

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

S CI 2014 4423

**BETWEEN:**

**MAJID KAMARI KAMASAE**

Plaintiff

and

**THE COMMONWEALTH OF AUSTRALIA and others**  
**(in accordance with the schedule attached)**

Defendants

and between:

**TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ABN 11 093 114 553)**

Plaintiff by Counter-Claim

and

**COMMONWEALTH OF AUSTRALIA and others**  
**(in accordance with the schedule attached)**

Defendants by Counter-Claim

**DEFENCE AND COUNTERCLAIM**

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Date of document: 7 August 2015  
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To the Plaintiff's Second Amended Statement of Claim dated 25 May 2015 the Third Defendant  
(**Transfield Services**) says –

**Part A - Parties**

1. To paragraph 1 –

- (a) it admits the allegations in sub-paragraph (a);
- (b) it does not admit the allegations in sub-paragraph (b);
- (c) it does not admit the allegations in sub-paragraph (c);
- (d) it does not admit the allegations in sub-paragraph (d);

- (e) it admits that the plaintiff was transferred by the Commonwealth to the Independent State of Papua New Guinea (PNG) on or about 4 September 2013, and otherwise denies the allegations in sub-paragraph (e);
  - (f) it does not admit the allegations in sub-paragraph (f);
  - (g) it admits the allegations in sub-paragraph (g);
  - (h) it admits the allegations in sub-paragraph (h).
2. It admits the allegations in paragraph 2.
  3. It does not plead to paragraph 3, in which no allegations are made against it.
  4. To paragraph 4 –
    - (a) it admits the allegations in sub-paragraph (a);
    - (b) it admits that it carried on business, relevantly, providing welfare, garrison and accommodation services to the Commonwealth in respect of sites located in regional processing countries designated by the Commonwealth;
    - (c) it denies that it provided services to the Commonwealth at immigration detention facilities;
    - (d) otherwise, it does not admit the allegations therein.
  5. It does not admit the allegations in paragraph 5.
  6. It does not admit the allegations in paragraph 6.

#### **Part B – Manus Island Regional Processing Centre**

7. It admits the allegations in paragraph 7.
8. To paragraph 8 –
  - (a) it admits the allegations in sub-paragraphs (a), (b) and (d);
  - (b) it does not admit the allegations in sub-paragraph (c).
9. As to paragraph 9 –
  - (a) it admits the allegations in sub-paragraphs (a) and (b);
  - (b) it does not admit the allegations in sub-paragraph (c).
10. To paragraph 10 –
  - (a) it admits the allegations in sub-paragraph (a);

- (b) it admits the allegations in sub-paragraph (b);
- (c) to sub-paragraph (c) –
  - (i) it admits that the Centre has or is intended to have a secure perimeter;
  - (ii) it says that egress from the Centre by persons who were required to reside there pursuant to the directions to reside made by PNG as alleged at paragraphs 24, 27(d) and 29, and ingress into the centre by other persons, was permitted and controlled by PNG, acting through the Centre Administrator, in accordance with the 2012 and 2013 MOU's and the 2013 and 2014 Administrative Arrangements (as alleged or admitted at paragraphs 13, 16, 26, 27(b) and 29);
  - (iii) it admits that pursuant to the Transfield Contract it was contracted to provide services to the Commonwealth which relevantly included ensuring that the security of the perimeter was maintained at all times in accordance with departmental policies and procedures as notified from time to time by the Commonwealth (Transfield Contract, 4.18), which services it sub-contracted to Wilson, as alleged in paragraph 132 below;
  - (iv) it says that the provision of security services pursuant to the Transfield Contract took place in circumstances where the persons who were required to reside at the Centre were already the subject of restrictions on their liberty by reason of decisions made by officials of the government of PNG under PNG law (being the directions to reside made by PNG as alleged at paragraphs 24, 27(d) and 29);
  - (v) otherwise, it does not admit the allegations therein;
- (d) it does not admit the allegations in sub-paragraph (d).

11. It admits the allegations in paragraph 11.

12. To paragraph 12 –

- (a) it refers to and relies upon the Convention for its full terms and effect;
- (b) it denies that the Convention imposes obligations on the Commonwealth with respect to refugees who are within the territory of PNG;
- (c) it says further that the Convention does not give rise to private rights enforceable under the domestic law of Australia or PNG;

(d) it otherwise denies the allegations therein.

13. It admits the allegations in paragraph 13.

14. To paragraph 14 –

(a) it refers to and relies upon the 2012 MOU for its full terms and effect;

(b) it says further that clause 21 of the 2012 MOU provided that the Government of PNG and the Government of Australia would establish a joint committee with responsibility for the oversight of practical arrangements required to implement the MOU including issues relating to the duration of stay of persons transferred to PNG under the MOU (**Transferees**), which committee would meet no less than once monthly and would co-chaired by mutually agreed representatives of the Australian High Commission Port Moresby and the PNG Immigration and Citizenship Service;

(c) it otherwise does not admit the allegations therein.

15. It admits the allegations in paragraph 15.

16. It admits the allegations in paragraph 16 and says that it will rely at trial on the 2013 Administrative Arrangements for their full terms and effect.

17. It does not admit the allegations in paragraph 17, and it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect.

18. It does not admit the allegations in paragraph 18, and it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect.

19. It does not admit the allegations in paragraph 19, and it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect.

20. It admits the allegations in paragraph 20.

21. It does not admit the allegations in paragraph 21, and it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect.

22. As to paragraph 22:

(a) it does not admit the allegations therein;

(b) it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect;

- (c) it says further that there were further terms of the 2013 Administrative Arrangements as follows:
- (i) the PNG Minister for Foreign Affairs and Immigration (the **PNG Minister**) may declare the Centre to be a Relocation Centre pursuant to s.15B of the *PNG Migration Act 1978 (PNG)* (***PNG Migration Act***) (clause 1.1);
  - (ii) the PNG Minister will direct Transferees to reside in the Centre in accordance with s.15C(1) of the *PNG Migration Act* (clause 1.3);
  - (iii) the PNG Minister will, under s.20 of the *PNG Migration Act*, exempt Transferees from section 3 (prohibition of entry without entry permit) and section 7 (unlawful presence in country), of that Act (clause 1.4);
  - (iv) the government of PNG will allow the Transferees to remain at the Centre while their claims to international protection are being assessed and, if they are determined to be in need of international protection, while they are waiting for the provision of a durable solution (clause 3.3);
  - (v) the government of PNG will move Transferees assessed not to be in need of international protection and having exhausted all avenues of review, to a transit facility in Port Moresby pending return to their country of origin or to a third country to which they have a right of entry and stay (clause 3.4).

23. To paragraph 23 –

- (a) it does not admit the allegations in paragraph 23, and it refers to and relies upon the 2013 Administrative Arrangements for their full terms and effect;
- (b) it says further that Attachment A to the 2013 Administrative Arrangements also provided that the Interim Joint Advisory Committee was to oversee the implementation and operation the Centre, including relevantly the welfare of Transferees, process outcomes including refugee status determinations, the voluntary and involuntary return of Transferees, infrastructure developments, maintenance and Centre management.

