

**IN THE SUPREME COURT
OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST**

No: S CI 2014 4423

B E T W E E N

AS BY HER LITIGATION GUARDIAN MARIE THERESA ARTHUR *Plaintiff*

and

**MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**

First Defendant

and

COMMONWEALTH OF AUSTRALIA

Second Defendant

**DEFENDANTS' DEFENCE TO STATEMENT OF CLAIM DATED
23 SEPTEMBER 2016**

Date of Document:		14 October 2016
Filed on behalf of:	First and Second Defendants	
Prepared by:	Australian Government Solicitor Level 21 200 Queen Street, Melbourne Vic 3000 DX 50 Melbourne Email: matthew.crowley@ags.gov.au	Solicitor's Code: 9342 Tel No: 03 9242 1242 Fax No: 03 9242 1278 Ref No: 14153136 Ref: Matthew Crowley

The Defendants by way of their defence to the Plaintiff's Statement of Claim dated 23 September 2016 say as follows.

The Defence adopts the definitions contained in the Statement of Claim unless specifically stated.

A. Preliminary

1. The Defendants admit the allegations contained in paragraph 1.

2. The Defendants say that AS was detained pursuant to section 189 of the *Migration Act 1958* (Cth) (the **Migration Act**) between 26 July 2013 and 19 August 2014 at the following locations:
 - a) 26/07/2013 to 12/08/2013 – Phosphate Hill Alternative Place of Detention (Christmas Island)
 - b) 12/08/2013 to 16/08/2013 – Lilac/Aqua Alternative Place of Detention (Christmas Island)
 - c) 16/08/2013 to 18/10/2013 – Darwin Airport Lodge Alternative Place of Detention
 - d) 18/10/2013 to 19/08/2014 – Construction Camp Alternative Place of Detention (Christmas Island),and otherwise do not admit the allegations contained in paragraph 2.
3. The Defendants do not plead to the allegations contained in paragraph 3 as it does not contain any allegations against them.
4. The Defendants do not plead to the allegations contained in paragraph 4 as it does not contain any allegations against them.
5. The Defendants do not plead to the allegations contained in paragraph 5 as it does not contain any allegations against them.
6. The Defendants do not plead to the allegations contained in paragraph 6 as it does not contain any allegations against them.
7. Save that the Defendants say that the Commonwealth is capable of being sued by operation of the *Judiciary Act 1903* (Cth) they admit the allegations contained in paragraph 7.
8. The Defendants admit the allegations contained in paragraph 8.

9. The Defendants admit the allegations contained in paragraph 9.
10. The Defendants say in response to subparagraph 10(a) that the Second Defendant is vicariously liable for officers and employees who have acted reasonably, properly and responsibly in the circumstances arising out of the performance of their Commonwealth employment duties, does not otherwise admit the allegations contained in paragraph 10(a) and does not admit the allegations contained in subparagraph 10(b).
11. The Defendants admit the allegations contained in paragraph 11.
12. The Defendants admit the allegations contained in paragraph 12.

B. Duties

13. The Defendants refer to and repeat paragraph 2 herein and otherwise do not admit the allegations contained in paragraph 13.
14. The Defendants do not admit the allegations contained in paragraph 14.
15. The Defendants refer to and repeat paragraph 2 herein and otherwise do not admit the allegations contained in paragraph 15.
16. Save that the Defendants say that the conditions of the detention of AS were subject to the management of the Second Defendant's contractors, Serco and IHMS, they do not admit the allegations contained in paragraph 16.
17. The Defendants do not admit the allegations contained in paragraph 17.
18. The Defendants do not admit the allegations contained in paragraph 18.
19. Save that the Defendants admit that the held immigration detention centre facilities on Christmas Island had perimeter fences, they otherwise do not admit the allegations contained in paragraph 19.

