

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 13/12/2019 3:59:39 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID816/2019
File Title: PLAINTIFF M83A/2019 & ANOR v SCOTT MORRISON & ORS
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 13/12/2019 4:32:18 PM AEDT

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

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 33
Rule 16.32

Defence

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

NO VID 816 OF 2019

PLAINTIFF M83A/2019 and others named in the Schedule
Applicant

SCOTT MORRISON and others named in the Schedule
Respondent

This Defence to the Further Amended Statement of Claim dated 8 November 2019 (**FASOC**) is pleaded on the following basis:

- a. The Respondents do not plead to the particulars attached to each subparagraph of the FASOC unless specific reference is made to an alleged particular in this Defence.
- b. Insofar as an allegation in the FASOC is made against only one or more of the Respondents, the corresponding paragraph of this Defence responds only on behalf of such of those Respondents against whom the pleading is made.
- c. Insofar as an allegation in the FASOC is made in relation to one or more Group Members in addition to the First and Second Applicant, this Defence responds only to so much of the allegation as relates to the First and Second Applicant. The Respondents do not know and cannot plead to the allegations made with respect to the Group Members.
- d. Insofar as the use of 'purportedly' in different paragraphs of the FASOC is to be taken to assert or imply that a particular act, provision, power or authority lacked validity then, in addition to any other response to that paragraph in this Defence, the Respondents deny such further assertion or implication.

To the allegations made in each paragraph of the FASOC, the First, Second, Third, Fourth, Fifth and Sixth Respondents say as follows:

A. REPRESENTATIVE PROCEEDING

- 1.- 8. The Respondents do not know and cannot admit the matters in paragraphs 1 – 8 and say in further response to paragraphs 3 – 8 that the Respondents would not be able to plead to those matters until such time as the individual members of the various groups referred to in paragraphs 3 – 8 are identified.

Filed on behalf of the Respondents
Prepared by: Louise Rafferty
AGS lawyer within the meaning of s 55I of the *Judiciary Act*
1903

Address for Service:
The Australian Government Solicitor,
4 National Circuit, Barton, ACT 2600
Louise.Rafferty@ags.gov.au

File ref: 19004990

Telephone: 02 6253 7005
Lawyer's Email:
Louise.Rafferty@ags.gov.au
Facsimile: 02 6253 7383
DX 5678 Canberra

B. THE FIRST APPLICANT

9. The Respondents do not know and cannot admit the matters in paragraph 9.
10. The Respondents admit paragraph 10.
11. The Respondents do not know and cannot admit the matters in paragraph 11.
12. The Respondents admit paragraph 12.
13. The Respondents admit paragraph 13.
14. The Respondents admit paragraph 14.
15. In response to paragraph 15 the Respondents:
 - a. do not know and cannot admit the matters in paragraph 15(a);
 - b. admit paragraph 15(b); and
 - c. admit paragraph 15(c).
16. In response to paragraph 16 the Respondents:
 - a. admit paragraph 16(a);
 - b. admit that the First Applicant was not returned to [REDACTED]; and
 - c. otherwise do not know and cannot admit paragraph 16(b).

Particulars

- i. The Respondents rely on such discussions and communications evidenced in relation to interviews held between the First Applicant and officers of the Sixth Respondent.
 - ii. The Respondents rely on a Detention Client Interview between the First Applicant and an officer of the Sixth Respondent on [REDACTED]; Doc ID: CTH 1000.0001.0891.
17. The Respondents admit paragraph 17.
18. The Respondents admit paragraph 18.
19. The Respondents admit paragraph 19.
20. In response to paragraph 20 the Respondents:
 - a. say that the First Applicant was subject to an Australian Regional Processing Visa (Offshore Entry Person) pursuant to Regulation 9 of the *Immigration*

Regulations 2013 (Nr) or Regulation 9 of the *Immigration Regulations 2014* (Nr) (**RPC Visa**), until he was given derivative status for the purpose of a refugee status determination under the *Refugee Convention Act 2012* (Nr); and

- b. otherwise admit paragraph 20.
21. The Respondents admit paragraph 21.
22. In response to paragraph 22 the Respondents:
- a. admit that the First Applicant resided at Regional Processing Centre 2, known as 'RPC2' from his arrival to Nauru until he was discharged to community based accommodation on [REDACTED];
 - b. say that the First Applicant resided in community based accommodation at Area [REDACTED] from [REDACTED] until [REDACTED];
 - c. say that the First Applicant moved to shared community accommodation with his [REDACTED] at [REDACTED] on [REDACTED] until they departed Nauru on [REDACTED]; and
 - d. otherwise deny paragraph 22.
23. In response to paragraph 23 the Respondents:
- a. admit the First Applicant held a passport from [REDACTED] with an issue date of [REDACTED] and an expiry date of [REDACTED]; and
 - b. do not know and cannot admit whether the passport was valid.
24. The Respondents do not know and cannot admit the matters in paragraph 24.
25. The Respondents admit paragraph 25.
26. The Respondents do not know and cannot admit the matters in paragraph 26.
- C. THE SECOND APPLICANT**
27. The Respondents do not know and cannot admit the matters in paragraph 27.
28. The Respondents do not know and cannot admit the matters in paragraph 28.
29. The Respondents do not know and cannot admit the matters in paragraph 29.
30. The Respondents do not know and cannot admit the matters in paragraph 30.
31. In response to paragraph 31 the Respondents:
- a. admit the matters in that paragraph; and

- b. say the boat was intercepted on [REDACTED].
32. In response to paragraph 32 the Respondents:
- a. admit the matters in that paragraph; and
 - b. say the passengers from the boat arrived in Australia on [REDACTED].
33. In response to paragraph 33 the Respondents:
- a. admit the matters in that paragraph; and
 - b. say the Second Applicant was detained in Australia from [REDACTED].
34. The Respondents admit paragraph 34.
35. The Respondents admit paragraph 35.
36. The Respondents admit paragraph 36.
37. In response to paragraph 37 the Respondents:
- a. say that the Second Applicant was subject to an RPC Visa, until he was found to be a refugee under the *Refugee Convention Act 2012* (Nr); and
 - b. otherwise admit paragraph 37.
38. The Respondents admit paragraph 38.
39. In response to paragraph 39 the Respondents:
- a. say that the Second Applicant resided at the following locations:
 - i. Nauru Regional Processing Centre 3, known as 'RPC3' from his arrival in Nauru on [REDACTED] until [REDACTED];
 - ii. Australia (Melbourne Immigration Transit Accommodation and Wickham Point Alternative Place of Detention) from [REDACTED] until [REDACTED];
 - iii. Nauru RPC3 from [REDACTED] to [REDACTED];
 - iv. [REDACTED] from [REDACTED] to [REDACTED]; and
 - v. Nauru RPC1 from [REDACTED] to [REDACTED];
 - b. admit that the Second Applicant resided at Nauru RPC1 from [REDACTED] to [REDACTED]; and
 - c. otherwise deny paragraph 39.

