

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

S CI 2014 4423

BETWEEN:

AS BY HER LITIGATION GUARDIAN MARIE THERESA ARTHUR

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR

Defendants

And

**INTERNATIONAL HEALTH AND MEDICAL SERVICES PTY LTD (ABN 40 073
811 131)**

First Third Party

and

SERCO AUSTRALIA PTY LTD (ABN 44 003 677 352)

Second Third Party

**DEFENCE TO STATEMENT OF CLAIM ON THIRD PARTY NOTICE
AND COUNTERCLAIM**

Date of document: 13 December 2016
Filed on behalf of: The Second Third Party
Prepared by:
Corrs Chambers Westgarth
Lawyers
Level 25, 567 Collins Street
Melbourne VIC 3000

Solicitor's Code: 9973
Tel: +61 2 9210 6500
Fax: +61 2 9210 6611
Ref: 9112442

Email: anna.ross@corrs.com.au
katrina.sleiman@corrs.com.au

To the Statement of Claim indorsed on the Third Party Notice served by the Second Defendant on the Second Third Party (**Serco**) dated 14 October 2016, **Serco** says -

1. It does not plead to paragraph 1, in which no allegations are made against it.
2. It does not plead to paragraph 2, in which no allegations are made against it.
3. It admits the allegations in paragraph 3.
4. It does not plead to paragraph 4, in which no allegations are made against it.
5. It does not plead to paragraph 5, in which no allegations are made against it.
6. It does not plead to paragraph 6, in which no allegations are made against it.
7. It admits the allegations in paragraph 7.

8. To paragraph 8 –

- (a) it admits that on 29 June 2009 it entered into a contract with the Second Defendant (**the Commonwealth**) acting through and represented by the Department of Immigration and Citizenship (**the Department**) for the provision of services to the Commonwealth at, amongst other places, Christmas Island, and that the nature and content of Serco's obligation to provide services was defined in and subject to the terms of that contract (**the Serco Contract**);
- (b) it admits that at all relevant times the Serco Contract contained the terms alleged at sub-paragraphs (a), (b), (c), (d), (e), (f), (g), (i) and (j) of the particulars to paragraph 7;
- (c) it says that the term alleged at sub-paragraph (h) was a term of the Serco Contract only on and after 1 October 2013;

Particulars

The term was incorporated into the Contract by Deed of Variation No.5, which took effect on 1 October 2013.

- (d) it says in respect of the term alleged at sub-paragraph (g) –
 - (i) that Serco was required by the Serco Contract to provide a monthly schedule of programs and activities for each of the Christmas Island Facilities (namely Phosphate Hill, Construction Camp and Lilac Aqua Alternative Places of Detention and North West Point (collectively, **Facilities**)), for approval by the Department before their implementation;
 - (ii) that at all relevant times Serco's performance of the requirement under paragraph 1.10 of section 2.2.1 of Schedule 2 of the Serco Contract that it provide access to detainees to an appropriate range of programs and activities was to be measured by:
 - (A) whether or not it delivered programs and activities in accordance with the schedule for programs and activities approved by the Department from time to time; and
 - (B) whether or not there were substantiated events of detainees being denied access to any existing program, activity or religious activity without reasonable grounds, where 'reasonable grounds' included:
 - (1) lack of relevant infrastructure;

- (2) numbers of people in detention in excess of the operational capacity of the facility;
- (3) relevant infrastructure being unavailable due to repair or upgrade by the Department; and
- (4) the denial of access on health or security grounds provided that the decision to deny access was reasonable and justifiable.

Particulars

Clause 1.10.2(a) of Schedule 2 to the Serco Contract was to the effect alleged at sub-paragraph (i).

Clauses 2.1 and 2.2 of Annexure A to Schedule 4.1 to the Serco Contract were to the effect alleged at sub-paragraphs (ii), on and from the effective date of the Deed of Variation No. 2 made on 14 July 2010.