20. The Defendants do not admit the allegations contained in paragraph 20 and they refer to and repeat the matters set out at paragraphs 13-19 herein.
21. The Defendants do not admit the allegations contained in paragraph 21.
22. Save that the Defendants admit that the Second Defendant owed AS and people in held immigration detention a non-delegable duty of care to ensure that reasonable care is taken of them, the Defendants do not admit the allegations contained in paragraph 22.
23. Save that the Defendants admit the Second Defendant owed AS and people in held immigration detention the duty set out at paragraph 22 herein, the Defendants do not admit the allegations contained in paragraph 23.
24. The Defendants do not admit the allegations contained in paragraph 24.
25. The Defendants do not admit the allegations contained in paragraph 25.
26. The Defendants do not admit the allegations contained in paragraph 26.
27. The Defendants do not admit the allegations contained in paragraph 27.
28. The Defendants do not admit the allegations contained in paragraph 28.
29. The Defendants refer to and repeat paragraph 22 herein and otherwise do not admit the allegations contained in paragraph 29.
30. The Defendants refer to and repeat paragraph 22 herein and otherwise do not admit the allegations contained in paragraph 30.
31. The Defendants admit the allegations contained in paragraph 31 but say that it does not apply to the First Defendant and in any event does not give rise to private right sounding in a cause of action against the Second Defendant.
32. The Defendants admit the allegations contained in paragraph 32.

33. The Defendants refer to and repeat paragraph 22 herein and otherwise do not admit the allegations contained in paragraph 33.
34. The Defendants do not admit the allegations contained in paragraph 34.
35. The Defendants deny the allegations contained in paragraph 35 and say further that as a matter of law no duty of the kind described exists.
36. The Defendants refer to and repeat paragraph 35 herein and otherwise deny the allegations contained in paragraph 36.
37. The Defendants refer to and repeat paragraph 31 herein and otherwise deny the allegations contained in paragraph 37.
38. The Defendants refer to and repeat paragraph 37 herein and otherwise deny the allegations contained in paragraph 38.

C. Facts relevant to the claim of AS

39. The Defendants admit the allegations contained in paragraph 39.
40. The Defendants refer to and repeat paragraph 2 herein, say that F and M were detained pursuant to section 189 of the Migration Act on 26 July 2013 and otherwise do not admit the allegations contained in paragraph 40.
41. The Defendants do not admit the allegations contained in paragraph 41.
42. The Defendants do not admit the allegations contained in paragraph 42.
43. The Defendants do not admit the allegations contained in paragraph 43.
44. The Defendants do not admit the allegations contained in paragraph 44.
45. The Defendants admit the allegations contained in paragraph 45.
46. The Defendants do not admit the allegations contained in paragraph 46.

47. The Defendants say that the Minister made 2 residence determinations relating to 'three families' on 2 September 2013, however, neither determination made by the Minister on 2 September 2013 related to AS and her family, and the Defendants otherwise deny the allegations contained in paragraph 47.
48. The Defendants refer to and repeat paragraph 47 and otherwise deny the allegations contained in paragraph 48.
49. The Defendants refer to and repeat paragraph 47 and otherwise deny the allegations contained in paragraph 49.
50. The Defendants refer to and repeat paragraph 47 and otherwise deny the allegations contained in paragraph 50.
51. The Defendants admit the allegations contained in paragraph 51.
52. The Defendants deny the allegations contained in paragraph 52.
53. The Defendants admit the allegations contained in paragraph 53.
54. The Defendants admit the allegations contained in paragraph 54.
55. Save that the Defendants say that between 19 August 2014 and 15 January 2015 AS, F, M and B were in detention at the following locations:
 - a) 19/08/2014 to 21/08/2014 – Perth Immigration Residential Housing
 - b) 21/08/2014 to 23/08/2014 – Wickham Point
 - c) 23/08/2014 to 15/01/2015 – Bladin Alternative Place of Detention,they otherwise deny the allegations contained in paragraph 55.
56. The Defendants refer to and repeat paragraph 19 herein and otherwise do not admit the allegations contained in paragraph 56.
57. The Defendants do not admit the allegations contained in paragraph 57.