24. To paragraph 24 –

- (a) it says that on 2 September 2012 the PNG Minister –
  - (i) pursuant to s.15B of the *PNG Migration Act*, declared the Asylum Seeker Assessment Centre located at the PNG Naval base in Lombrum, Manus Province (the **Centre**) to be a relocation centre for the temporary residence of asylum seekers pending the determination of their refugee status under international law;
  - (ii) pursuant to s.15D of the PNG Migration Act appointed the PNG Chief Migration Officer as the Administrator of the Relocation Centre;
  - (iii) pursuant to s.20 of the *PNG Migration Act* exempted Transferees who travel to PNG under the terms of the 2012 MOU, from the requirements imposed by s.3 of that Act that no person other than a citizen of PNG shall enter PNG unless he holds an entry permit, and by s.7 of that Act that the presence of a person, other than a citizen, in PNG is unlawful if he does not hold an entry permit;
  - (iv) pursuant to s.15C of the *PNG Migration Act* directed all persons seeking international refugee protection and who are permitted to enter and reside in PNG under the terms of the 2012 MOU, to temporarily reside at the Relocation Centre, for the purposes of the determination of their refugee status;
- (b) it says that on 27 November 2012 the PNG Minister –
  - (i) revoked –
    - (A) the declaration alleged in sub-paragraph 24(a)(i);
    - (B) the exemption alleged in paragraph 24(a)(iii);
    - (C) the direction alleged in paragraph 24(a)(iv);
  - (ii) pursuant to s.15B of the *PNG Migration Act*, declared the Relocation Centre to be a relocation centre for the temporary residence of asylum seekers pending the determination of their refugee status claims;
  - (iii) pursuant to s.20 of the *PNG Migration Act* exempted Transferees who travel to PNG under the terms of the 2012 MOU, from the requirements imposed by s.3 of that Act that no person other than a citizen of PNG

shall enter PNG unless he holds an entry permit, and by s.7 of that Act that the presence of a person, other than a citizen, in PNG is unlawful if he does not hold an entry permit;

(iv) pursuant to s.15C of the PNG Migration Act directed all persons seeking international refugee protection and who are permitted to enter and reside in PNG under the terms of the 2012 MOU, to temporarily reside at Relocation Centre, for the purposes of the determination of their refugee status;

(c) otherwise, it admits the allegations therein.

25. As to paragraph 25 –

(a) it says that access to and egress from the Centre was limited as a result of the matters pleaded at paragraph 24 (a) and (b) above;

(b) otherwise, it does not admit the allegations therein.

26. It admits the allegations in paragraph 26.

27. To paragraph 27 –

(a) it does not admit the allegations therein, and it refers to and relies upon the 2013 MOU for its full terms and effect;

(b) it says further that, on or about 17 July 2014, the Commonwealth and PNG entered into Administrative Arrangements for regional processing and settlement in PNG (the **2014 Administrative Arrangements**), which it refers to and relies upon for their full terms and effect.

(c) it says that the 2014 Administrative Arrangements provided, in part, that –

(i) persons to be transferred to PNG are those persons who have travelled irregularly by sea to Australia or have been intercepted by Australian authorities or rescued in the course of trying to reach Australia by irregular means, and are authorised by Australian law to be transferred to PNG (cl 4.1);

(ii) the Government of Australia will request clearance from the Government of PNG for the proposed transfers (cl 4.2.8);

(iii) the PNG Minister for Foreign Affairs and Immigration will direct a Transferee to reside in a Centre in accordance with Section 15C(1) of the

*PNG Migration Act* (cl 2.3);

- (iv) the Centre will be managed by an Administrator (an officer appointed under Section 15D of the *PNG Migration Act* to manage and control the Centre), supported by contracted Service Providers (cl 5.1.1);
- (v) the Administrator will delegate the day to day management of the Centre to an Operational Manager (a PNG Officer) (cl 5.3.2);
- (vi) the Government of Australia will appoint a Programme Co-ordinator, who will be responsible, in close liaison with the Operational Manager, for managing all Australian Officers and services contracts in relation to the Centre (cl 5.3.3);
- (vii) the Government of PNG will allow a Transferee to remain at the Centre while their claim to international protection is being assessed (cl 5.2.1);
- (viii) the Government of PNG will accommodate a Transferee found not to be in need of international protection and who has exhausted all avenues for review, in a transit detention facility pending return to their country of origin or to a third country in respect to which they have a right to enter and reside (cl 5.2.3);
- (ix) Transferees will not be permitted to leave the Centre until health and security cleared by the Government of PNG (cl 5.4.1);
- (x) Transferees in the process of having their claims to protection assessed may be permitted to move in and outside a Centre during the day, subject to appropriate security arrangements for escorted activities, including sporting events, shopping, cultural activities and any other activities approved by the Administrator (cl 5.4.2);
- (xi) the Administrator may approve a Transferee, who has skills useful to the local community, to leave a Centre to undertake volunteering activities during the day (cl 5.4.4);
- (xii) a Service Provider will be appointed to provide adequate security to ensure the safety of those residing in the Centre and the safety of the Centre (cl 5.4.6);
- (xiii) refugee determination will be made by PNG under PNG law (cl 6.1);



- (xiv) a joint committee will be established to oversee the implementation and operation of regional processing Centres. In support of the joint committee a joint working group located at the Centre will specifically advise on the technical and practical aspects related to the operation of that Centre. The joint working group will be co-chaired by the PNG Minister and the Australian Department of Immigration and Border Protection Co-ordinator (attachments A and B to the 2014 Administrative Arrangements)

### Particulars

The 2014 Administrative Arrangements were in writing and executed by the parties on or about 17 July 2014. A copy of may be inspected on reasonable notice.

- (d) it says further that, on 14 August 2013, the PNG Minister -
- (i) pursuant to s.15B of the *PNG Migration Act*, declared several sites, including the Centre, to be a relocation centre for the temporary residence of asylum seekers pending the determination of their refugee status claims;
  - (ii) pursuant to s.15D of the *PNG Migration Act* appointed the PNG Chief Migration Officer as the Administrator of the Centre;
  - (iii) pursuant to s.20 of the *PNG Migration Act* exempted Transferees who travel to PNG under the terms of the 2013 MOU, from the requirements imposed by s.3 of that Act that no person other than a citizen of PNG shall enter PNG unless he holds an entry permit, and by s.7 of that Act that the presence of a person, other than a citizen, in PNG is unlawful if he does not hold and entry permit;
  - (iv) pursuant to s.15C of the *PNG Migration Act* directed all persons seeking international refugee protection and who are permitted to enter and reside in PNG under the terms of the 2013 MOU, to temporarily reside at Centre, for the purposes of the determination of their refugee status.

