the applicant's date of birth was 12 October 1990;
 - (j) the Prosecution Notice contained the Misleading Representations.

PARTICULARS

Agent Eade's knowledge of the matters in subparagraphs (a) to (g) is to be inferred from her role as the AFP officer who signed the Prosecution Notice and her possession of the AFP file on the applicant, and where relevant, from the fact that the acts or omissions she is alleged to have known were her own acts or omissions, and as matter of logic where she is alleged not to have had the material alleged above. Agent Eade's knowledge of the matters in subparagraphs (h) to (j) is to be inferred from the circumstances alleged and her role and experience as an AFP officer.

229. In the premises, at the time she signed the Prosecution Notice on 30 March 2010, Agent Eade:
- (a) did not know the applicant's date of birth;
 - (b) did not have a basis to certify that the applicant's date of birth was 12 October 1990;
 - (c) did not have a bona fide belief in the truth of the allegation in the Prosecution Notice that the applicant's date of birth was 12 October 1990.
230. In the premises, Agent Eade's purported exercise of the Prosecution Power by signing the Prosecution Notice was unlawful.

PARTICULARS

The exercise of power was unlawful on the basis:

- (i) that it is an offence under section 133A of Appendix B of the *Criminal Code Compilation Act 1913* (WA) to knowingly sign a Prosecution Notice that is false in any material particular; and
 - (ii) further and alternatively, it was condition of the Prosecution Power that it could only be exercised bone fide for the purpose for which it was intended and on a proper basis by the person purporting to exercise it, and by reason of the matters alleged in paragraph 229 above, Agent Eade had not satisfied that condition.
231. By reason the matters alleged in paragraphs 228 and 229 above, at the time she signed the Prosecution Notice, Agent Eade knew, or alternatively was recklessly indifferent to the fact:
- (a) the Prosecution Notice contained the Material Falsity; and
 - (b) her exercise of the Prosecution Power was unlawful.

PARTICULARS

The applicant refers to and repeats paragraph 228 above.

232. By reason of the unlawful exercise of the Prosecution Power the applicant suffered harm, including because the applicant was detained and subject to the conduct and events alleged in Section E above as they applied to the applicant (**Relevant Harm**).

PARTICULARS

The Relevant Harm suffered by the applicant is constituted by being held in detention, being a maximum-security adult gaol, awaiting trial between 30 March 2010 to 21 December 2010.

233. At material times, Agent Eade –

- (a) intended;
- (b) alternatively, was recklessly indifferent as to the possibility –

that the applicant would suffer the Relevant Harm by reason of her purported exercise of the Prosecution Power.

PARTICULARS

Agent Eade's intention, or alternatively reckless indifference, is to be inferred from:

- (i) her knowledge of the matters alleged in paragraph 228 above;
- (ii) her consequent knowledge of the risk that the applicant may be a minor, and
- (iii) the fact that due to her position as an AFP officer, she was aware that it was likely that as a consequence of her exercising the Prosecution Power the applicant would suffer the Relevant Harm.

234. By virtue of the matters alleged in paragraphs 220 to 233 above, the actions of Agent Eade constituted misfeasance in public office.

Q. COMMON ISSUES OF FACT AND LAW

235. The questions of law or fact common to the claims of the Group Members are:

- (a) whether the respondent maintained the policies alleged in Section D above;
- (b) whether the acts or omissions by the respondent alleged in Sections E, F, G and H occurred;
- (c) whether the respondent knew of the deficiencies of Wrist X-Ray Analysis prior to the Wrist X-Ray Procedure being performed on the Group Members, as alleged in Section I above;
- (d) whether the respondent had the Disruption Objective and whether the respondent's officers were pressured in the way alleged in Section J above;
- (e) whether the Christmas Island Detention, Transfer Detention, Investigation Detention, X-Ray Detention, Regional Immigration Detention and/or Arrest Detention were unlawful;
- (f) whether the respondent owed the duties alleged in Section M above;

- (g) if the respondent owed the duties alleged in Section M, whether the respondent breached those duties as alleged in Section N above;
- (h) whether the respondent contravened the RDA Act as alleged in Section O above;
- (i) whether any damages should be granted in favour of the applicant and the other Group Members and, if so, whether that should include aggravated and/or exemplary damages.