- (e) it says that it was a term of the Serco Contract that the Department had or would enter into separate contracts with other entities unrelated to Serco for the provision of health services to detainees [clause 3.5];
- (f) it says that it was a term of the Serco Contract that the Department had or would enter into memoranda of understanding with various government bodies for the provision of a range of services to the facilities or to detainees [clause 3.5];
- (g) it says, in respect of the term alleged at sub-paragraph (k), that the term also included the words “but the Department is not entitled to be compensated in excess of the amount of the relevant cost, liability, loss, damage, or expense” [clause 59.2];
- (h) it says that it was a term of the Serco Contract that Serco’s liability under any indemnity in the contract or for any common law or statutory cause of action arising out of the operation of the contract will be reduced proportionately to the extent that any breach of the contract by the Department or any act or omission on the part of the Department or Department personnel (other than a breach of the Department’s non-delegable duty of care arising from any act, omission or neglect on the part of Serco or its personnel, or any breach by Serco of its obligations and warranties under the contract) contributed to the relevant cost, liability, loss, damage or expense [clause 61.1];

- (i) it says that it will rely on the Serco Contract as amended from time to time during the relevant period for its full terms and effect; and
 - (j) otherwise, it does not admit the allegations therein.
9. To paragraph 9 –
- (a) it does not admit that it owed to the plaintiff, or other group members, the duty alleged;
 - (b) it admits that it owed a duty to take reasonable care that the performance of its obligations under the Serco Contract did not cause reasonably foreseeable injury to the plaintiff and/or group members, but says that duty did not require Serco to do anything that it was not required to do under the Serco Contract; and
 - (c) it denies that it owed the duty alleged to the Commonwealth.
10. It does not plead to paragraph 10, in which no allegations are made against it.
11. To paragraph 11 –
- (a) it denies that, to the extent that it owed any duty to the plaintiff or group members, it breached such duty or was negligent;
 - (b) it denies that it breached any term of the Serco Contract and (if it owed any duty of care to the Commonwealth) that it breached any duty of care to the Commonwealth;
 - (c) it denies that the plaintiff or group members have suffered loss or damage as a result of, or arising from, any negligence or breach of duty of Serco;
 - (d) it denies that the Commonwealth has suffered loss or damage as a result of, or arising from, any negligence or breach of duty of Serco;
 - (e) it says that the liability of the Commonwealth to the plaintiff and group members and the entitlement of the plaintiff and group members to damages, if any, is to be determined in accordance with the substantive laws in force in Christmas Island which, throughout the relevant period, included the *Civil Liability Act 2002* (Western Australia);

Particulars

The *Civil Liability Act 2002* (WA) applies by operation of Part III Division 1 of the *Christmas Island Act 1958* (Cth). That Act is included in the list tabled pursuant to s 8B of the *Christmas Island Act 1958* (Cth) for the period

21 September 2002 to 21 March 2003 of Acts of the Western Australian Parliament in force on Christmas Island.

Physical conditions of detention

- (f) in respect of the alleged “physical conditions of detention on Christmas Island”–
- (i) it denies that it owed any duty to ensure that the physical conditions of detention on Christmas Island were not such as were likely to -
 - (A) cause or exacerbate injury to the plaintiff or group members;
 - (B) cause or exacerbate injury to the plaintiff’s parents such that the ability to mitigate the negative impacts of any injury or exacerbation of existing injury to the plaintiff were further adversely affected;
 - (C) cause or exacerbate developmental delay in the plaintiff or minor group members,and repeats the matters alleged at paragraph 9;
 - (ii) it denies that it breached any duty owed to the plaintiff and group members or to the Commonwealth;
 - (iii) as to allegations concerning the type or standard of accommodation provided, it says further that -
 - (A) pursuant to the Serco Contract it did not have responsibility for the provision of physical infrastructure and accommodation facilities, including the size of those facilities, the extent to which they admitted natural light or were insulated, air-conditioned or ventilated, whether they were temporary or permanent, whether or not they included self-catering facilities, whether or not they included areas which allowed privacy for families; nor was it responsible for the construction or composition of the pathways within and between sets of buildings;
 - (B) the Commonwealth was responsible for each of the matters identified in the previous sub-paragraph;
 - (C) insofar as the plaintiff and group members suffered loss or damage as a result of the physical conditions of detention comprising the nature of the physical infrastructure and accommodation facilities, any such loss or damage did not arise from any negligent act or

omission of Serco or any breach by Serco of the Serco Contract and Serco is not liable for any such loss or damage;