### ***Commonwealth control of centre***

28. To paragraph 28 –

- (a) it admits that the capital costs and recurrent operational costs of the Centre were funded or mainly funded by the Commonwealth, pursuant to the 2012 MOU and 2013 Administrative Arrangements and, subsequently, the 2013 MOU and 2014 Administrative Arrangements;
- (b) it admits that the placement, care and management of Transferees directed by PNG to reside at the Centre was funded by the Commonwealth pursuant to the 2012 MOU and 2013 Administrative Arrangements and, subsequently, the 2013 MOU and 2014 Administrative Arrangements;
- (c) it otherwise does not admit the allegations therein.

29. To paragraph 29 –

- (a) it denies the allegations therein;
- (b) it says further that PNG is a sovereign State that has control over matters within its territory to the exclusion of any other State;
- (c) it refers to and repeats paragraphs 24(b) and 27(d), and says that at all relevant times-
  - (i) PNG had agreed to accept Transferees from Australia in accordance with the 2012 MOU and the 2013 MOU;
  - (ii) Transferees were taken to PNG by the Commonwealth pursuant to the duty imposed by s 198AD of the *Migration Act 1958* (Cth);
  - (iii) Transferees were permitted to enter and remain in PNG by reason of the exemptions granted to them by the PNG Minister under s 20 of the *PNG Migration Act*;
  - (iv) the PNG Minister had declared the Centre to be a relocation centre pursuant to s 15B of the *PNG Migration Act*;
  - (v) the PNG Minister had directed, pursuant to s 15C of the *PNG Migration Act*, that Transferees reside at the Centre while their claims for international protection were determined by the Government of PNG, under PNG law;
  - (vi) the Royal Papua New Guinea Constabulary was responsible for the enforcement of the laws of PNG in Manus Province, including at the

Centre, and including by enforcing any directions under s 15C(1) of the *PNG Migration Act*,

- (vii) for the duration of the claim period, a special unit of the Royal Papua New Guinea Constabulary (the **Mobile Squad**) was stationed in the vicinity of the Centre. The commanding officer of the Mobile Squad reported directly to his commanding officer in Port Moresby;
  - (viii) the PNG Chief Migration Officer had management and control of the Centre, having been appointed as the Administrator of the Centre by the PNG Minister acting pursuant to s.15D of the *PNG Migration Act*;
  - (ix) as contemplated by the 2013 and 2014 Administrative Arrangements, the PNG Chief Migration Officer delegated the day to day management of the Centre to the Operational Manager, who was an officer of the PNG Immigration and Citizenship Service;
  - (x) while they were and are residing at the Centre, restrictions on Transferees' movement in and of the Centre were subject to the approval of the Operational Manager, in accordance with the 2013 and 2014 Administrative Arrangements;
  - (xi) management and control of the Centre was overseen by a Joint Committee and Joint Working Group comprised of representatives of the PNG Minister and the Commonwealth;
  - (xii) a Programme Co-ordinator appointed by the Commonwealth was responsible for managing contracted service providers at and in relation to the Centre, in close liaison with the Operational Manager;
  - (xiii) as a service provider, Transfield Services was required to comply with the directions of the Contract Administrator appointed by the Commonwealth pursuant to the Transfield Contract (provided only that those directions were consistent with the contract).
- (d) it says further that, by reason of the matters alleged in paragraphs (c) above, insofar as Transferees were –
- (i) required to reside at the Centre;
  - (ii) restricted from leaving the Centre;

(iii) detained;

they were so required, restricted and/or detained by the Government of PNG, and not by Transfield Services.

### **Part C – Applicable law**

30. As to paragraph 30:

- (a) it admits the allegations so far as they relate to acts and omissions alleged to have occurred during the Transfield Period;
- (b) otherwise, it does not admit the allegations therein.

31. Insofar as they concern Transfield Services, it admits the allegations in paragraph 31.

32. To paragraph 32:

- (a) it does not admit the allegations therein;
- (b) it says that, under the substantive law of negligence in PNG:
  - (i) contractual obligations can inform the standard of care that is owed in negligence (including, but not limited to, by reason of s 53(2) of the *Wrongs (Miscellaneous Provisions) Act 1975* (PNG));
  - (ii) the content of any duty of care under PNG law, including with respect to the living conditions of Transferees, would be determined in part by the conditions under which locals live within PNG;
  - (iii) a tortfeasor may recover contribution from any other tortfeasor, whether as a joint tortfeasor or otherwise;
  - (iv) the amount of contribution recoverable from a tortfeasor or third party is such as is found by the Court to be just and equitable having regard to the extent of his or her responsibility for the damage.

### **Parts D to H – G4S Period**

33. It does not plead to paragraphs 33 to 124 in which no allegations are made against it.

[There are no paragraphs 34 to 124]

**Part I – Transfield Period – Contract Arrangements**

125. It admits the allegations in paragraph 125, and it refers to and relies upon the Transfield Contract for its full terms and effect.
126. It does not admit the allegations in paragraph 126, and it refers to and relies upon the Transfield Contract for its full terms and effect.
127. It does not admit the allegations in paragraph 127, and it refers to and relies upon the Transfield Contract for its full terms and effect.
128. It does not admit the allegations in paragraph 128, and it refers to and relies upon the Transfield Contract for its full terms and effect.
129. It does not admit the allegations in paragraph 129, and it refers to and relies upon the Transfield Contract for its full terms and effect.
130. To paragraph 130 –
- (a) it admits that at all material times since on or about 24 March 2014 it has provided the services specified in Schedule 1 to the Transfield Contract;
  - (b) otherwise, it does not admit the allegations therein.
131. It does not admit the allegations in paragraph 131, and it refers to and relies upon the Transfield Contract for its full terms and effect.
132. To paragraph 132 –
- (a) it denies the allegations therein;
  - (b) it says that, on or about 28 March 2014, it entered into a contract entitled “Subcontract agreement in relation to the provision of services on Manus Island (Papua New Guinea)” with Wilson Protective Services PNG Ltd (**Wilson**), being a company incorporated under PNG law (**the 2014 Wilson Subcontract**);
  - (c) it relies on the 2014 Wilson Subcontract for its full terms and effect.
133. To paragraph 133 –
- (a) it says that Wilson commenced providing services under the 2014 Wilson Subcontract after 28 March 2014;
  - (b) it denies that Transfield Personnel provided security services at the Centre;
  - (c) it otherwise does not admit the allegations therein.

134. To paragraph 134 –
- (a) to sub-paragraph (a):
    - (i) it does not admit that it had the power to approve or not approve the training given to security staff, including training given by Wilson to the Wilson Personnel in relation to the work to be performed at the Centre;
    - (ii) if it had the power referred to in subparagraph (i), it denies that that power was exercised;
  - (b) it does not admit the allegations in sub-paragraphs (b) and (c).
135. To paragraph 135 –
- (a) to sub-paragraph (a) –
    - (i) it denies that it authorised or empowered Wilson to “effect legal relations” between Transfield Services and transferees;
    - (ii) it denies that it exercised any custodial or detention powers or that it authorised Wilson to do so;
  - (b) it does not admit the allegations in sub-paragraph (b).
136. It denies the allegations in paragraph 136.
137. To paragraph 137 –
- (a) it denies the allegations in sub-paragraph (a);
  - (b) it refers to cl.17.7 of the Transfield Contract;
  - (c) it does not plead to sub-paragraph (b), which makes no allegation against it.