40. In response to paragraph 40 the Respondents:
- a. admit that the Second Applicant had appointments with various medical professionals from time to time at which complaints were made as recorded in those professionals' notes; and
 - b. otherwise do not know and cannot admit the allegations in paragraph 40.

41. In response to paragraph 41 the Respondents:

- a. admit the matters in that paragraph; and
- b. say that the Second Applicant was brought to Australia on [REDACTED].

42. The Respondents do not know and cannot admit the matters in paragraph 42.

43. The Respondents do not know and cannot admit the matters in paragraph 43.

44. The Respondents do not know and cannot admit the matters in paragraph 44.

D. THE REGIONAL PROCESSING CENTRE VISAS

45. The Respondents admit paragraph 45.

46. In response to paragraph 46 the Respondents:

- a. admit that the First Applicant and Second Applicant were required at times within that period to reside in a tent or marquee;
- b. admit that the tent or marquee had one or more the features in (a) to (k); and
- c. otherwise do not know and cannot admit the matters in that paragraph.

47. In response to paragraph 47, the Respondents:

- a. in relation to the First Applicant, repeat the matters in paragraph 22 above;
- b. in relation to the Second Applicant, repeat the matters in paragraph 39 above; and
- c. otherwise deny the paragraph.

48. In response to paragraph 48 the Respondents:

- a. in relation to paragraph 48(a):
 - i. say that it was a condition of the RPC visa that the holder must not engage in any activity for which a business or employment visa may be granted, except with the approval of the Secretary of the Department of Justice and Border Control of Nauru; and

Particulars

48.a.i.1. reg 9(6)(e) of the *Immigration Regulations* 2014 (Nr)

- ii. otherwise deny the paragraph;
 - b. in relation to paragraph 48(b) repeat and rely upon the matters stated in paragraph (a) above;
 - c. in relation to paragraph 48(c):
 - i. say that, pursuant to the *Education Act 2011* (Nr), from the time Nauru was designated a regional processing country on 10 September 2012 until 13 July 2015, school aged children at the Nauru RPC received education and schooling within the Nauru RPC; and
 - ii. say that, pursuant to the *Education Act 2011* (Nr), since 13 July 2015, school aged children at the Nauru RPC received education and schooling outside the RPC and were transported by bus from the Nauru RPC each morning and returned to the Nauru RPC by bus at the conclusion of the school day;
 - iii. say that education programs and activities were available to adults and minors resident in the RPC holding RPC visas; and
 - iv. otherwise deny the paragraph.
49. In response to paragraph 49 the Respondents:
- a. say that as a consequence of being subject to RPC Visas, the First and Second Applicants were lawfully resident on Nauru while the matters referred to in paragraphs (a) and (b) were under consideration;
 - b. say the Republic of Nauru is a signatory to the International Covenant on Civil and Political Rights and the Convention Relating to the Status of Refugees;
 - c. say that removal from Nauru is assessed against the risk of refoulement;

Particulars

- i. Under clause 19 of the Memorandum of Understanding with Australia, the Republic of Nauru assures the Commonwealth of Australia that it will:

49.c.i.1. not expel or return a Transferee to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership or a particular group or political opinion;

49.c.i.2. make an assessment, or permit an assessment to be made, of whether or not a Transferee is covered by the definition of refugee in Article 1A of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees; and

49.c.i.3. not send a Transferee to another country where there is a real risk that the Transferees will be subjected to torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty.

d. say that visa status has no bearing on the issue of refoulement; and

e. otherwise admit the paragraph.

50. In response to paragraph 50 the Respondents:

a. admit that conditions are applied to all RPC Visas by operation of reg 9(6)(a) of the *Immigration Regulations* 2013 (Nr) and reg 9(6)(a) of the *Immigration Regulations* 2014 (Nr), which say the holder of the visa must reside in premises specified in the visa; and

b. otherwise do not admit paragraph 50.

51. The Respondents admit paragraph 51.

52. In response to paragraph 52 the Respondents:

a. say that on 22 November 2013, Ms Bervena Adeang, an officer of Nauru, was declared by the Secretary of the Department of Justice and Border Control of Nauru to be the Operational Manager of RPC3, pursuant to s 3(2) of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nr) (the RPC Act);

b. say that in July 2014, Ms Adeang and the Operational Managers of the other sites within the Nauru RPC made Centre Rules applicable to all the sites within the 20 Nauru RPC in reliance upon s 7 of the RPC Act (Centre Rules);

c. say that for the period up to 5 October 2015 by reason of the combined effect of:

i. the specification in the RPC visa that the plaintiff must reside at the Nauru RPC;

ii. s 18C of the RPC Act; and

iii. rule 3.1.3 of the Centre Rules,

it was unlawful under the law of Nauru for holders of RPC Visas to leave, or attempt to leave, RPC3 without the permission of the Operational Manager or an authorised officer under the RPC Act, or another authorised person;

- d. say that open centre arrangements first commenced in February 2015 when an application for movement out of the Regional Processing Centre could be made to the Government of Nauru; and
 - e. admit that full open centre arrangements were introduced on 5 October 2015.
53. The Respondents admit matters in paragraph 53.
54. In response to paragraph 54 the Respondents:
- a. admit the paragraph; and
 - b. say for the avoidance of doubt that the Respondents did not detain, and were not responsible for the detention of, the First and Second Applicants.
55. In response to paragraph 55 the Respondents say that the pleading should be struck out because it is ambiguous and likely to cause embarrassment.

E. THE MOU AND ADMINISTRATIVE ARRANGEMENTS

56. The Respondents admit paragraph 56.
57. The Respondents admit paragraph 57.
58. The Respondents admit paragraph 58.
59. The Respondents deny paragraph 59.