- (iv) as to the allegations concerning the “quality, quantity and serving times of and conditions of access to food” it says further that -
- (A) it admits that the food available to detainees was the food provided by it pursuant to the Serco Contract;
 - (B) self-service breakfast supplies were provided to detainees along with self-catering facilities which included microwaves, kettles, toasters and fridges;
 - (C) it admits that lunch and dinner were provided at set times in the dining rooms and that detainees were required to provide identification at lunch and dinner;
 - (D) it denies that reasonable care required that it make arrangements for access by detainees to food that differed to those identified above;
- (v) as to the allegations concerning overcrowding, it says further that –
- (A) the number of detainees on Christmas Island was not within its control but was within the control of the Commonwealth, and it repeats the matters alleged at sub-paragraph (vi) below;
 - (B) insofar as the plaintiff and group members suffered loss or damage as a result of the physical conditions of detention comprising overcrowding, any such loss or damage did not arise from any negligent act or omission of Serco or any breach by Serco of the Serco Contract and Serco is not liable for any such loss or damage;
- (vi) as to the allegations concerning “the occupational activities in which persons in detention on Christmas Island could participate”, it says further that –
- (A) Serco had no control over the number of detainees arriving at Christmas Island, the timing of their arrival or the availability of accommodation and facilities within which to house and provide services to detainees;
 - (B) the engagement by detainees in the programs and activities (including the need to roster access to programs and to sporting,

library and internet facilities) was influenced by the number of detainees arriving at Christmas Island and the period of time that those detainees remained on Christmas Island;

- (C) for the substantial majority of the relevant period, the number of detainees residing in each facility on Christmas Island exceeded the design capacities of the facility, and often also exceeded its contingency capacity;

Particulars

Schedule 1 to the Serco Contract provided the operational and surge capacity of North West Point, Construction Camp and Phosphate Hill was follows:

Facility	Operational capacity	Surge capacity
North West Point	400	800
Construction Camp	332 based on one person per room, however this capacity may vary depending on how the Facility is used	-
Phosphate Hill	104	208

The Serco contract was varied by Deed of Variation 2. Schedule 1 to Deed of Variation 2 provided the operational capacity of Lilac and Aqua Compound was follows:

Lilac and Aqua Compound (combined)	600 based on two persons per room, however this capacity may vary depending on how the Facility is used.	-
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During the relevant period, the actual number of detainees in each facility was as follows:

	27 August 2011	30 April 2013	18 July 2013	26 July 2013	26 August 2014
North West Point	644	1,124	1,948	1,539	642
Construction Camp	0	447	543	589	262
Phosphate Hill	108	474	480	619	83

Lilac and Aqua Compound	56	635	1,005	960	0
Total:	808	2,680	3,976	3,707	987

- (D) in order to access the contingency capacity of the North West Point facility it was necessary to use for accommodation purposes (and place beds in) sections of the facility that would otherwise have been utilised as activity rooms and education blocks, which impaired Serco's ability to provide access to cultural, sporting, leisure, and religious activities;
- (E) for the substantial majority of the relevant period Serco was required by the Department to separate detainees on Christmas Island between different facilities, or within a single facility, by reference to criteria including the detainees' dates of arrival in Australia, so as to facilitate the implementation of government policies concerning regional processing;

Particulars

On 7 May 2011, the Australian Government announced a commitment to enter into an arrangement with the Malaysian Government whereby 800 asylum seekers who arrive by boat in Australia after the date of effect of the arrangement would be transferred to Malaysia. On 31 August 2011, the High Court of Australia ruled that the proposed transfer to Malaysia was not authorised by the *Migration Act 1958*.