## **Part J – Transfield Period – Duties and Standard of Care**

### ***Detention duty of care***

138. To paragraph 138 –
- (a) to sub-paragraph (a) –
    - (i) it refers to and repeats the allegations at paragraph 29 above;
    - (ii) otherwise, it does not admit the allegations;
  - (b) to sub-paragraph (b) –

- (i) it admits that on or about 24 March 2014 it was engaged by the Commonwealth to provide the services specified in Schedule 1 to the Transfield Contract;
  - (ii) otherwise, it denies the allegations;
- (c) to sub-paragraph (c) –
- (i) it denies that it “affected the Commonwealth’s legal relations with detainees”;
  - (ii) it denies that it exercised “custodial or detention powers”;
  - (iii) it says that by the Transfield Contract it was required to provide the services specified in the Transfield Contract, being services with respect to Transferees who were already subject to restrictions arising by reason of decisions made by officials of the government of PNG under PNG law as alleged in paragraph 29 above;
  - (iv) otherwise, it denies the allegations;
- (d) to sub-paragraph (d) –
- (i) it admits that in providing services in accordance with the Transfield Contract, at all relevant times -
    - (A) it was required to comply with the directions of the Contract Administrator appointed by the Commonwealth, provided that those directions were consistent with the contract (Transfield Contract, 4.3);
    - (B) it was managed by a Program Co-Ordinator appointed by the Commonwealth to be responsible for managing services contracts in relation to the Centre, in close liaison with the Operational Manager (as alleged in paragraphs 27(c)(vi));
  - (ii) otherwise, it does not admit the allegations therein;
- (e) to sub-paragraph (e) –
- (i) it repeats the matters alleged under sub-paragraph (d) hereof;
  - (ii) otherwise, and in the absence of particulars concerning the alleged exercises of power by the Commonwealth to direct Transfield Services as

to the manner in which it provided services under the Contract, it does not admit the allegations therein.

139. To paragraph 139 –

- (a) to sub-paragraph (a) –
  - (i) it refers to and repeats the allegations at paragraph 29 above;
  - (ii) otherwise, it denies the allegations therein;
- (b) it refers to cl 17.7 of the Transfield Contract, and denies the allegations in sub-paragraph (b).

140. To paragraph 140 – insofar as the allegations concern Transfield Services -

- (a) It denies the allegations in sub-paragraph (a), and repeats the allegations in paragraph 29;
- (b) it denies the allegations in sub-paragraph (b);
- (c) to sub-paragraph (c) –
  - (i) it admits that it had practical control over the provision of food and water to Transferees at the Centre subject to the circumstances of the Centre as provided by clause 2.1 of the Transfield Contract;
  - (ii) it denies the allegations in sub-paragraph (ii) and refers to and repeats the matters alleged at paragraph 166;
- (d) it admits that it had control, through Wilson, over physical security at the Centre to the extent alleged in paragraph 176 below, and otherwise denies the allegations in subparagraph (d);
- (e) it denies the allegations at sub-paragraph (e);

141. To paragraph 141 –

- (a) it does not plead to sub-paragraph (a) in which no allegation is made against it;
- (b) to sub-paragraph (b) –
  - (i) it admits that it owed a duty to take reasonable care that the performance of its obligations under the Transfield Contract did not cause reasonably foreseeable injury to the plaintiff and/or group members;
  - (ii) otherwise, it denies the allegations therein.



142. It does not plead to paragraph 142 in which no allegation is made against it.

***Standard of care***

143. It does not plead to paragraph 143 in which no allegation is made against it.

144. To paragraph 144 –

- (a) to sub-paragraph (a) -
  - (i) it denies that the Transfield Contract conferred powers upon it;
  - (ii) it denies that, in performing its obligations under the Transfield Contract, it exercised powers of any kind other than those available to any natural person;
  - (iii) alternatively, it denies that it exercised powers:
    - (A) in the nature of custodianship or detention powers; or
    - (B) that were conferred or authorised by the Commonwealth;
  - (iv) alternatively, if it did exercise powers conferred or authorised by the Commonwealth, it says that that was supported by s 198AHA(2) of the *Migration Act 1958* (Cth);
  - (v) it otherwise denies the allegations therein;
  - (vi) it refers to and repeats the allegations at paragraph 29;
- (b) it does not admit the allegations in sub-paragraph (b);
- (c) it does not admit the allegations in sub-paragraph (c).

145. To paragraph 145 –

- (a) it says that that it was required to do no more than to exercise reasonable care in the provision of services under the Transfield Contract to avoid reasonably foreseeable injury to the plaintiff and/or group members;
- (b) it says that reasonable care is to be assessed by reference to the standards that would apply in the provision of equivalent services in PNG;
- (c) it denies that it was required to exercise the Australian Precautions.

*Foreseeable, significant harms*

146. To paragraph 146 – insofar as the allegations concern Transfield Services -
- (a) it admits that it knew or ought reasonably to have known that Transferees at the Centre had or were claiming or were likely to be claiming asylum;
  - (b) it admits that it knew or ought reasonably to have known that Transferees at the Centre had or were likely to have had diverse religious and cultural beliefs, practices and customs;
  - (c) it admits that it knew or ought reasonably to have been aware that some Transferees at the Centre may have suffered violence, trauma and torture;
  - (d) it admits that it knew or ought reasonably to have been aware that some Transferees at the Centre may have travelled to Australia in circumstances of physical deprivation, danger or fear;
  - (e) it admits that it knew or ought reasonably to have been aware that some Transferees at the Centre may have arrived in Australia with physical or psychological health conditions requiring medical treatment;
  - (f) otherwise, it does not admit the allegations therein.
147. To paragraph 147 – insofar as the allegations concern Transfield Services –
- (a) it does not admit the allegations therein;
  - (b) it says that unless and until the Plaintiff defines the content of “Australian Precautions” it cannot plead further.
148. To paragraph 148 – insofar as the allegations concern Transfield Services –
- (a) it does not admit the allegations therein;
  - (b) it says that unless and until the Plaintiff defines the content of “Australian Precautions” it cannot plead further.
149. To paragraph 149 –
- (a) it admits that for the duration of the Transfield Period there was no Australian domestic legal or regulatory framework for undertaking a refugee status determination (**RSD**), within the meaning of the Convention or otherwise, at or in respect of any person at the Centre;