F. THE RESPONDENTS

60. In response to paragraph 60 the Respondents:
- a. admit that each of the Third, First and Second Respondents was a Minister of State for the Commonwealth as pleaded respectively in paragraphs 61, 62 and 63 below; and
 - b. say that as a Minister each of them had the responsibilities pleaded respectively in paragraphs 61, 62 and 63 below.
- 60A. In response to paragraph 60A the Respondents:
- a. say the Commonwealth of Australia entered into the MOU and the Administrative Arrangements;
 - b. say the Department of Immigration and Citizenship was the Australian authority responsible for dealing with matters concerning the MOU from 3 August 2013 to 18 September 2013;
 - c. say the Department of Immigration and Border Protection was the Australian authority responsible for dealing with matters concerning the MOU from

18 September 2013 to 20 December 2017 and responsible for dealing with matters concerning the Administrative Arrangements from 11 April 2014 to 20 December 2017;

- d. say that the Department of Home Affairs has been the Australian authority responsible for dealing with matters concerning the MOU and the Administrative Arrangements since 20 December 2017; and
- e. otherwise deny the paragraph.

61. In response to paragraph 61 the Respondents:

- a. in response to paragraph 61(a) admit that the Third Respondent was the Minister for Immigration, Multicultural Affairs and Citizenship from 1 July 2013 to 18 September 2013;
- b. admit paragraph 61(b); and
- c. in response to paragraph 61(c):
 - i. admit that from 1 July 2013 to 18 September 2013 the Third Respondent was appointed by the Governor-General of Australia pursuant to s 64 of the Constitution to administer the Department of Immigration, Multicultural Affairs and Citizenship in accordance with the Governor-General's Administrative Arrangements Order dated 16 May 2013;
 - ii. admit that from 1 July 2013 to 18 September 2013 in accordance with the Governor-General's Administrative Arrangements Order dated 16 May 2013 the Third Respondent administered the *Migration Act* 1958 (Cth);
 - iii. admit that from 1 July 2013 to 18 September 2013 the matters dealt with by the Department of Immigration, Multicultural Affairs and Citizenship were set out in the Governor-General's Administrative Arrangements Order dated 16 May 2013 and admit that such matters covered matters concerning the MOU; and
 - iv. otherwise deny paragraph 61(c).

62. In response to paragraph 62 the Respondents:

- a. in response to paragraph 62(a) admit that the First Respondent was the Minister for Immigration and Border Protection from 18 September 2013 to 23 December 2014 and the acting Minister for Immigration and Border Protection from 21 August 2018 to 27 August 2018;
- b. in response to paragraph 62(b) admit that as the Minister for Immigration and Border Protection from 18 September 2013 to 23 December 2014 the First Respondent was the holder of a public office;

- c. in response to paragraph 62(c):
 - i. admit that from 18 September 2013 to 23 December 2014 the First Respondent was appointed by the Governor-General of Australia pursuant to s 64 of the Constitution to administer the Department of Immigration and Border Protection in accordance with the Governor-General's Administrative Arrangements Orders dated 18 September 2013 and 12 December 2013;
 - ii. admit that from 18 September 2013 to 23 December 2014 in accordance with the Governor-General's Administrative Arrangements Orders dated 18 September 2013 and 12 December 2013 the First Respondent administered the Migration Act; and
 - iii. admit that from 18 September 2013 to 23 December 2014 the matters dealt with by the Department of Immigration and Border Protection were set out in the Governor-General's Administrative Arrangements Orders dated 18 September 2013 and 12 December 2013 and admit that such matters covered matters concerning the MOU and the Administrative Arrangements; and
- d. otherwise deny paragraph 62.

63. In response to paragraph 63 the Respondents:

- a. in response to paragraph 63(a) admit that the Second Respondent:
 - i. was the Minister for Immigration and Border Protection from 23 December 2014 to 20 December 2017; and
 - ii. has been the Minister for Home Affairs since 20 December 2017;
- b. admit paragraphs 63(b)(i) and (iv);
- c. in response to the balance of 63(b) admit that:
 - i. from 23 December 2014 to 20 December 2017 the Second Respondent was appointed by the Governor-General of Australia pursuant to s 64 of the Constitution to administer the Department of Immigration and Border Protection in accordance with the Governor-General's Administrative Arrangements Orders dated 23 December 2014, 9 July 2015 (as amended by Orders in Council dated 21 September 2015), 30 September 2015 (as amended by Orders in Council dated 19 July 2016), and 1 September 2016 (as amended by Orders in Council dated 27 October 2016, 13 April 2017 and 30 November 2017);
 - ii. since 20 December 2017 the Second Respondent was appointed by the Governor-General of Australia pursuant to s 64 of the

Constitution to administer the Department of Home Affairs in accordance with the Governor-General's Administrative Arrangements Orders dated 1 September 2016 (as amended by Orders in Council dated 27 October 2016, 13 April 2017, 30 November 2017 and 20 December 2017), 19 April 2018, 4 April 2019 and 29 May 2019;

- iii. from 23 December 2014 in accordance with the Governor-General's Administrative Arrangements Orders referred to in sub-paragraphs 63(c)(i) and (ii) herein the Second Respondent administered the Migration Act; and
- iv. from 23 December 2014 the matters dealt with by the Department of Immigration and Border Protection and the Department of Home Affairs were set out in the Governor-General's Administrative Arrangements Orders referred to in sub-paragraphs 63(c)(i) and (ii) herein and admit that such matters covered matters concerning the MOU and the Administrative Arrangements; and

d. otherwise deny paragraph 63.

64. In response to paragraph 64 the Respondents admit that each of the Fourth and Fifth Respondents was a Secretary of a Department of State of the Commonwealth as pleaded respectively in paragraphs 65 and 66 below.

65. In response to paragraph 65 the Respondents:

- a. in response to paragraph 65(a) admit that the Fourth Respondent was appointed:
 - i. Secretary of the Department of Immigration and Citizenship with effect from March 2012 on an acting basis and then from 29 January 2013 until 18 September 2013; and
 - ii. Secretary of the Department of Immigration and Border Protection with effect from 18 September 2013 to 13 October 2014;
- b. in response to paragraph 65(b) admit that the Fourth Respondent as the Secretary of a Department of State of the Commonwealth was the holder of a public office;
- c. in response to paragraph 65(c) admit that:
 - i. from March 2012 to 13 February 2013 the Fourth Respondent as the Secretary of a Department of State of the Commonwealth had the responsibilities set out in s 57 of the *Public Service Act 1999* as it provided in that period (before it was repealed and substituted by the *Public Service Amendment Act 1999* with effect from 14 February 2013); and

ii. from 14 February 2013 to 13 October 2014 the Fourth Respondent as the Secretary of a Department of State of the Commonwealth had the responsibilities set out in s 57 of the *Public Service Act 1999* as it provided in that period; and

d. otherwise deny paragraph 65.