R. DAMAGES

236. In the premises, the conduct of the respondent as alleged warrants an award to the applicant and/or the other Group Members of:

- (a) damages;
- (b) further and alternatively, aggravated damages
- (c) further and alternatively, exemplary damages.

PARTICULARS OF AGGRAVATED AND EXEMPLARY DAMAGES

Aggravated damages

The detention of the applicant and the other Group Members by or on behalf of the respondent:

- (i) involved serious breaches of the applicant's and the other Group Members' human rights, including but not limited to:
 - (A) their rights under the CRC;
 - (B) their right to liberty and security of person; and
 - (C) their right not to be subjected to arbitrary detention;
- (ii) involved infliction of harm upon a child:
 - (A) known to be without a parent or guardian and consequently vulnerable;
 - (B) in contravention of the respondent's own policies; and
 - (C) in circumstances where the respondent knew or ought to have known that Wrist X-Ray Analysis was incapable of reliably determining age and should not be relied upon;
- (iii) has not been the subject of apology, compensation or redress by the respondent.

Exemplary damages

The detention of the applicant and the other Group Members by or on behalf of the respondent:

- (iv) involved a misapplication of powers in Divisions 7 and 8 of Part 2 of the Migration Act directed against a minor for an improper purpose or purposes, namely for the purpose of facilitating the Investigations and/or the charging

and or the prosecution of the Group Members and relevant Sub-Group Members (as relevant) and/or giving effect to the Disruption Objective;

- (v) was intentional;
- (vi) was facilitated by failing to inform the applicant and the other Group Members of their right to request removal under s 198(1) of the Migration Act in circumstances where each had told the respondent's officers in DIAC of their wish to return to Indonesia;
- (vii) was imposed in circumstances where it was known that the applicant and the other Group Members were unaccompanied minors and consequently vulnerable;
- (viii) was intended to cause harm to a vulnerable person in violation of their human rights;
- (ix) has not been the subject of apology by or on behalf of the respondent; and
- (x) has not resulted in disciplinary action or punishment of the respondent's officers involved.

Further particulars of damages, including aggravated and exemplary damages may be provided after discovery.

The applicant accordingly seeks the relief set out in the Consolidated Originating Application.

Date: 19 February 2021



Mark Geoffrey Barrow
Ken Cush & Associates
Solicitor for the Applicant

This pleading was prepared by Mr A T Strahan QC, Mr P A Tierney, Mr T K Jeffrie and Ms S C B Brenker of counsel.

Certificate of lawyer

I, Geoffrey Mark Barrow, certify to the Court that, in relation to the consolidated statement of claim filed on behalf of the applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 19 February 2021

A handwritten signature in black ink, appearing to read 'mg', followed by a long horizontal line extending to the right.

Mark Geoffrey Barrow

Ken Cush & Associates

Solicitor for the Applicant

ANNEXURE A

Relevant Right or Freedom	Act of the Respondent
The right to have the respondent in all actions concerning him, act in the best interests of him, as a child (Article 3 of the CRC).	DIAC Non-investigation Act DIAC Non-Removal Act AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act AFP Non-Investigation Act CDPP Prosecuting Act
The right to have the respondent take appropriate measures to protect him from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 of the CRC).	AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act
The right to have the respondent provide special protections and assistance to him as a child temporarily deprived of his family environment (Article 20 of the CRC).	AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act
The right not to be subject to inhuman and degrading treatment or punishment (Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 37(a) of the CRC).	DIAC Non-investigation Act DIAC Non-Removal Act AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act
The right, as a child, to only be subjected to detention as a measure of last resort and for the shortest period of time (Article 37(b) of the CRC).	AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act
The right, as a child in detention, to be separated from adults unless it was in his best interests not to do so (Article 37(c) of the CRC).	AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act
The Right, as a person deprived of his liberty, to be treated with dignity and respect (Article 37(d) CRC; Article 11 of the ICCPR).	AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act