- (b) it says further that the consideration by the PNG Minister, pursuant to s.15A of the *PNG Migration Act*, of whether to determine that a particular transferee is a refugee for the purposes of the *PNG Migration Act* and any legal or regulatory framework directed at such consideration, was at all relevant times within the control of the sovereign state of PNG;
  - (c) otherwise, it does not admit the allegations therein.
150. To paragraph 150 – insofar as the allegations concern Transfield Services -
- (a) it admits that throughout the Transfield Period it was aware of the length of time that each transferee had remained at the Centre;
  - (b) it otherwise does not admit the allegations therein.
151. To paragraph 151 – insofar as the allegations concern Transfield Services -
- (a) it admits that it knew that for some Transferees uncertainty concerning their futures may cause stress and anxiety;
  - (b) otherwise, it does not admit the allegations therein.
152. To paragraph 152 –
- (a) it admits the allegations at sub-paragraph (a);
  - (b) it admits the allegations at sub-paragraph (b);
  - (c) to sub-paragraph (c) –
    - (i) it admits the allegations therein;
    - (ii) it says that given those facts, Transfield Services used airfreight wherever possible to transport to Manus Island, materials and equipment required for construction and maintenance works and labour sourced from outside of PNG where necessary;
  - (d) to sub-paragraph (d) –
    - (i) it says that the detection and removal of unexploded military ordnance, geotechnical surveys and remedial earthworks were not required in respect of parts of the Centre on which construction projects were proposed or undertaken by Transfield Services;
    - (ii) otherwise, it admits the allegations therein;

- (e) it admits the allegations at sub-paragraph (e);
  - (f) it admits the allegations at sub-paragraph (f).
153. To paragraph 153 –
- (a) to sub-paragraph (a) –
    - (i) during the Transfield Period any delays in construction works for which Transfield Services was responsible were substantially attributable to the time taken to receive the approvals required for it to undertake those works (in accordance with the facilities maintenance program (FMP) described at paragraph 166(a)(iv) below);
    - (ii) otherwise it does not admit the allegations therein;
  - (b) to sub-paragraph (b) –
    - (i) it admits that the recruitment process for some specialist personnel such as those involved in the delivery of cultural, religious and recreational programs, was lengthy;
    - (ii) it admits that it took some months to achieve full staffing levels at the Centre;
    - (iii) otherwise, it does not admit the allegations therein.
154. To paragraph 154 – insofar as the allegations concern Transfield Services -
- (a) it admits that it knew of the matters alleged in paragraphs 152 and 153(b) above;
  - (b) otherwise, it does not admit the allegations therein.
155. It does not admit the allegations at paragraph 155.
156. To paragraph 156 – insofar as the allegations concern Transfield Services -
- (a) it repeats the matters alleged at paragraph 145 above;
  - (b) otherwise, it denies the allegations.
157. To paragraph 157 –
- (a) it repeats the matters alleged at paragraph 145 above;
  - (b) otherwise, it denies the allegations.

**Part K – Transfield period - Negligence**

158. To paragraph 158 –
- (a) it denies the allegations at sub-paragraph (a);
  - (b) as to sub-paragraph (b):
    - (i) it refers to and repeats paragraph 29;
    - (ii) it otherwise does not admit the allegations therein.
159. To paragraph 159 –
- (a) it admits that the residence direction alleged at sub-paragraph 27(d)(iv) herein remained in force at all times on and after 24 March 2014;
  - (b) it does not admit the allegations in sub-paragraph (b).
160. To paragraph 160 –
- (a) to sub-paragraph (a) –
    - (i) it does not admit the allegations therein;
    - (ii) it refers to and repeat the allegations at sub-paragraph 10(c);
  - (b) to sub-paragraph (b), in respect of the Transfield Sub-group Claimants **(Claimants)** –
    - (i) it denies the allegations therein; and
    - (ii) it refers to and repeats paragraph 29.
161. To paragraph 161 –
- (a) it does not plead to sub-paragraph (a) in which no allegation is made against it;
  - (b) to sub-paragraph (b) –
    - (i) it admits that it owed a duty to take reasonable care that the performance of its obligations under the Transfield Contract did not cause reasonably foreseeable injury to the plaintiff and/or group members;
    - (ii) otherwise, it denies the allegations therein.

***Food and water***

162. To paragraph 162, insofar as the allegations concern Transfield Services -

- (a) it denies that it failed to exercise reasonable care in respect of the provision, preparation and storage of food and water for consumption by transferees;
- (b) it says that unless and until the plaintiff defines the content of “Australian Precautions” it cannot plead further concerning the “Australian Precautions” and repeats sub-paragraph (a);
- (c) it says that it had in place at all relevant times systems and processes as follows –
  - (i) in respect of food quality, portions, handling and preparation –
    - (A) food was handled, prepared and stored in accordance with a documented quality management system reflecting hazard analysis and critical control point (HACCP) principles and practices which included procedures for –
      - (1) the provision of meals accommodating special medical needs and other dietary requirements;
      - (2) food receipt, inspection and storage;
      - (3) quality checks for fresh and dry foods;
      - (4) food preparation and cooking;
      - (5) food safety analysis;
      - (6) kitchen maintenance and cleaning;
      - (7) foreign material in foods;
      - (8) pest control and prevention;
      - (9) personal hygiene for all catering personnel;
      - (10) preventative measure for avoiding food poisoning;
      - (11) complaints procedures;
    - (B) it provided a 6 week cyclical menu which included both lean and spicy food;
    - (C) meal portions were at least 10% more than those specified by Australian dietary guidelines published by the National Health & Medical Research Council;

- (D) all meat products were sourced from Australia and were Halal certified and pork was kept and served separately from other meat products;
  - (E) any foods considered to be high-risk were shipped from Australia in accordance with HACCP standards;
  - (F) snacks (nuts, portion-controlled biscuits and fruit cake) were available to Transferees throughout the day, either at coffee and tea stations or on request in meal service areas;
  - (G) food was prepared off-site in a kitchen specifically established for preparing food for transferees;
  - (H) a significant number of kitchen staff were employed including a head chef, chef, senior chef de partie, sous chef, kitchen hand, mess supervisor, servery team leader, servery staff, catering administrator, catering driver, catering stores team leader, catering stores person and catering trainer;
  - (I) all personnel responsible for managing catering held at least a Certificate III in Hospitality (Kitchen Operations) or equivalent and had acquired at least 3 years' experience in managing commercial kitchens and all other personnel engaged in the preparation of food or beverages held at least a Certificate II in Hospitality (Kitchen Operations) or equivalent;
  - (J) all local catering staff were suitably qualified and were supervised by Australian staff.
- (ii) in respect of drinking water –
- (A) water was delivered daily to each compound, food service areas and drinking points around accommodation areas in both 19L bottles and 600ml bottles;
  - (B) water was delivered early in the morning (usually at about 6am), in the early afternoon (usually at about 2pm) and before dinner (usually at about 5pm);

- (C) some Transferees developed a practice of individually taking a large number of 600ml water bottles (some taking more than 20 bottles each at a time), which meant that the number of bottles available to other Transferees was reduced. In order to overcome that problem Transfield Services assigned catering or security staff to monitor water access points to ensure that access to bottled water was equitable;
  - (D) security staff were require to monitor water access points so that supplies were replenished when needed;
  - (d) otherwise, it denies the allegations therein.
163. To paragraph 163 –
- (a) it denies the allegations in sub-paragraph (a);
  - (b) to sub-paragraph (b) –
    - (i) it denies the allegations in sub-paragraph (b);
    - (ii) it says that occasionally it was not possible for forklifts delivering 19L bottles of water to access the Centre, with the result that on occasion water was available only in 600ml bottles;
    - (iii) it says that delays in the provision of water to Transferees were occasional only and typically lasted no more than an hour;
  - (c) to sub-paragraph (c) –
    - (i) it denies the allegations;
    - (ii) it says that at meal times 2 pieces of fruit were available to each transferee and at other times fruit and sugar were available to Transferees on request;
    - (iii) it otherwise repeats the matters alleged at paragraph 62(c).
164. It denies the allegations in paragraph 164 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
165. It denies the allegations in paragraph 165 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.