66. In response to paragraph 66 the Respondents:

a. in response to paragraph 66(a) admit that the Fifth Respondent was:

i. Secretary of the Department of Immigration and Border Protection with effect from 13 October 2014 to 20 December 2017; and

ii. Secretary of the Department of Home Affairs since 20 December 2017 to date;

b. in response to paragraph 66(b) admit that the Fifth Respondent as the Secretary of a Department of State of the Commonwealth was the holder of a public office;

c. in response to paragraph 66(c) admit that the Fifth Respondent as the Secretary of a Department of State of the Commonwealth since 13 October 2014 had the responsibilities set out in s 57 of the *Public Service Act 1999* as it provided in that period; and

d. otherwise deny paragraph 66.

67. The Respondents admit paragraph 67.

G. THE FIRST RPC VISA AND THE SUBSEQUENT RPC VISAS

The first RPC Visa

68. The Respondents admit paragraph 68.

68A. In response to paragraph 68A the Respondents:

a. admit that the Commonwealth Officers were acting in the course of their employment as public servants under the *Public Service Act 1999* (Cth) when applying for visas as alleged in paragraph 68A(a);

b. say the Commonwealth Officers were acting in accordance with delegations and duties;

Particulars

i. in relation to the First Applicant, the Commonwealth officer was acting in accordance with delegations and duties of Detention Operations Officer stationed in Darwin; and

- ii. in relation to the Second Applicant, the Commonwealth officer was acting in accordance with delegations and duties of a Transfer Officer stationed on Christmas Island;
 - c. admit, repeat and rely upon the matters stated in paragraphs 96(f)(i)-(iv) below concerning Commonwealth Officers applying for RPC visas; and
 - d. otherwise deny the paragraph.
69. In response to paragraph 69 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
70. In response to paragraph 70 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
71. In response to paragraph 71 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
72. In response to paragraph 72 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.

The Subsequent RPC Visas

73. In response to paragraph 73 the Respondents:
- a. admit the matters in that paragraph; and
 - b. say that pursuant to reg 9(5A) of the *Immigration Regulations 2013* (Nr) and reg 9(5A) of the *Immigration Regulations 2014* (Nr) a RPC Visa could be granted on the request of an officer of the Commonwealth of Australia without submitting an application in the prescribed form.
- 73A In response to paragraph 73A the Respondents:
- a. admit that the Commonwealth Officers were acting in the course of their employment as public servants under the *Public Service Act 1999* (Cth) when requesting visas as alleged in paragraph 73A(a);
 - b. say the Commonwealth Officers were acting in accordance with delegations and duties;

Particulars

- i. in relation to the First Applicant, the Commonwealth officer was acting in accordance with delegations and duties of Detention Operations Officer stationed in Darwin; and

- ii. in relation to the Second Applicant, the Commonwealth officer was acting in accordance with delegations and duties of a Transfer Officer stationed on Christmas Island;
 - c. admit, repeat and rely upon the matters stated in paragraphs 96(f)(i)-(iv) below concerning Commonwealth Officers requesting RPC visas as alleged in paragraph 73A(c); and
 - d. otherwise deny the paragraph.
- 74. In response to paragraph 74 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 75. In response to paragraph 75 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 76. In response to paragraph 76 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 77. In response to paragraph 77 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 78. In response to paragraph 78 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 79. In response to paragraph 79 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
- 79A. The Respondents do not plead to paragraph 79A as it is an allegation made in relation to one or more Group Members and the Respondents do not know and cannot admit allegations made with respect to the Group Members.
- 79B. The Respondents do not plead to paragraph 79B as it is an allegation made in relation to one or more Group Members and the Respondents do not know and cannot admit allegations made with respect to the Group Members.
- H. **MIPO #1 THE VISA APPLICATION AND REQUESTS WERE INVALID AND BEYOND POWER BECAUSE THEY WERE MADE WITHOUT AFFORDING PROCEDURAL FAIRNESS TO THE FIRST APPLICANT, THE SECOND APPLICANT AND GROUP MEMBERS – CAUSE OF ACTION AGAINST THE MESSRS MORRISON, DUTTON, BURKE BOWLES AND PEZZULLO**
- 80. In response to paragraph 80 the Respondents:

- a. say that the First Applicant was afforded notice of the application for the First Visa in his name;

Particulars

- i. Such notice in relation to the application for the First Visa, is evidenced in the following records of the Sixth Respondent:

80.a.i.1. record of discussions on [REDACTED]:
CTH.1002.0001.0001 at .0003

80.a.i.2. Pre Transfer Record form dated [REDACTED]:
CTH.1000.0001.0953

- ii. The First Applicant was thereafter able to make representations in relation to the requesting of Subsequent Visas.
- b. say that the Second Applicant was afforded notice of the application for the First Visa in his name; and

Particulars

- i. Such notice in relation to the application for the First Visa, is evidenced in the following records of the Sixth Respondent:

80.b.i.1. Pre Transfer Record form dated [REDACTED]:
CTH.2000.0001.0918

- ii. The Second Applicant was thereafter able to make representations in relation to the requesting of Subsequent Visas.

- c. otherwise deny the allegations.

81. In response to paragraph 81 the Respondents:

- a. admit that the First Visa and Subsequent Visas were apt to affect the rights or interests of the First and Second Applicants under, and in accordance with, Nauruan law;
- b. repeat and rely upon the matters stated in paragraphs 96(f)(i), (ii) and (iv) below; and
- c. otherwise deny the allegations.

82. In response to paragraph 82 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraph 80.b above.

83. In response to paragraph 83 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:
- a. deny the allegations of acting beyond power;
 - b. say there was no obligation to afford procedural fairness as particularised;
 - c. say that if and to the extent there was any obligation to afford procedural fairness as particularised it was satisfied by reason of the matters set out in paragraph 80 above; and
 - d. otherwise repeat and rely upon the matters stated in paragraphs 96(f)(i), (ii) and (iv) below.
84. In response to paragraph 84 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraph 80 above.
85. In response to paragraph 85 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:
- a. deny the allegations of acting beyond power;
 - b. say there was no obligation to afford procedural fairness as particularised;
 - c. say that if and to the extent there was any obligation to afford procedural fairness as particularised it was satisfied by reason of the matters set out in paragraph 80 above; and
 - d. otherwise repeat and rely upon the matters stated in paragraphs 96(f)(i), (ii) and (iv) below.
86. In response to paragraph 86 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraph 80 above.
87. In response to paragraph 87 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:
- a. deny the allegations of acting beyond power;

- b. say there was no obligation to afford procedural fairness as particularised;
 - c. say that if and to the extent there was any obligation to afford procedural fairness as particularised it was satisfied by reason of the matters set out in paragraph 80 above; and
 - d. otherwise repeat and rely upon the matters stated in paragraphs 96(f)(i), (ii) and (iv) below.
88. In response to paragraph 88 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraph 80 above.
89. In response to paragraph 89 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:
- a. deny the allegations of acting beyond power;
 - b. say there was no obligation to afford procedural fairness as particularised;
 - c. say that if and to the extent there was any obligation to afford procedural fairness as particularised it was satisfied by reason of the matters set out in paragraph 80 above; and
 - d. otherwise repeat and rely upon the matters stated in paragraphs 96(f)(i), (ii) and (iv) below.
90. There is no paragraph 90.
91. There is no paragraph 91.
92. In response to paragraph 92 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraphs 80 to 89 above.
93. In response to paragraph 93 the Respondents say that the pleading should be struck out because it contains material that is scandalous, and because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
94. In response to paragraph 94 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.