58. The Defendants do not admit the allegations contained in paragraph 58.
59. The Defendants do not admit the allegations contained in paragraph 59.
60. The Defendants do not admit the allegations contained in paragraph 60.
61. The Defendants do not admit the allegations contained in paragraph 61.
62. The Defendants admit that M made a report and that the Commonwealth became aware of the report and otherwise do not admit the allegations contained in paragraph 62.
63. The Defendants do not admit the allegations contained in paragraph 63.
64. The Defendants do not admit the allegations contained in paragraph 64.
65. The Defendants do not admit the allegations contained in paragraph 65.
66. The Defendants do not admit the allegations contained in paragraph 66.
67. The Defendants do not admit the allegations contained in paragraph 67.
68. The Defendants do not admit the allegations contained in paragraph 68.
69. The Defendants do not admit the allegations contained in paragraph 69.
70. The Defendants admit that M undertook a Mental State Examination and that the Commonwealth became aware of this and otherwise do not admit the allegations contained in paragraph 70.
71. The Defendants do not admit the allegations contained in paragraph 71.
72. The Defendants do not admit the allegations contained in paragraph 72.
73. The Defendants do not admit the allegations contained in paragraph 73.
74. The Defendants do not admit the allegations contained in paragraph 74.
75. The Defendants do not admit the allegations in paragraph 75.

76. The Defendants do not admit the allegations contained in paragraph 76.
77. The Defendants do not plead to the allegations in paragraph 77 as it does not contain any allegations against them.
78. The Defendants do not admit the allegations contained in paragraph 78.
79. The Defendants admit the allegations contained in paragraph 79.
80. The Defendants do not admit the allegations contained in paragraph 80.
81. The Defendants do not admit the allegations contained in paragraph 81.
82. The Defendants deny the allegations contained in paragraph 82.
83. The Defendants do not admit the allegations contained in paragraph 83.
84. The Defendants do not admit the allegations contained in paragraph 84.
85. The Defendants do not admit the allegations contained in paragraph 85.
86. The Defendants do not admit the allegations contained in paragraph 86.

D. Negligence

87. The Defendants deny the allegations contained in paragraph 87.
88. The Defendants deny the allegations contained in paragraph 88.
89. The Defendants deny the allegations contained in paragraph 89.
90. The Defendants deny the allegations contained in paragraph 90.
91. The Defendants deny the allegations contained in paragraph 91.
92. The Defendants deny the allegations contained in paragraph 92.
93. The Defendants deny the allegations contained in paragraph 93.
94. The Defendants deny the allegations contained in paragraph 94.
95. The Defendants deny the allegations contained in paragraph 95.

96. The Defendants deny the allegations contained in paragraph 96.
97. The Defendants deny the allegations contained in paragraph 97.
98. The Defendants deny the allegations contained in paragraph 98.
99. The Defendants deny the allegations contained in paragraph 99.
100. The Defendants deny the allegations contained in paragraph 100.
101. The Defendants deny the allegations contained in paragraph 101.
102. The Defendants deny the allegations contained in paragraph 102.

E. False Imprisonment

103. The Defendants deny the allegations contained in paragraph 103.
104. The Defendants deny the allegations contained in paragraph 104.
105. The Defendants deny the allegations contained in paragraph 105.
106. The Defendants deny the allegations contained in paragraph 106.
107. The Defendants deny the allegations contained in paragraph 107.

F. Loss and damage

108. The Defendants deny the allegations contained in paragraph 108.
109. The Defendants do not admit the allegations contained in paragraph 109.
110. The Defendants deny the allegations contained in paragraph 110.
111. The Defendants do not admit the allegations contained in paragraph 111.
112. The Defendants deny the allegations contained in paragraph 112.