<p>The right to equal treatment before the courts (Article 5(a) of International Covenant on the Elimination of Racial Discrimination).;</p>	<p>AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act CDPP Prosecuting Act</p>
<p>The right to have the respondent accord to him the benefit of the doubt in that if there was a possibility that he was a child, he should be treated as such (Article 8 of the CRC, General Comment 6 of the Committee on the Rights of the Child).</p>	<p>DIAC Non-investigation Act DIAC Non-Removal Act AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act AFP Non-Investigation Act CDPP Prosecuting Act</p>
<p>The right not to be deprived of liberty other than in accordance with procedures established by law (Article 9 of the ICCPR)</p>	<p>AFP Charging Act CDPP Indictment Act CDPP Discretion Act Second CDPP Discretion Act AFP Non-Investigation Act CDPP Prosecuting Act</p>

ANNEXURE B

List of rights or freedoms impaired or nullified by the Age Requirements:

- i. The right to have the respondent in all actions concerning him, act in the best interests of him, as a child (Article 3 of the CRC).
- ii. The right to have the respondent take appropriate measures to protect him from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19 of the CRC).
- iii. The right to have the respondent provide special protections and assistance to him as a child temporarily deprived of his family environment (Article 20 of the CRC).
- iv. The right not to be subject to inhuman and degrading treatment or punishment (Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 37(a) of the CRC).
- v. The right, as a child, to only be subjected to detention as a measure of last resort and for the shortest period of time (Article 37(b) of the CRC).
- vi. The right, as a child in detention, to be separated from adults unless it was in his best interests not to do so (Article 37(c) of the CRC).
- vii. The Right, as a person deprived of his liberty, to be treated with dignity and respect (Article 37(d) CRC; Article 11 of the ICCPR).
- viii. The right to equal treatment before the courts (Article 5(a) of International Covenant on the Elimination of Racial Discrimination).
- ix. The right to have the respondent accord to him the benefit of the doubt in that if there was a possibility that he was a child, he should be treated as such (Article 8 of the CRC, General Comment 6 of the Committee on the Rights of the Child).
- x. The right not to be deprived of liberty other than in accordance with procedures established by law (Article 9 of the ICCPR).

ANNEXURE C

Group Members as far as is currently known are:

1. Abdul Hafid;
2. Abdul Jabar;
3. Abdulah Mancora;
4. Abu Bakar Kewa;
5. Ade Neo Tong;
6. Ahmat Bala;
7. Aldi Batco;
8. Ali Eska;
9. Ali Roni;
10. Aminolah Boy;
11. Andi Muhammad;
12. Andre Walalayo;
13. Anto;
14. Ardi Muhammad;
15. Adi Mbuik;
16. Ari Suprianto;
17. Ari Usman;
18. Arifin Abraham Modok;
19. Arsadi;
20. Arwan Ameer;
21. Baco Ali;
22. Bahar Samsuk;
23. Bangun B;
24. Busra Husein;
25. Choky Aditia;

26. Daeng Mustakim;
27. Darmawan Omar;
28. Darwis Rusli;
29. Devan Ibrahim;
30. Dion Domun.
31. Dorman Bumi Amin;
32. Drads Juliartha;
33. Erwin Prayoga;
34. Esual Henuk;
35. Faisal Arsyad;
36. Fernando Sitompul;
37. Gill;
38. Gisan Beleng;
39. Hadi;
40. Hairun Valdo;
41. Hamzah Gogo;
42. Hans Beia;
43. Haris Mancora;
44. Hasrul Lelang;
45. Hasto;
46. Hendra;
47. Hendra Raya;
48. Husein Rahman;
49. Maikel Husa;
50. Idris Syamsudin;
51. Irfan Sidin;
52. Irwan Syamsudin Djainadi;