95. In response to paragraph 95 the Respondents say that the pleading should be struck out because it is likely to cause embarrassment and delay. Insofar as it is possible to respond to that paragraph the Respondents do not know and cannot admit that the First Applicant and Second Applicant suffered and continue to suffer, loss and damage as alleged.

95A. In further response to the whole of paragraphs 80 to 95, the Respondents say that those pleadings should be struck out because they fail to disclose a reasonable cause of action.

J. MIPO #2 VISA APPLICATIONS AND REQUESTS WERE BEYOND POWER – CAUSE OF ACTION AGAINST MESSRS MORRISON, DUTTON, BURKE, BOWLES AND PEZZULLO

96. In response to paragraph 96 the Respondents:

- a. deny paragraph 96(a);
- b. deny paragraph 96(b);
- c. deny paragraph 96(c), and rely upon the matters stated in sub-paragraphs (c)–(j) herein;
- d. in response to paragraph 96(d) say that:
 - i. it is scandalous, ambiguous, likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court; and
 - ii. if and to the extent paragraph 96(d) alleges that each Relevant Commonwealth Officer who took any pleaded action in relation to any particular person or Visa referred to in paragraph 96(d) lacked authority or power to take that step unless they were the ‘officer’ who took that person from Australia to Nauru, that allegation is denied;
- e. deny paragraph 96(e) and rely upon the combined effect of ss 198AD(2) and (3);
- f. deny paragraph 96(f) and say:
 - i. s 198AHA of the Migration Act took effect retrospectively from 18 August 2012, being the date of commencement of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*;
 - ii. s 198AHA(2) of the Migration Act conferred upon the Commonwealth, through its officers (including Relevant Commonwealth Officers), the capacity and authority to apply for and/or request RPC visas under the relevant laws of Nauru as in

force from time to time, the making of such applications or requests being:

- 96.f.ii.1. action taken in relation to the MOU and/or the 'regional processing functions' (as defined in s 198AHA(5)) of Nauru; or
- 96.f.ii.2. alternatively, incidental or conducive to the taking of action in relation to the MOU and/or the 'regional processing functions' (as defined in s 198AHA(5)) of Nauru;
- iii. further, or alternatively, Relevant Commonwealth Officers had non-statutory executive power pursuant to s 61 of the Constitution to apply for and/or request RPC visas;
- iv. the capacity and authority of the Relevant Commonwealth Officers to apply for and/or request RPC visas depended exclusively upon Australian law but, that capacity or authority having been exercised by the making of an application or request for an RPC visa, the validity of that application or request depended upon Nauruan law;
- g. say in response to paragraph 96(g) that the MOU alone was not the relevant source of legal power to apply for or request any RPC Visa;
- h. admit paragraph 96(h);
- i. deny paragraph 96(i) and say:
 - i. the Nauruan legislation which initially governed applications for regional processing centre (RPC) visas comprised the *Immigration Act 1999* (Nr) (1999 Act) (as relevantly in force from 15 March 2013 until 28 January 2014), and the *Immigration Regulations 2013* (Nr) (2013 Regulations) (as relevantly in force from 15 May 2013 to 30 January 2014), made under s 44 of the 2014 Act.
 - ii. after 28 and 30 January 2014 respectively, the 1999 Act and the 2013 Regulations were replaced by the *Immigration Act 2014* (Nr) (2014 Act) and the *Immigration Regulations 2014* (Nr) (2014 Regulations), made under s 33 of the 2014 Act;
 - iii. Regulation 9(1)(a) of each of the 2013 and 2014 Regulations provided for the grant of RPC visas to an 'offshore entry person' within the meaning of 'the Migration Act 1958 of the Commonwealth of Australia';
 - iv. s 37(2) the *Interpretation Act 2011* (Nr) provides that where a Nauruan law refers to a foreign law, the reference to the foreign law is a reference to the law 'as in force from time to time'. Accordingly, references in Nauruan law to 'the Migration Act 1958

of the Commonwealth of Australia' are references to the *Migration Act 1958* (Cth) as in force from time to time;

- v. with effect from 1 June 2013 the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) (Amending Act) repealed the definition of 'offshore entry person' and inserted the definition of 'unauthorised maritime arrival' into the *Migration Act 1958*. The Amending Act replaced all references to 'offshore entry person' in the Act with references to 'unauthorised maritime arrival' (see eg Amending Act Sch 1 cls 11-14, 20-30). The Explanatory Memorandum to the Amending Act makes clear that the defined term 'unauthorised maritime arrival' was intended to continue the effect of the definition of 'offshore entry person', while also extending its application (at [22]-[23]);
- vi. the definition of 'unauthorised maritime arrival' is identifiable as the provision being referred to in reg 9(1)(a); and
- vii. in light of the foregoing, immediately on the commencement of the Amending Act, all persons who were previously 'offshore entry persons' became 'unauthorised maritime arrivals'; and
- j. deny paragraph 96(j).

97. In response to paragraph 97 the Respondents:

- a. deny paragraph 97(a);
- b. deny paragraph 97(b);
- c. deny paragraph 97(c);
- d. say in response to paragraph 97(d) that:
 - i. it is scandalous, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court; and
 - ii. if and to the extent paragraph 97(d) alleges that each Relevant Commonwealth Officer who took any pleaded action in relation to any particular person or Visa referred to in paragraph 97(d) lacked authority or power to take that step unless they were the 'officer' who took that person from Australia to Nauru, that allegation is denied;
- e. deny paragraph 97(e) and rely upon the combined effect of ss 198AD(2) and (3);
- f. deny paragraph 97(f) and in that regard repeat and rely upon the matters stated in paragraph 96(f) above;

- g. say in relation to paragraph 97(g) that the MOU alone was not the relevant source of legal power to apply for or request any RPC Visa;
- h. say, in relation to paragraph 97(h), that the Administrative Arrangement and/or the MOU are relevant to, but are not themselves, the source(s) of legal power for Requesting Commonwealth Officers to request Subsequent Visas, and otherwise deny the allegations in paragraph 97(h);
- i. repeat and rely upon the matters stated in paragraph 96(i) above in relation to paragraph 97(i); and
- j. deny paragraph 97(j).