Detainees who arrived in Australia on or after 13 August 2012 became susceptible to transfer to a regional processing country pursuant to Subdivision B of Division 8, Part 2 of the *Migration Act 1958*. Nauru and Papua New Guinea were designated regional processing countries. As it was not possible for all arrivals after 13 August 2012 to be transferred to regional processing countries, some were transferred to such countries, while others were released into the Australian community on bridging visas pending future consideration of their asylum claims at a time consistent with the "no advantage" test.

On 19 July 2013, Australia signed a Regional Resettlement Arrangement with Papua New Guinea whereby all asylum seekers arriving in Australia by boat from 19 July 2013 onwards would be

transferred to Papua New Guinea for processing and, if they are found to be refugees, permanent settlement.

On 3 August 2013, Australia signed a new memorandum of understanding with Nauru that asylum seekers who are transferred to Nauru for processing and found to be refugees could be settled in Nauru permanently.

- (F) the requirement to segregate cohorts of detainees in accordance with subparagraph (E) above prevented Serco from allowing detainees from different cohorts to access programs, activities and facilities at the same time, and impaired Serco's ability to provide access to cultural, sporting, leisure, and religious activities;
- (G) throughout the relevant period –
- (1) Serco was required by the Serco Contract to provide a monthly schedule of programs and activities for each Facility, for approval by the Department before their implementation;
 - (2) Serco submitted to the Department each month a schedule of programs and activities for each Facility, in accordance with the Serco Contract;
 - (3) each month the Department approved the schedules of programs and activities;
 - (4) from time to time throughout the relevant period Serco submitted, and the Department approved, modified programs which were modified because the detainee population on Christmas Island exceeded normal and surge capacity;
 - (5) Serco conducted programs consisting of sporting, social, leisure and religious activities which included social nights, kids club, women's group, men's group, excursions, youth group, walking group, sports hall for women and families, movies, children's movies and cartoons, toy library, 'mums and bubs', story time, swimming, music, fortnightly Catholic church, Christian fellowship, Hindu Temple,

Mosque, Muslim prayers, arts and crafts and news reports in Tamil, Vietnamese, Singhalese, Farsi, Arabic, Afghan;

- (6) Serco delivered the programs described at sub-paragraph (5) in accordance with the schedules approved by the Department, save for or in respect of -
 - (a) circumstances in which, from time to time, Serco was excused from performance by the Department, including because of a surge in the detainee population placing significant pressure on infrastructure, amenities and the delivery of services;
 - (b) minor variations between the actual commencement time and the advertised commencement time for the activity;
 - (c) May 2014, when it did not deliver music classes in accordance with the approved schedule at North West Point;
- (7) the plaintiff, and other group members, had access to the above-mentioned programs and activities;
- (8) Serco's performance of its contractual obligations was monitored and measured by the Department each month against 'indicator metrics' as provided by part 9 and schedule 4.1 of the Serco Contract which provided, relevantly, that where Serco did not meet the relevant contractual standard an 'abatement' may be applied, with the effect that payment to Serco for services provided under the Contract would be reduced;
- (9) the Department applied only a single abatement in connection with Serco's delivery of programs and activities, being an abatement in respect of May 2014 when Serco did not deliver music classes in accordance with the approved schedule at North West Point;