*Shelter and accommodation*

166. To paragraph 166 – insofar as the allegations concern Transfield Services –

- (a) it says that pursuant to the Transfield Contract –
  - (i) the Commonwealth, and not Transfield Services, was responsible for accepting and commissioning all infrastructure at and comprising the Centre (schedule 1, clause 2.4);
  - (ii) Transfield Services was responsible for the maintenance and management of assets and infrastructure (schedule 1, clause 2.4) but that within the meaning of the Transfield Contract (and subject to the matters alleged in sub-paragraphs (iii) to (viii) below) such maintenance and management did not include the provision, construction, replacement or refurbishment of infrastructure, specifically accommodation, ventilation, bathing and hygiene facilities, provision for personal space and privacy, shade or areas available for exercise;
  - (iii) when directed by the Commonwealth, Transfield Services was required to develop a maintenance management plan for the Centre for approval by the Commonwealth (schedule 1, clause 2.4.5);
  - (iv) Transfield Services was required to provide to the Commonwealth a draft facilities maintenance program (the **FMP**) which relevantly itemised and costed, recommended maintenance and upgrades to the infrastructure at the Centre, and was permitted to submit updated FMP's to the Commonwealth during the term of the Contract (schedule 1, clause 12.1);
  - (v) Transfield Services was not permitted to implement the FMP or any part of it unless and until it received prior written approval from the Commonwealth (schedule 1, clause 12.1);
  - (vi) the Commonwealth would pay Transfield Services a facilities management cost to facilitate the execution of approved FMP items (schedule 1, clause 12.1);
  - (vii) Transfield Services was required to consult with the Commonwealth so as to agree a reasonable timetable for the commencement of any approved FMP items (schedule 1, clause 12.1);

- (viii) the Commonwealth may, during the term of the Contract, submit a brief to Transfield Services requesting it to undertake “minor capital works” and Transfield Services may undertake such works subject to agreement with the Commonwealth including as to the terms on which such works would be undertaken (schedule 1, clause 12.2);
- (b) it says that, consistent with the Transfield Contract as alleged in the preceding paragraph, apart from the provision of routine maintenance and repairs, the Commonwealth, and not Transfield Services, was responsible for providing and determining –
  - (i) the quality of accommodation facilities;
  - (ii) the extent and nature of ventilation of accommodation facilities;
  - (iii) the quality of bathing and hygiene facilities;
  - (iv) provision for personal space and privacy for transferees;
  - (v) provision of shaded areas and areas within which Transferees could engage in exercise;
- (c) it says that, other than by proposing projects for the improvement of the facilities and infrastructure at the Centre pursuant to the FMP, it had no power to effect the provision, construction or improvement of infrastructure including accommodation, ventilation, bathing and hygiene facilities, personal space and structures permitting privacy for transferees, shaded areas or areas within which Transferees could engage in exercise;
- (d) it denies that it owed any duty to Transferees to provide or implement systems for the provision, construction or improvement of accommodation, ventilation, bathing and hygiene facilities, personal space and structures permitting privacy for transferees, shaded areas or areas within which Transferees could engage in exercise;
- (e) it says further that:
  - (i) Transfield Services did prepare and submit to the Commonwealth proposals for maintenance and improvement of the facilities and infrastructure at the Centre;

### Particulars

Between about March 2014 and September 2014 Transfield Services prepared and submitted to the Commonwealth for approval, proposals in respect of approximately 120 FMP items, including for the improvement of bathroom facilities, replacement of roofs on accommodation blocks, installation and improvement of ventilation and air-conditioning, provision of shaded areas for relaxation and additional recreation spaces and the supply of reticulated drinking water. The proposals were writing, copies of which are in the possession of Transfield Services' solicitors and may be inspected on reasonable notice.

- (ii) on or about 21 September 2014 the Commonwealth approved 21 FMP items ;

### Particulars

A list of the projects approved by the Commonwealth is in the possession of Transfield Services' solicitors and may be inspected on reasonable notice.

- (iii) During the Transfield Period, Transfield Services has completed major improvements to the ablution facilities in Foxtrot and E Block Compounds, replacement of the roof structure on Delta compound, extension and renovation of the Centre kitchen, improvements to the mess facility, the construction of an under-roof recreation area, provision of additional laundry facilities for transferees and the removal of unused playground equipment to create additional space for transferees.
- (f) it says that unless and until the plaintiff defines the content of "Australian Precautions" it cannot plead further concerning the "Australian Precautions";
- (g) it admits that, pursuant to the Transfield Contract, Transfield Services was required to ensure that each transferee was, during their reception process, provided (relevantly) with bedding that was clean and fit for purpose, where required new clothing and footwear suited to the local climate and transferee's cultural needs and a starter pack of toiletries, and that otherwise those items were to be replenished as required or purchased or collected by Transferees trading Individual Allowance Points at a shop at the Centre to be provisioned and managed by Transfield Services (schedule 1, clauses 4.5 and 3.7);
- (h) otherwise, it denies the allegations therein.

167. To paragraph 167 –

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

- (i) it refers to and repeats sub-paragraphs 166(a) to (d);
- (ii) it admits that bathroom facilities were shared or communal;
- (iii) it says that no accommodation rooms had dirt floors;
- (iv) in relation to beds and mattresses –
  - (A) it says that it provided Transferees with permanent framed beds with mattresses, pillows and linen but that some Transferees chose to sleep on the floor and dismantle their beds, and some moved into rooms in which there was no spare bed without advising Transfield Services;
  - (B) it says that its welfare team, which was in daily direct contact with transferees, received requests concerning bedding and mattresses, which its logistics team supplied, and that Transferees were informed of the process by which any such requests were met;
- (v) it otherwise denies the allegations therein;

(b) to sub-paragraph (b) –

- (i) it says that prior to November 2014, it provided to each transferee at the start of each month a hygiene pack containing soap; shampoo, conditioner, toothbrush, toothpaste, deodorant, skin lotion, baby powder, shaving cream, sunscreen and insect repellent;
- (ii) prior to November 2014, Transferees were able to purchase (using a points system) the full range of items mentioned in sub-paragraph (i), from the on-site canteen;
- (iii) from November 2014 onwards, Transferees were able to collect (without points charged) the full range of items mentioned in sub-paragraph (1) from the on-site canteen;
- (iv) supplies of razors were replenished at security huts at the Centre three times a week;

- (v) it says that, on the arrival of a Transferee at the Centre during the Transfield Period, it provided a clothing issue comprising two t-shirts, a long sleeve shirt, track-pants, two shorts, six pairs of underwear, two pairs of socks, one pair of shoes, one pair of thongs, pyjamas, a raincoat, a hat, a pair of sunglasses and a laundry bag.