98. In response to paragraph 98 the Respondents:

- a. deny paragraph 98(a);
- b. deny paragraph 98(b);
- c. deny paragraph 98(c);
- d. deny paragraph 98(d);
- e. say in response to paragraph 98(e) that:
 - i. it is scandalous, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court; and
 - ii. if and to the extent paragraph 98(e) alleges that each Requesting Commonwealth Officer who took any pleaded action in relation to any particular person or Visa referred to in paragraph 98(e) lacked authority or power to take that step unless they were the 'officer' who took that person from Australia to Nauru, that allegation is denied;
- f. deny paragraph 98(f) and rely upon the combined effect of ss 198AD(2) and (3);
- g. deny paragraph 98(g), and in response to each respective sub-paragraph:
 - i. deny-subparagraph (i);
 - ii. deny sub-paragraph (ii); and
 - iii. deny sub-paragraph (iii) and in that regard repeat and rely upon the matters stated in paragraph 96(i) above;
- h. deny paragraph 98(h), say that s 198AHA does not have the effect or operation referred to therein, and in relation to the cross-reference to paragraph 96(i) repeat and rely upon the matters stated in paragraph 96(i) above;

- i. deny paragraph 98(i); and
 - j. in relation to the whole of paragraph 98, repeat and rely upon the matters set out in subparagraphs 96(k), (l), and (m) above.
99. In response to paragraph 99 the Respondents say that the pleading should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraphs 96 to 98 above.
100. In response to paragraph 100 the Respondents say that the pleading should be struck out because it contains material that is scandalous, and because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
101. In response to paragraph 101 the Respondents say that the pleading should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
102. In response to paragraph 102 the Respondents say that the pleading should be struck out because it is likely to cause embarrassment and delay. Insofar as it is possible to respond to that paragraph the Respondents say that they do not know and cannot admit that the First Applicant and Second Applicant suffered and continue to suffer, loss and damage as alleged.
- 102A. In further response to the whole of paragraphs 96 to 102, the Respondents say that those pleadings should be struck out because they fail to disclose a reasonable cause of action.

K. MIPO #3 HUMAN RIGHTS WERE BREACHED – CAUSE OF ACTION AGAINST MESSRS MORRISON, DUTTON BOWLES AND PEZZULLO

103. The Respondents admit the matters stated in paragraph 103.
104. In response to paragraph 104 the Respondents:
- a. admit that Australia and Nauru were ‘the Participants’ in, and within the meaning of, the MOU;
 - b. deny that the MOU gave rise to any legal obligations to ‘Transferees’ as alleged and say:
 - i. the MOU is an instrument of less-than-treaty status only between the governments of Australia and Nauru;
 - ii. the MOU does not in its terms or effect confer any legal rights upon any participants or non-participants;

- iii. the MOU does not in its terms or effect impose any legal obligations owed to participants or non-participants; and
- iv. the terms of the MOU have not been incorporated into Australia's domestic law.

105. The Respondents deny paragraph 105, and repeat and rely upon what is stated in paragraph 104 above.

106. In relation to paragraph 106 the Respondents:

- a. admit that what is alleged in paragraph (a) was a 'relevant human rights standard' for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above; and
 - ii. on that basis deny paragraph 106(a);
- b. admit that what is alleged in paragraph (b) was a 'relevant human rights standard' for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above; and
 - ii. on that basis deny paragraph 106(b);
- c. admit that what is alleged in paragraph (c) was a 'relevant human rights standard' for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above; and
 - ii. on that basis deny paragraph 106(c); and
- d. say that the prohibitions and obligations referred to in paragraph 106:
 - i. did not apply to the 'Transferees' as the Respondents do not owe such obligations to persons in Nauru as they are outside of Australia's jurisdiction;
 - ii. did not confer upon 'Transferees' any rights against the Respondents under the domestic law of Australia;
 - iii. did not impose upon the Respondents any obligations owed to 'Transferees' under the domestic law of Australia; and
 - iv. did not operate as a matter of law to render anything allegedly done, or not done, by the Respondents unlawful, beyond power or

unauthorised under the domestic law of Australia (including, relevantly, the law dealing with misfeasance in public office).

107. In relation to paragraph 107 the Respondents:

- a. say that paragraph 107(a) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 107(a);
- b. say that paragraph 107(b) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 107(b);
- c. say that paragraph 107(c) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 107(c);
- d. say that paragraph 107(d) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 107(d); and
- e. say that the balance of paragraph 107 should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court;
- f. insofar as it is possible to respond:
 - i. repeat and rely upon paragraphs 45 and 46 above concerning the reference to 'Residence Condition';
 - ii. say that all and any detention(s) in Nauru resulted from the independent exercise of sovereign and executive power by Nauru;
 - iii. deny that any detention in Nauru was contrary to any law of Australia;
 - iv. deny that any detention in Nauru was contrary to any pleaded law of Nauru;
 - v. say that if, and to the extent, sub-para iv. above is incorrect, the authority and/or powers of the Respondents in respect of regional processing in Nauru were not dependent on the lawfulness of things done by Nauru in Nauru; and
 - vi. repeat and rely upon the matters stated above at paragraphs 80, and 96 to 98.

108. In relation to paragraph 108 the Respondents:

- a. say that paragraph 108(a) should be struck out for the reasons given above in response to each paragraph which is cross-referenced in paragraph 108(a);
- b. say that paragraph 108(b) should be struck out for the reasons given above in response to each paragraph which is cross-referenced in paragraph 108(b);
- c. say that paragraph 108(c) should be struck out for the reasons given above in response to each paragraph which is cross-referenced in paragraph 108(c);
- d. say that paragraph 108(d) should be struck out for the reasons given above in response to each paragraph which is cross-referenced in paragraph 108(d);
- e. say that the balance of paragraph 108 should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court; and
- f. insofar as it is possible to respond, say that all and any detention(s) in Nauru resulted from the independent exercise of sovereign and executive power by Nauru.

109. In relation to paragraph 109 the Respondents:

- a. say that paragraph 109(a) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 109(a);
- b. say that paragraph 109(b) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 109(b);
- c. say that paragraph 109(c) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 109(c);
- d. say that paragraph 109(d) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 109(d);
- e. say that the balance of paragraph 109 should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court; and
- f. insofar as it is possible to respond:
 - i. say that all and any requirements to reside at a place in Nauru resulted from the independent exercise of sovereign and executive power by Nauru; and

- ii. repeat and rely upon the matters pleaded in paragraph 46 above in relation to the reference to 'Tent Conditions'.