- (H) in the circumstances alleged, reasonable care required that Serco do no more than it in fact did with respect to the provision of occupational activities in which persons in detention on Christmas Island could participate;
- (vii) as to the allegations concerning conditions of access to clothes, toiletries and personal effects, it says further that –
- (A) all detainees were provided with an initial allocation of clothing and toiletries on arrival;
- (B) additional toiletries were available at all times, on request from Serco, and no written request was required;
- (C) additional clothing was available on request by detainees completing a form submitted to Serco;
- (D) items for babies such as nappies and bottles were available from officers stations at all times;
- (E) other items were available for ‘purchase’ at the canteen with ‘points’ acquired through participation in programs and activities;
- (F) it denies that reasonable care required that it make different arrangements for access by detainees to personal effects;
- (G) as to the allegations concerning the presence of crabs, centipedes and vermin, it says further that red crabs are a protected species on Christmas Island;
- (viii) as to the allegations concerning –
- (A) the “omnipresence of security guards and security cameras”;
- (B) “intrusions” for the purposes of welfare checks;
- (C) the fact that common areas were only open at whatever times and on whatever conditions determined by the Defendants;
- (D) the fact that the only food permitted for consumption was that provided ‘at the will of the defendants’;
- (E) the fact that there were conditions of access to personal effects;

it says further that those circumstances were a consequence of the fact of the detention of the plaintiff and group members and that, insofar as the plaintiff and group members suffered loss or damage as a result of those circumstances, then –

- (1) the circumstances giving rise to the loss or damage were within the control of the Minister and/or the Commonwealth (as the case may be) and were not within the control of Serco; and
- (2) any such loss or damage did not arise from any negligent act or omission of Serco or any breach by Serco of the Serco Contract; and
- (3) Serco did not cause or contribute to any such loss or damage and is not liable in respect of it.

Particulars

At all relevant times:

- 1) s.46A(2) of the *Migration Act* conferred on the Minister a non-delegable, non-compellable power to determine that s.46A(1) does not apply to an application by an authorised maritime arrival for a visa of a specified class if the Minister thought it in the public interest to do so;
- 2) s.195A of the *Migration Act* conferred on the Minister a non-delegable, non-compellable power to grant to a person in detention under s 189 of the *Migration Act* a visa of a particular class if the Minister thought it in the public interest to do so;
- 3) s.197AB of the *Migration Act* conferred on the Minister a non-delegable, non-compellable power to make a determination to the effect that a person detained under s.189 of the *Migration Act* is to reside at a specified place instead of a immigration detention as defined by s.5(1) of the Act, if the Minister thought it in the public interest to do so;
- 4) s.198AE of the *Migration Act* conferred on the Minister a non-dcleagable, non-compellable power to determine that s.198AD does not apply to an unauthorised maritime arrival, if the Minister thought it in the public interest to do so;
- 5) The *Migration Act*, including in particular the definition of “immigration detention” in s.5, confers an implied power on the Commonwealth to decide the place where an

unlawful non-citizen is to be detained, including whether the non-citizen is to be detained on Christmas Island or mainland Australia;

- 6) Serco had no power to make any decisions or actions of the kind set out in sub-paragraphs (1)-(5) above;
- 7) Serco did not determine the place or places at which the detainees were detained at Christmas Island and did not determine and had no power to affect the duration of their detention.

Health care

(g) it says further that if and insofar as the plaintiff and group members suffered loss or damage as a result of any failure to -

- (i) monitor and assess their conditions and determine whether and to what extent they suffered from injury which might be caused or exacerbated by detention on Christmas Island or have in place a system for so doing;
- (ii) provide them with access or timely access to medical services;
- (iii) have in place a system for medical treatment;
- (iv) provide them with reasonable health care and to exercise due care and skill in providing such care;

then:

- (v) the circumstances giving rise to the loss or damage were within the control of the Commonwealth or the First Third Party (International Health and Medical Services Pty Ltd, **IHMS**), or both of them, and not within the control of Serco;
- (vi) any such loss or damage did not arise from any negligent act or omission of Serco or any breach by Serco of the Serco Contract; and
- (vii) Serco is not liable for any such loss or damage.