53. Jamaludin;
54. Jefri David Poko;
55. Jefri Yeskiel;
56. Jekson Rebo;
57. Jhefry Sere;
58. Jon Bin Mapa;
59. Jumadin Idris Madi Min;
60. Junias Laifoy;
61. Kevin Syukur;
62. Lasi Klomang;
63. Lekidela;
64. Lorens Lapikana;
65. Markus;
66. Migel Henuk;
67. Min Marhom;
68. Muhammad Charlie;
69. Muhammad Debu;
70. Muhammad Guntur;
71. Muhammad Kampoh;
72. Muhammad Maleng;
73. Muhammad Rasid;
74. Mahmud Koli;
75. Muktar Weni;
76. Mulyadi Bin Nurdin;
77. Munawyr Hariz;
78. Minir Alamin;
79. Mustafa Mustafa;

80. Nasrudin;
81. Nasrudin Umar;
82. Nofri Sodakain;
83. Randy Laode;
84. Randy Mugelo;
85. Rayan Abdul;
86. Ricky Ndoen;
87. Rifan Lasi;
88. Rilan;
89. Ripo Waluyo;
90. Robinson Bomma;
91. Roni;
92. Rudi Usman;
93. Rusdi Lauta;
94. Rusli Lamisi;
95. Ryan Saleh;
96. Salai Andi;
97. Sandi Sandi;
98. Sehan Lodo;
99. Sem Pramise;
100. Sikran Hasan;
101. Samat Samat;
102. Sonry Riy;
103. Sudirman Jiu;
104. Sukirman Madi;
105. Sulaiman Burhan;
106. Sumatro;

107. Supriyadin Bala;
108. Syam;
109. Syarif Ansar (Arsad);
110. Syarifudin Ari Hasan Min;
111. Syawaludin Syamsul;
112. Tjow Tong;
113. Udin Abdullah;
114. Umar Galang;
115. Vandi;
116. Walan Faisal;
117. Wanri Muris;
118. Wat;
119. Yandi Mulik;
120. Yeskiel;
121. Yofi Zadrak Lassy.

ANNEXURE D

Particulars of Disruption Objective

1. 9 October 2008, Media release by Senator Chris Evans Minister for Immigration and Citizenship titled 'People smuggling charge sends strong warning'. The plaintiff will rely on the whole of the media release including the statement that "The Australian Government will take all steps possible to ensure those people behind the practice of people-smuggling are brought to justice".
2. 17 October 2008, Media release by Senator Chris Evans Minister for Immigration and Citizenship titled 'People smuggling charges affirm strong border message'. The plaintiff will rely on the whole of the media release including the statement that "the arrest and charging by the Australian Federal Police of two Indonesian nationals on people smuggling charges today sent a strong warning to people smugglers in the region. The Australian Government is committed to strong border security arrangements and is determined to deal effectively and appropriately with people smuggling".
3. 4 December 2008, Ministerial statement relating to national security by Kevin Rudd MP, Prime Minister. The plaintiff will rely on the whole of the Prime Minister's speech including the statement that "the government is committed to deploying all necessary resources to prosecute those criminals who seek to undermine Australia's border security. We will work with our partners in the region to shut down the illegal operations of people smugglers and see them put in jail where they belong".
4. 6 March 2009, Media release by Chris Bowen MP Minister for Immigration and Citizenship titled 'Jailing of people smuggler sends strong message'. The plaintiff will rely on the whole of the media release including the following statements:
5. "Mr Debus said the Western Australian District Court sentencing of Abdul Hamid reinforced the message that those found guilty faced severe punishment".
6. "The Australian Government has maintained extensive patrolling of our borders by Border Protection Command and organisers, skippers and crews of people smuggling ventures face long jail terms if caught and convicted".
7. "The Rudd Government has also consistently made clear its commitment to maintain a system of mandatory detention and excision".
8. 9 July 2009, Joint media release by the Hon Brendan O'Connor MP Minister for Home Affairs and Senator Chris Evans Minister for Immigration and Citizenship titled 'Australia jails 11 people smugglers'. The plaintiff will rely on the whole of the media release including the statement, "The Minister for Home Affairs, Brendan O'Connor, and the Minister for Immigration and Citizenship, Senator Chris Evans, today welcomed the jailing of 11 Indonesian skippers and boat crew involved in the recent people smuggling activity, saying it send a strong message that Australia will not tolerate such crimes".
9. 2010, Explanatory Memorandum in respect of the Anti-People Smuggling and Other Measures Bill 2010. The plaintiff will reply on the whole of the Explanatory Memorandum including the statements that:

10. “The purpose of this Bill is to strengthen the Commonwealth’s anti-people smuggling legislative framework by ensuring that an appropriate range of offences are available to target and deter people smuggling activity and by creating greater harmonisation across Commonwealth legislation”;
11. “The Bill will put in place laws to provide greater deterrence of people smuggling activity and to address the serious consequences of such activity. The Bill will also provide greater capacity for Australian Government agencies to investigate and disrupt people smuggling networks”.
12. 23 February 2010, Media release by the Hon Brendan O’Connor MP Minister for Home Affairs titled Legislation to combat people smuggling. The plaintiff will rely on the whole of the media release including the statements that:
13. “Attorney-General, Robert McClelland, Minister for Immigration and Citizenship, Senator Chris Evans, and Minister for Home Affairs, Brendan O’Connor, today outlined the Government’s intention to introduce legislation to significantly strengthen Australia’s people smuggling laws”;
14. “the government is committed to targeting criminal groups who organise, participate in and benefit from people smuggling activities. This legislation represents an important part of the government’s comprehensive approach to combating people smuggling”.
15. 24 February 2010, Second Reading Speech by Attorney-General, the Hon Robert McClelland MP in respect of the Anti-People Smuggling and Other Measures Bill 2010. The plaintiff will reply on the whole of the Second Reading Speech including the statements that:
16. “People smuggling is a pernicious trade and the government has a comprehensive, hardline approach to combating the scourge of people smuggling”;
17. “The government is devoting unprecedented resources to protecting Australia’s borders and developing intelligence on people-smuggling syndicates. We are working cooperatively with Australia’s regional partners to disrupt people smuggling where those ventures originate overseas. And we are subjecting people smugglers to the full force of Australian law”;
18. “This bill will strengthen the Commonwealth’s anti-people smuggling legislative framework, supporting the government’s plan to combat people smuggling”;
19. “The bill ensures that people-smuggling activities are consistently and comprehensively criminalised, with a new offence of providing material support for people smuggling. The bill equips our law enforcement and national security agencies with effective investigative capabilities to detect and disrupt people smugglers”;
20. “It demonstrates the government’s commitment to addressing the serious nature of people-smuggling activities and to targeting those criminal groups who seek to organise, participate in and benefit from people-smuggling activities”.

21. 11 March 2010, Bills Digest No. 131 2009-10 in respect of the Anti-People Smuggling and Other Measures Bill 2010. The plaintiff will rely on the whole of the Bills Digest.
22. 19 April 2010, Media release of the Australian High Commission at Colombo titled 'Australia gets tough on people smugglers and halts proceeding of claims by some Asylum Seekers'. The plaintiff will rely on the whole of the media release including the following statements:
23. "In a related move, Australia will strengthen its anti-people smuggling laws by making it an offence for anyone to provide funds or other support that facilitates the crime of people smuggling in Australia".
24. "Australia is determined to send a strong message that, by working closely with partner countries in the region, people smugglers will be caught, and they will go to jail. New offences to stop people smuggling with penalties up to twenty years have been introduced to the Australian Parliament".
25. 1 July 2010, Ministerial Direction of the Hon Brendan O'Connor MP to the Australian Federal Police titled '2010 Ministerial Direction for the AFP'. The plaintiff will rely on the whole of the Ministerial Direction including the statement that the AFP "contribute effectively to Australia's border management and security, particularly protecting Australia from people smuggling including prevention, deterrence and disruption".
26. 31 March 2011, Joint media release with Chris Bowen MP and Kevin Rudd MP titled 'Bali Process Ministers endorse regional framework for tackling people smuggling'. The plaintiff will rely on the whole of the press release including the statement "the framework provides the regional context for Australia to take forward bilateral discussions with countries in the region on measures to combat people smuggling".
27. 31 August 2011, Press conference with Chris Bowen MP, Minister for Immigration, at Canberra. The plaintiff will rely on the whole of the press conference including the statement of Chris Bowen MP that "I'm proud of the fact that this Government is determined to break the people smugglers' business model".