### **Particulars**

Notwithstanding that he was already resident at the Centre when the Transfield Period began, in April 2014 the plaintiff received a clothing pack containing the items listed above. The plaintiff requested additional clothes and shoes on 8 and 12 May 2014 respectively. These were provided to him on 16 May 2014.

- (vi) otherwise, it denies the allegations therein;
- (c) to sub-paragraph (c) –
    - (i) it refers to and repeats sub-paragraphs 166(a) to (d);
    - (ii) it admits that Transferees were accommodated in re-furbished or part-refurbished buildings;
    - (iii) it denies that the bathing and hygiene facilities were unclean;
    - (iv) otherwise, it does not admit the allegations therein;
    - (v) it says that unless and until the plaintiff defines the content of “Australian Precautions” it cannot plead further concerning the “Australian Precautions”;
  - (d) it does not admit the allegations in sub-paragraph (d), and it refers to and repeats sub-paragraphs 166(a) to (d);
  - (e) it does not admit the allegations in sub-paragraph (e), and it refers to and repeats sub-paragraphs 166(a) to (d);
  - (f) to sub-paragraph (f) –
    - (i) it denies that Transferees had no or no adequate access to sun protection products and says that Transferees were provided with hats in their clothing issue and that sunscreen was available at the canteen at all times;
    - (ii) otherwise, does not admit the allegations therein, and it refers to and repeats sub-paragraphs 166(a) to (d);

168. It denies the allegations in paragraph 168 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
169. It denies the allegations in paragraph 169 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.

***Medical treatment and healthcare***

170. To paragraph 170 –
- (a) it does not admit the allegations in sub-paragraph (a);
  - (b) it does not admit the allegations in sub-paragraph (b);
  - (c) to sub-paragraph (c) –
    - (i) it denies that it was obliged to ensure that Transferees had access to appropriate and timely medical treatment, the provision of medical services at the Centre being the subject of a contract, to which Transfield Services was not a party, between the Commonwealth and International Health and Medical Services Pty Ltd (**IHMS**);
    - (ii) it admits that it was obliged by clause 2.9 of the Transfield Contract to ensure that any transferee who requests, or appears to be in need of medical attention, is referred for appropriate medical attention;
    - (iii) it says that, other than in emergencies, under the Transfield Contract its obligation to refer Transferees for medical attention was limited to referring Transferees to IHMS, and that it was not required to assess whether or not Transferees were in need of medical treatment;
    - (iv) it admits that it was obliged by clause 2.9 of the Transfield Contract, where it appeared to it that a transferee required emergency medical attention, to provide first aid by suitably qualified personnel, to seek emergency attention for the transferee immediately and to inform IHMS and the Commonwealth of the transferee's condition as soon as the initial response was complete;
    - (v) otherwise, it denies the allegations therein.
171. To paragraph 171 – insofar as the allegations concern Transfield Services –
- (a) to sub-paragraph (b)(i) –

- (i) it says that it had no role in relation to the retention or removal of medical aids possessed by Transferees on arrival in Australia or on Manus Island and no policy or practice of retaining, confiscating or removing medical aids possessed by Transferees on arrival at the Centre;
  - (ii) it denies that it was obliged, pursuant to the Transfield Contract or otherwise, to have in place systems capable of preventing harm being caused to Transferees as a result of prolonged deprivation of medical aids;
  - (iii) it says that it had and implemented a process for screening and recording all transferee property brought into the Centre at the time of reception, which process occurred within sight of the relevant transferee;
  - (iv) otherwise, it denies the allegations therein;
- (b) to sub-paragraphs (b)(ii), (iii), (iv) and (v):
- (i) it refers to and repeats the allegations in paragraph 170(c);
  - (ii) denies that it was obliged, under the Transfield Contract or otherwise –
    - (A) to provide or have in place systems to ensure the provision of medical treatment and health care for Transferees;
    - (B) to recognise or identify, and to intervene by seeking or arranging medical assessment or treatment, cases of mental illness or injury among Transferees;
    - (C) to maintain medical and other logs or records documenting medical and health related issues arising within the Centre;
    - (D) to ensure or have in place systems capable of ensuring that the medical care provided to Transferees was provided by appropriately trained and qualified individuals;
- (c) further in respect of mental illness or injury it says that –
- (i) at the Centre it did not engage personnel who were trained or qualified to diagnose or treat mental illness or injury and nor was it obliged to do so pursuant to the Transfield Contract or otherwise;
  - (ii) it provided welfare support for Transferees who had or potentially had mental health issues by implementing procedures that reflected a multi-agency collaborative approach, specifically –

- (A) its procedure for mental health referrals stipulated, relevantly, that Transfield Services case managers (whose function was to provide welfare and not medical services) may assist Transferees who have mental health concerns but who may be reluctant or unwilling to themselves make requests to IHMS for treatment or consultations for their mental health, by making a referral to the IHMS mental health team by making an incident report;
- (B) it implemented a behaviour management strategy pursuant to which -
- (1) Complex Behaviour Management meetings at which behavioural management issues affecting particular Transferees were discussed, were held regularly. Those meetings were chaired by Wilson and attended by Transfield Services, IHMS, the Commonwealth and the Papua New Guinea Immigration and Citizenship Service Authority,
  - (2) IHMS determined whether any of the identified behaviours raised mental health issues;
- (C) Transfield Services' Welfare team implemented processes intended to mitigate the risk of suicide and self-harm by Transferees and to provide additional support during situations of particular vulnerability and stress, including –
- (1) communicating with and supporting Transferees who missed 3 consecutive meals over any 24 hour period, who had received recent refugee status determination notifications, who had identified mental health concerns or had no or low participation in programs and activities;
  - (2) daily welfare checks including referrals to IHMS mental health service;
  - (3) observation by specialist security teams in cases where a transferee was identified as being potentially at risk of self-harm;



- (d) otherwise, it does not admit the allegations.
172. To paragraph 172 -
- (a) to sub-paragraph (a) -
- (i) it says that it had no role in relation to the retention or release of medical aids possessed by Transferees on arrival in Australia or in relation to the eventual return of any such medical aids;
- (ii) in so far as they relate to Transfield Services, it denies the allegations therein;
- (b) to sub-paragraph (b) -
- (i) it does not admit the allegations in sub-paragraphs (i) to (iii);
- (ii) it admits the allegations in sub-paragraph (iii), save that it does not say that it could also be accompanied by Wilson personnel;
- (iii) otherwise, it does not admit the allegations therein;
- (iv) it repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
- (c) it does not admit the allegations in sub-paragraph (c), and it repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
- (d) to sub-paragraph (d) -
- (i) it denies that Transferees were not permitted to obtain a request for medical aids save as provided by the Medical Centre, and says that Transferees were permitted to access paracetamol by requesting it from Wilson personnel who were authorised to provide this by IHMS in accordance with the approved procedure;
- (ii) it admits that in order to obtain appointments with the medical centre -
- (A) except in urgent cases Transferees were required to submit a request for medical treatment either by:
- (1) submitting a request to Transfield Services, which Transfield Services would refer to Wilson personnel, who would refer to the medical centre through the back system, and IHMS within 24 hours of receipt; or
- (2) submitting a request directly to IHMS;