Particulars

- 1) The Commonwealth and IHMS entered into a contract for the provision of health care by IHMS to people in detention on Christmas Island on or about 29 September 2006, which agreement applied in relation to detainees on Christmas Island up until 29 November 2011;
- 2) The Commonwealth and IHMS entered into a contract for the provision of health care by IHMS to people in detention on Christmas Island on or about 14 January 2009, which agreement applied in

relation to detainees on Christmas Island from 29 November 2011 (collectively, the **IHMS Contracts**);

- 3) The IHMS Contracts contained terms to the following effect –
 - a. IHMS must ensure that health care is made available and delivered to people in detention at all times during the term of the contract and in the manner provided in the contract;
 - b. IHMS must ensure that the health needs of people in detention are anticipated, identified, addressed and managed by suitably qualified and trained health care providers in accordance with detention health standards or (where applicable) accepted industry practice;
 - c. IHMS must ensure that if a person presents, or is identified with a health condition or problem that person is provided with a clinically appropriate health care response in accordance with the IHMS Contract;
 - d. IHMS must ensure that the mental health needs of people in detention are adequately and appropriately identified, monitored and treated at all times during their placement in immigration detention, including by the conduct of periodic mental health screening, assessment and treatment services in accordance with the IHMS Contract;
- 4) throughout the relevant period IHMS provided services pursuant to the IHMS Contracts to detainees on Christmas Island;

Education

- (h) it says further that if (which is not admitted) it owed to the plaintiff and/or the other group members or the Commonwealth, any duty of care in respect of the provision of access to school for school-aged detainees –
 - (i) Serco had no control over the number of school aged children who were detained on Christmas Island, or the period of time that such children remained on Christmas Island;
 - (ii) Serco had no control over the number of local schools that were able or willing to accept detainee children, the resources available at those schools or the capacity of those schools to accept detainee children;
 - (iii) during the relevant period (prior to July 2014):
 - (A) the only local school on Christmas Island was the Christmas Island District High School (**the District School**), which catered to children between kindergarten and year 12;
 - (B) a school was established at Phosphate Hill (**the Phosphate School**) to provide access to education to detainee children, which was

staffed by teachers from the District School (collectively, **the schools**);

- (C) access to the schools occurred pursuant to a memorandum of understanding between the Commonwealth and the Western Australian Department of Education;
- (D) the schools would not permit detainee children to attend unless they had been immunised;
- (E) because of the limited facilities and the limited number of teachers on Christmas Island, the schools could provide teaching to only a small number of detainee children on any given day;

Particulars

As at July 2013, 24 children (in two groups of 12) aged 5 to 12 years could attend the District School each day, while 48 children (in two groups of 24) aged 13 to 17 years could attend the Phosphate School.

As at 22 January 2014, 24 children (in two groups of 12) aged 13 to 16 years could attend Phosphate Hill, while 35 children against 5-8 years, and then later in the day 35 children aged 8 to 13 years, could attend the District School.

As an indicative figure, on 15 March 2014 there were 324 children aged under 18 years detained on Christmas Island in the following age groups:

Age	Aqua / Lilac	Construction Camp	Phosphate Hill	Total
0 – 4	42	112	0	154
5 – 8	31	30	0	61
9 – 13	15	23	2	40
14 - 17	20	14	35	69
Total	108	179	37	324

- (F) prior to July 2013, the Department created lists of children who were to attend the schools and provided those lists to Serco so that it could arrange transport to and from the schools for those children;

- (G) the requirement to segregate cohorts of detainees in accordance with the subparagraph (f)(vi)(E) above restricted the children who could attend school at any one time;
- (H) between July 2013 and June 2014, Serco assisted the Department by generating lists of children who were to attend the schools on a rotational basis, and assisted IHMS to arrange for children to be immunised so that they could attend school;

Particulars

The arrangement originally involved rotating two week blocks, alternating between children detained in Lilac or Aqua compounds, and those detained at Construction Camp. This was subsequently changed to one month blocks.

The plaintiff attended school on at least 30 occasions on Christmas Island between 24 February 2014 and 9 June 2014.

In addition, the plaintiff attended English language classes at Construction Camp.