ANNEXURE E

Opposition Statements

- 1 April 2010, Media release of the Australian Liberal Party titled 'Business as usual for people smugglers under Kevin Rudd as boat K115 arrives'. The plaintiff will rely on the whole of the media release including the following statements:
 - a. "The arrival of another boat, K115, within just 24 hours shows it is business as usual for people smugglers under Kevin Rudd, Shadow Minister for Immigration and Citizenship, Scott Morrison and Shadow Minister for Justice, Customs and Border Protection, Michael Keenan said today";
 - b. "On the long weekend Kevin Rudd set a new record for the number of people arriving illegally by boat to seek asylum, in a financial year. With costs having already blown out by more than \$130 million this year, it is not unreasonable to expect further cost increases of more than \$200 million before the year is out".
- 2 15 March 2010, Speech of Scott Morrison MP in the House of Representatives in relation to the Anti-People Smuggling and Other Measures Bill 2010. The plaintiff will rely on the whole of the speech including the following statements:
 - a. "While we do support the measures, from what I have just heard, Labor seems intent on pursuing their age-old strategy for dealing with most issues, and that is to try to spin the boats away. You cannot spin the boats away; you need to take action and you need to put in place measures which stop the boats. The measures that the coalition put in place while we were in government have been roundly criticised by those opposite, but they did have one very interesting result. Under the coalition over the last six years of our government, after we introduced most significantly offshore processing known as the 'Pacific Solution', the number of boats went to three per year. Today under this government in 2010 we have an average of 10 boats per month. That is the highest rate of arrivals on record";
 - b. "This bill creates a new offence of providing material support or resources towards a people-smuggling venture. It establishes in the Migration Act an aggravated offence of people smuggling which involves exploitation or danger of death or serious harm. It applies mandatory minimum penalties. It creates an offence of providing material support that does not apply to a person who pays smugglers to facilitate their own passage or that of a family member to Australia. We do not oppose these amendments. We do not oppose bringing in tough laws that deal with people smuggling. But we need to be clear that this bill offers no comprehensive solution to the problem the government find themselves with of their own making".
- 3 8 August 2010, Media release of George Brandis Liberal Senator for Queensland titled 'Real Action to Stop people Smugglers'. The plaintiff will rely on the whole of the media release including the following statements:
 - a. "We are determined to send a strong message to people smugglers that their cruel and callous trade in human cargo must stop";

- b. “As part of this approach, the Coalition will also introduce tough new penalties to deter people smugglers and ensure they pay a higher price for their crimes”;
 - c. “Existing penalties are clearly not acting as a sufficient deterrent for those tempted to become involved in the people smuggling trade. The boats keep coming”;
 - d. “A Coalition government will therefore introduce new minimum and non-parole periods for a range of people smuggling offences to ensure that those convicted of people smuggling receive a custodial sentence”;
 - e. “Currently, no minimum or non-parole period applies to those convicted of the crimes of people smuggling, supporting people smuggling and concealing and harboring non-citizens”.
- 4 8 August 2010, Media release of the Hon Tony Abbott MP Leader of the Opposition titled ‘Real Action to Stop People Smugglers’. The plaintiff will rely on the whole of the media release.
- 5 23 November 2010, Asylum Seekers speech of Scott Morrison MP in the House of Representatives. The plaintiff will rely on the whole of the Minister’s speech including the following the statement that: “This is a government that has lost its way again. As long as Labor has lost its way on border protection, the people smugglers will continue to find their way to Australia—and they do, in ever-increasing numbers: 9,188 people have arrived in 190 boats. It is clear that the people smugglers will continue to make hay while the Gillard sun of failed policy continues to shine on their activities. This year we have had an all-time record of 122 boats and counting—double last year’s number—and this continues to fill the Gillard government’s trophy cabinet of policy failures: most boats in a month, most boats in a financial year, most boats in a calendar year”.