110. In relation to paragraph 110 the Respondents cannot plead to the 'Unlawful Detention' for the reasons given in paragraph 107 above, and otherwise:

- a. deny the breaches alleged in paragraph 110(a) for the reasons stated in paragraph 106 above; and
- b. deny the breaches alleged in paragraph 110(b) for the reasons stated in paragraph 106 above.

111. In relation to paragraph 111 the Respondents:

- a. deny the breach(es) alleged in paragraph 111(a) for the reasons stated in paragraph 106 above;
- b. deny the breach(es) alleged in paragraph 111(b) for the reasons stated in paragraph 106 above;
- c. deny the breach alleged in paragraph 111(c) for the reasons stated in paragraph 106 above; and
- d. repeat and rely upon the matters pleaded in paragraph 46 above in relation to the reference to 'Tent Conditions'.

112. In relation to paragraph 112 the Respondents:

- a. deny the allegation of breach in paragraph 112 for the reasons stated in paragraph 106 above; and
- b. repeat and rely upon the matters stated, respectively, in paragraphs 45 and 46 above in relation to the references to 'Residence Condition' and 'Tent Conditions'.

113. In relation to paragraph 113 the Respondents:

- a. say that, to the extent it contains cross-references to paragraphs 107-110, it should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court for the reasons set out in paragraphs 107-110 above;
- b. insofar as it is possible to respond to the cross references to paragraphs 107-110, repeat and rely upon the responses given in paragraphs 107-110 above;
- c. in relation to the cross-references to paragraphs 111 and 112, repeat and rely upon the matters stated in paragraphs 111 and 112 above; and
- d. insofar as it is possible (or meaningful) to respond to the balance of the paragraph, deny that the Respondents acted contrary to law.

114. In response to paragraph 114 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraphs 103 to 113 above.
115. In response to paragraph 115 the Respondents say that the pleading should be struck out because it contains material that is scandalous, and because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
116. In response to paragraph 116 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
117. In response to paragraph 117 the Respondents say that the pleading should be struck out because it is likely to cause embarrassment and delay. Insofar as it is possible to respond to that paragraph the Respondents do not know and cannot admit that the First Applicant and Second Applicant suffered and continue to suffer, loss and damage as alleged.
- 117A. In further response to the whole of paragraphs 103 to 117, the Respondents say that those pleadings should be struck out because they fail to disclose a reasonable cause of action.

L. MIPO #4 CHILD MIGRANT RIGHTS WERE BREACHED – CAUSE OF ACTION AGAINST MESSRS MORRISON, DUTTON, BOWLES, PEZZULLO

118. In relation to paragraph 118 the Respondents repeat and rely upon the matters stated in paragraphs 103 to 105 above.
119. In relation to paragraph 119 the Respondents:
- a. admit that what is alleged in paragraph (a) was a ‘relevant human rights standard’ for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above (save that the reference to ‘Transferees’ therein should be understood as referring to the Second Applicant and Child Group Members); and
 - ii. on that basis deny paragraph 119(a);
 - b. admit that what is alleged in paragraph (b) was a ‘relevant human rights standard’ for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above (save that the reference to ‘Transferees’ therein should be understood as referring to the Second Applicant and Child Group Members); and

- ii. on that basis deny paragraph 119(b);
- c. admit that what is alleged in paragraph (c) was a 'relevant human rights standard' for the purposes of the MOU but
 - i. repeat and rely upon the matters stated in paragraph 104 above (save that the reference to 'Transferees' therein should be understood as referring to the Second Applicant and Child Group Members); and
 - ii. on that basis deny paragraph 119(c); and
- d. say that the alleged rights referred to in paragraph 119:
 - i. were not rights against the Respondents as the Second Applicant and Child Group Members were outside of Australia's jurisdiction;
 - ii. were not rights against the Respondents under the domestic law of Australia;
 - iii. did not impose upon the Respondents any obligations owed to the Second Applicant and any Child Group Members under the domestic law of Australia; and
 - iv. could not, therefore, have operated as a matter of law to render anything allegedly done, or not done, by the Respondents unlawful, beyond power or unauthorised under the domestic law of Australia (including, relevantly, the law dealing with misfeasance in public office).

120. In relation to paragraph 120 the Respondents:

- a. say that paragraph 120(a) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 120(a);
- b. say that paragraph 120(b) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 120(b);
- c. say that paragraph 120(c) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 120(c);
- d. say that paragraph 120(d) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 120(d);

- e. say that the balance of paragraph 120 should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court; and
- f. insofar as it is possible to respond:
 - i. repeat and rely upon paragraphs 45 and 46 above concerning the reference to 'Residence Condition';
 - ii. say that all and any deprivation of liberty in Nauru resulted from the independent exercise of sovereign and executive power by Nauru;
 - iii. deny that any deprivation of liberty in Nauru was contrary to any law of Australia;
 - iv. deny that any deprivation of liberty in Nauru was contrary to any pleaded law of Nauru;
 - v. say that if, and to the extent, sub-para iv. above is incorrect, the authority and/or powers of the Respondents in respect of regional processing in Nauru were not dependent on the lawfulness of any deprivation of liberty in Nauru; and
 - vi. deny the allegation that any so-called 'First Resort Detention' was in breach of the standard alleged in paragraph 119(a), and in that regard the respondents repeat and rely upon the matters stated in paragraphs 119(a), (d), and (e) above.

121. In relation to paragraph 121 the Respondents:

- a. say that paragraph 121(a) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 121(a);
- b. say that paragraph 121(b) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 121(b);
- c. say that paragraph 121(c) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 121(c);
- d. say that paragraph 121(d) should be struck out for the reasons given above by way of response to each paragraph which is cross-referenced in paragraph 121(d);
- e. say that the balance of paragraph 121 should be struck out because it is evasive, ambiguous and likely to cause prejudice, embarrassment and delay and/or is an abuse of the process of the Court; and

- f. insofar as it is possible to respond:
 - i. repeat and rely upon paragraph 48(c) above concerning the reference to 'Residence Condition';
 - ii. say that any alleged 'Education Prohibition' in Nauru resulted from the independent exercise of sovereign and executive power by Nauru;
 - iii. deny that any alleged 'Education Prohibition' in Nauru was contrary to any law of Australia;
 - iv. deny that any alleged 'Education Prohibition' in Nauru was contrary to any pleaded law of Nauru; and
 - v. say that if, and to the extent, sub-para iv. above is incorrect, the authority and/or powers of the Respondents in respect of regional processing in Nauru were not dependent on the lawfulness of any alleged 'Education Prohibition' in Nauru.