- (iv) on and after 1 October 2013, the Serco Contract (at clause 1.12 of section 2.2.1 of Schedule 2, inserted by Deed of Variation (No 5)) relevantly required that –
 - (A) Serco encourage unaccompanied minors to attend school and parents of school aged children to send their children to school;
 - (B) Serco provide all school aged detainees with access to local schools (the Commonwealth to advise Serco of the appropriate local schools);
 - (C) Serco arrange transport and escort services to enable children and parents to attend school and participate in schooling related activities;
 - (D) Serco refer to the Department any instances where parents refuse to enrol their school aged children at a school;
 - (E) Serco report to the Centre Manager weekly in writing any instances of children enrolled in school who are not attending school;
- (v) in June 2014, the Commonwealth announced that access to the schools by children in detention would cease and that a purpose built learning centre

would be established at Phosphate Hill to deliver educational services to children in detention (the **Learning Centre**);

(vi) in and after July 2014, children in detention on Christmas Island had access to the Learning Centre, which was operated by the Catholic Education Office of Western Australia pursuant to an agreement between it and the Commonwealth, and in respect of which Serco had no involvement or responsibility;

(vii) in the circumstances alleged at subparagraphs (i) to (vi), reasonable care required that Serco do no more than it in fact did in respect of the provision of access to school for school-aged detainees;

(i) it otherwise denies paragraph 11.

12. It denies the allegations in paragraph 12.

13. To paragraph 13 –

(a) it denies that the Commonwealth is liable in respect of any injury, loss or damage suffered by the plaintiff as alleged in the Statement of Claim;

(b) if the Commonwealth is liable to the plaintiff or group members, it denies that Serco is liable in respect of the same damage;

(c) it denies that the Commonwealth is entitled to recover contribution from Serco pursuant to the provisions of the Serco Contract or otherwise;

(d) Serco is not obliged to indemnify the Commonwealth pursuant to the Serco Contract in respect of any damages or costs which the Commonwealth may be liable to pay to the plaintiff because, if and to the extent that she sustained personal injuries, they did not arise from any negligent act or omission on the part of Serco or any breach of the Serco Contract by Serco;

(e) it says further that, pursuant to clause 61.1 of the Serco Contract (as alleged at subparagraph 8(h) above), if Serco has any liability to indemnify the Commonwealth its liability is to be reduced proportionately to the extent that any omission on the part of the Commonwealth or its personnel (other than a breach of the Department's non-delegable duty of care arising from any act, omission or neglect on the part of Serco or its personnel, or any breach by Serco of its obligations and warranties under the Contract) contributed to the relevant cost, liability, loss, damage or expense; and

- (f) for the purposes of clause 61.1 of the Serco Contract, it relies on the matters alleged in paragraphs 13 to 112 of the Statement of Claim;

COUNTERCLAIM

14. If, which is denied, Serco is liable for any loss or damage suffered by the plaintiff and/or group members, then:
- (a) by reason of the matters alleged in paragraph 13 of the Third Party Statement of claim and paragraphs 13 to 112 of the Statement of Claim the first defendant and/or the second defendant is liable to the plaintiff in respect of the same damage;
 - (b) accordingly, Serco is entitled pursuant to:
 - (i) section 7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA);
 - (ii) alternatively, Part IV of the *Wrongs Act 1958* (Vic);
 - (iii) alternatively, section 21 of the *Civil Law (Wrongs) Act 2002* (ACT),to recover contribution from the first and/or second defendant.

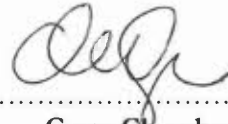
AND SERCO COUNTERCLAIMS AGAINST THE DEFENDANTS:

- A. Contribution.
- B. Costs.
- C. Such further or other relief as to the Court seems appropriate.

DATED: 13 December 2016

STEPHEN DONAGHUE

LISA NICHOLS



.....
Corrs Chambers Westgarth
Solicitors for the Second Third Party