113. The Defendants deny the allegations contained in paragraph 113.

Dated: 14 October 2016

R.J. STANLEY

GARRY LIVERMORE

A handwritten signature in black ink, appearing to read 'Matthew Crowley', is written over a horizontal dotted line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

.....
Matthew Crowley
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Defendants

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

S CI 2014 04423

BETWEEN:

A.S. BY HER LITIGATION GUARDIAN MARIE THERESA ARTHUR	Plaintiff
- and -	
MINISTER FOR IMMIGRATION AND BORDER PROTECTION	First Defendant
COMMONWEALTH OF AUSTRALIA	Second Defendant
- and -	
INTERNATIONAL HEALTH AND MEDICAL SERVICES PTY LIMITED	First Third Party
SERCO AUSTRALIA PTY LIMITED	Second Third Party

GENERAL FORM OF ORDER

JUDGE OF THE COURT:	The Honourable Justice J Forrest
DATE MADE:	18 August 2016
ORIGINATING PROCESS:	Writ
HOW OBTAINED:	At the directions hearing heard on 18 August 2016
ATTENDANCE:	Mr M Albert with Mr M Guo, of counsel for the plaintiff Mr RJ Stanley QC with Mr GH Livermore, of counsel for the first and second defendants Mr PE Anastassiou QC, of counsel for the first third party Ms L Nichols, of counsel for the second third party
OTHER MATTERS:	This order is signed by the Judge pursuant to rule 60.02(1)(b) of the Supreme Court (General Civil Procedure) Rules 2015.



THE COURT ORDERS THAT:

Pleadings

1. By 23 September 2016, A.S. file and serve an amended statement of claim.

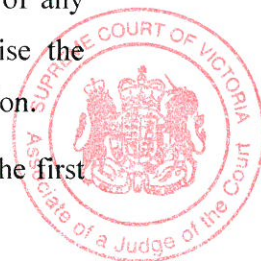
2. By 14 October 2016, the defendants file and serve any amended defence/s and any amended third party notices.
3. By 4 November 2016, the first and second third parties file and serve any defences to the third party notices.

Expert evidence

4. By 23 September 2016, A.S. file and serve on the defendants and the third parties any further expert evidence pursuant to O 44 and/or O 33 of the Supreme Court (General Civil Procedure) Rules 2015 upon which she proposes to rely at the trial.
5. By 18 November 2016, the defendants file and serve on A.S and the third parties all expert evidence upon which they propose to rely at the trial.
6. By 16 December 2016, the third parties file and serve on A.S and the defendants all expert evidence upon which they propose to rely at the trial.

Mediation

7. The proceeding is referred to a Mediator to be agreed between the parties or, in default of agreement, to be appointed by the Court, such mediation to be completed before 20 February 2017, by which date the Mediator shall report to the Court and to the associate to the managing judge about the completion of the mediation.
8. The solicitors for the plaintiffs shall, after such consultation, deliver to the Mediator a copy of this order, all pleadings (including further particulars) and a copy of any other relevant information as agreed, and take all steps necessary to ensure that the mediation commences as soon as practicable.
9. Those persons who have authority to settle the dispute and the terms of any settlement, and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement shall attend the mediation.
10. Subject to any further order, the costs of the mediation shall be paid in the first instance by the parties in equal shares.
11. The parties must forthwith notify the Associate to the Honourable Associate Justice Daly in the event of the proceeding being resolved before the date fixed for the trial.



Trial date

12. The trial date of 14 November 2016 be vacated and the trial be re-fixed for 15 March 2017.

Further application

- 13.
- (a) Within 14 days of A.S. filing and serving an amended statement of claim, A.S. make any application to the Court for further hearing of matters relating to discovery (including privileges and immunities), access to witnesses and common issues.
 - (b) Any such application be heard on 7 November 2016.

Filing and serving of materials

14. Any affidavit or supporting material, sought to be relied upon at the hearing of any application in respect of this proceeding, be filed and served on the Court and the parties no later than two days prior to the hearing date.

Other matters

15. Liberty to apply.
16. Costs be reserved.

DATE AUTHENTICATED: 19 August 2016


The Honourable Justice J Forrest