122. In relation to paragraph 122 the Respondents:

- a. deny the breaches alleged in paragraph 122(a) for the reasons stated in paragraph 119(b), (d), and (e) above;
- b. deny the breaches alleged in paragraph 122(c) for the reasons stated in paragraph 119(c), (d) and (e) above; and
- c. repeat and rely upon the matters stated in paragraph 121 above in relation to the 'Education Prohibition'.

123. In relation to paragraph 123 the Respondents:

- a. say that, to the extent it contains cross-references to paragraphs 107-110, it should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court for the reasons set out in paragraphs 107-110 above;
- b. insofar as it is possible to respond to the cross references to paragraphs 107-110, repeat and rely upon the responses given in paragraphs 107-110 above;
- c. in relation to the cross-references to paragraph 111, repeat and rely upon the matters stated in paragraphs 111 above; and
- d. insofar as it is possible (or meaningful) to respond to the balance of the paragraph, deny that the Respondents acted contrary to law.

124. In response to paragraph 124 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to

respond to that paragraph the Respondents deny the allegations by reason of the matters set out in paragraphs 118 to 123 above.

125. In response to paragraph 125 the Respondents say that the pleading should be struck out because it contains material that is scandalous, and because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
126. In response to paragraph 126 the Respondents say that the pleading should be struck out because it is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
127. In response to paragraph 127 the Respondents say that the pleading should be struck out because it is likely to cause embarrassment and delay. Insofar as it is possible to respond to that paragraph the Respondents do not know and cannot admit that the First Applicant and Second Applicant suffered and continue to suffer, loss and damage as alleged.
- 127A In further response to the whole of paragraphs 118 to 127, the Respondents say that those pleadings should be struck out because they fail to disclose a reasonable cause of action.

M. DIRECT AND VICARIOUS LIABILITY

128. In response to paragraph 128 the Respondents:
 - a. say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court by reason of deficiencies pleaded above with respect to each of MIPO#1, MIPO#2, MIPO#3 and MIPO#4; and
 - b. insofar as it is possible to respond, deny that the First Respondent is liable for the tort of misfeasance in public office.
129. In response to paragraph 129 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
130. In response to paragraph 130 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny that the Commonwealth can be directly liable for the tort of misfeasance in public office.
131. In response to paragraph 131 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:

- a. admit for the purposes of these proceedings that the Commonwealth could be vicariously liable for the tort of misfeasance in public office with respect to the conduct of a Minister; and
- b. deny that the First Respondent is liable for the tort of misfeasance in public office such as to give rise to any possible vicarious liability on the part of the Commonwealth.

132. In response to paragraph 132 the Respondents:

- a. say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court by reason of deficiencies pleaded above with respect to each of MIPO#1, MIPO#2, MIPO#3 and MIPO#4; and
- b. insofar as it is possible to respond, deny that The Second Respondent is liable for the tort of misfeasance in public office.

133. In response to paragraph 133 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.

134. In response to paragraph 134 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny that the Commonwealth can be directly liable for the tort of misfeasance in public office.

135. In response to paragraph 135 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:

- a. admit that the Commonwealth can be vicariously liable for the tort of misfeasance in public office with respect to the conduct of a Minister; and
- b. deny that the Second Respondent is liable for the tort of misfeasance in public office such as to give rise to any possible vicarious liability on the part of the Commonwealth.

136. In response to paragraph 136 the Respondents:

- a. say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court by reason of deficiencies pleaded above with respect to each of MIPO#1 and MIPO#2; and
- b. deny that the Third Respondent is liable for the tort of misfeasance in public office.

137. In response to paragraph 137 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
138. In response to paragraph 138 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny that the Commonwealth can be directly liable for the tort of misfeasance in public office.
139. In response to paragraph 139 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:
- a. admit that the Commonwealth can be vicariously liable for the tort of misfeasance in public office with respect to the conduct of a Minister; and
 - b. deny that the Third Respondent is liable for the tort of misfeasance in public office such as to give rise to any possible vicarious liability on the part of the Commonwealth.
140. In response to paragraph 140 the Respondents:
- a. say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court by reason of deficiencies pleaded above with respect to each of MIPO#1, MIPO#2, MIPO#3 and MIPO#4; and
 - b. insofar as it is possible to respond, deny that the Fourth Respondent is liable for the tort of misfeasance in public office.
141. In response to paragraph 141 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.
142. In response to paragraph 142 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny that the Commonwealth can be directly liable for the tort of misfeasance in public office.
143. In response to paragraph 143 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph:
- a. admit that the Commonwealth can be vicariously liable for the tort of misfeasance in public office with respect to the conduct of a Secretary; and

- b. deny that the Fourth Respondent is liable for the tort of misfeasance in public office such as to give rise to any possible vicarious liability on the part of the Commonwealth.

144. In response to paragraph 144 the Respondents:

- a. say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court by reason of deficiencies pleaded above with respect to each of MIPO#1, MIPO#2, MIPO#3 and MIPO#4; and
- b. insofar as it is possible to respond, deny that the Fifth Respondent is liable for the tort of misfeasance in public office.

145. In response to paragraph 145 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court.

146. In response to paragraph 146 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents deny that the Commonwealth can be directly liable for the tort of misfeasance in public office.

147. In response to paragraph 147 the Respondents say that the pleading is evasive, ambiguous, likely to cause prejudice, embarrassment and delay, and/or is an abuse of the process of the Court. Insofar as it is possible to respond to that paragraph the Respondents:

- a. admit that the Commonwealth can be vicariously liable for the tort of misfeasance in public office with respect to the conduct of a Secretary; and
- b. deny that the Fifth Respondent is liable for the tort of misfeasance in public office such as to give rise to any possible vicarious liability on the part of the Commonwealth.

Date: 13 December 2019



Louise Rafferty
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent

This pleading was settled by Tom Howe QC and Tim Begbie, counsel.

CERTIFICATE OF LAWYER

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

1. each allegation in the pleading; and
2. each denial in the pleading; and
3. each non-admission in the pleading.

Date: 13 December 2019



.....
Signed by Louise Rafferty
Lawyer for the Respondent

Schedule

No. VID 816 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Second Applicant: Plaintiff M83B/2019 (by his litigation representative, Plaintiff M83C/2019)

First Respondent: Scott Morrison

Second Respondent: Peter Dutton

Third Respondent: Tony Burke

Fourth Respondent: Martin Bowles

Fifth Respondent: Michael Pezzullo

Sixth Respondent: Commonwealth of Australia