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- (B) in urgent cases Transferees could request medical attention by asking Wilson personnel, who would contact IHMS by radio and request guidance or escort the transferee to the IHMS medical facility;
  - (iii) says that it had no role in assessing requests for medical appointments or scheduling appointments;
  - (iv) otherwise, it does not admit the allegations therein;
  - (e) it does not admit the allegations in sub-paragraph (e) and repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
  - (f) it does not admit the allegations in sub-paragraph (f) and repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
  - (g) it does not admit the allegations in sub-paragraph (g) and repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
  - (h) it does not admit the allegations in sub-paragraph (h) and repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c);
  - (i) it does not admit the allegations in sub-paragraph (i) and repeats the matters alleged at sub-paragraphs 170(c) and 171(b) and (c).
173. It denies the allegations in paragraph 173 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
174. It denies the allegations in paragraph 174.
175. It denies the allegations in paragraph 175 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.

***Internal security***

176. To paragraph 176 – insofar as the allegations concern Transfield Services -
- (a) it denies the allegations therein;
  - (b) it says that it was not responsible, under the Transfield Contract or otherwise, for the provision of either internal or external compound fencing;
  - (c) it says further that it had and implemented systems that were appropriate and adequate in respect of –

- (i) the monitoring of the transferee population for violent, intimidatory, discriminatory, ostracising, bullying or other anti-social behaviour between Transferees;
- (ii) the training of personnel to manage behaviour of the kind mentioned in sub-paragraph (i);
- (iii) the risk of violent or anti-social behaviour towards Transferees by other Transferees or Centre personnel;
- (iv) the security of the compounds within the Centre.

### **Particulars**

Transfield Services and Wilson had and implemented the following policies, systems and procedures:

1. A Behaviour Management Strategy which provided for or addressed, among other things:
  - a. behavioural support for Transferees through a welfare model which included encouraging transferees' engagement in programs and activities aimed at enhancing mental health and wellbeing;
  - b. a case management support team to provide welfare support to transferees;
  - c. the clear definition of inappropriate behaviour (which included violence, abuse, threatening behaviour, bullying or harassment);
  - d. communication to Transferees of expectations as to appropriate behaviour (refraining from anti-social or illegal behaviour) including by an induction process for Transferees on their arrival at the Centre;
  - e. guidance for Centre staff concerning the management of inappropriate behaviour;
  - f. the implementation of behaviour management plans for Transferees who demonstrate inappropriate behaviour, including anti-social or illegal behaviour, which process included the identification of behaviour including any form of violence or abuse or incitement to violence;
  - g. the ongoing review of behaviour management plans by the Complex Behaviour Management Committee on which Transfield Services was represented;
  - h. regular monitoring of Transferees displaying abusive, aggressive, bullying or harassing behaviour;
  - i. procedures for reporting inappropriate behaviour

2. Standard Operating Procedures and related guidelines which provided for or addressed, among other things:
  - a. a code of conduct for Centre staff which included requirements for staff relationships with Transferees and forbade bullying or harassment;
  - b. risk management;
  - c. conflict management;
  - d. intelligence management, including incident reporting, analysis of incident trends and the use of situation reports to alert stakeholders to early warning indicators of security risks;
  - e. the convening of a Joint Intelligence Group to review incidents and information gathered at the Centre to identify early warning indicators for unrest, self-harm or any other factors that may impact on the integrity of the Centre and the safety of transferees, staff or the local community;
  - f. the conduct of transferee security risk assessments and the creation and monitoring of profiles for Transferees at high risk of anti-social behaviour;
  - g. incident management for both minor and critical incidents, including the identification of threats and threat levels;
  - h. the use of force by security staff.
3. Guidelines for Interaction with Transferees provided for standards for and expectations of staff;
4. Security Standards which provided for or addressed, among other things:
  - a. monitoring of the Centre by video surveillance;
  - b. checks to account for all Transferees at least twice a day;
  - c. physical perimeter checks;
  - d. the issue of appropriate security equipment to security staff.
5. Perimeter security procedures.
6. Security staff were trained, by Wilson, including in relation to behaviour management, mental health awareness and cultural awareness, human rights standards, security procedures, safety checks, searching and screening, situational awareness, incident management, risk management, operational safety, crisis response and first aid. Training was delivered at induction and during employment. Training was delivered by experienced staff and in externally facilitated training programs. All staff were required to complete refresher training every 12 months.

Transfield Services' policies and procedures were documented. Copies of those documents are in the possession of Transfield Services' solicitors and may be inspected on reasonable notice.

177. To paragraph 177 – insofar as the allegations concern Transfield Services -
- (a) to sub-paragraph (a) –
    - (i) it denies the allegations in sub-paragraph (i);
    - (ii) it says that unless and until the plaintiff defines the content of “Australian Precautions” it cannot plead further concerning the “Australian Precautions”;
    - (iii) it does not admit the allegations in sub-paragraph (iii);
  - (b) it denies the allegations in sub-paragraph (b) and repeats the matters alleged at paragraph 176;
  - (c) to sub-paragraph (c) –
    - (i) it denies the allegations therein; and
    - (ii) it repeats the matters alleged at paragraph 176.
  - (d) it does not admit the allegations in sub-paragraph (d) and says that it cannot plead further in the absence of proper particulars of the plaintiff's claim;
  - (e) to sub-paragraph (e) –
    - (i) it denies that security staff engaged in excessive and unjustified use of force during periods of heightened tension;
    - (ii) otherwise, it does not admit the allegations and says that it cannot plead further in the absence of proper particulars of the plaintiff's claim;
  - (f) it denies the allegations in sub-paragraph (f);
  - (g) to sub-paragraph (g) – insofar as the allegations concern Transfield Services -
    - (i) it denies the allegations therein;
    - (ii) it says further that both internal and external fencing was significantly improved during the Transfield Period in that the Commonwealth, via a contractor, arranged for and managed the installation in or about May 2014 of new anti-climb fences both internally within and externally around the Centre;

- (iii) the Commonwealth, and not Transfield Services, was responsible for the requisitioning and installation of fencing.

- 178. It denies the allegations in paragraph 178 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
- 179. It denies the allegations in paragraph 179 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.

**Part L – Transfield Period - Causation**

- 180. To paragraph 180 –
  - (a) it denies that as a matter of fact it failed as alleged in sub-paragraphs (a) to (d) and repeats the matters alleged in response to the allegations made in the paragraphs of the Claim incorporated at paragraph 180;
  - (b) it denies that the matters alleged were “notorious” among Transferees, either at all, or throughout the period;
  - (c) otherwise, it denies the allegations therein.
- 181. To paragraph 181 –
  - (a) it repeats the allegations in the paragraph 180;
  - (b) it denies the allegations therein.
- 182. It denies the allegations in paragraph 182 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
- 183. It denies the allegations in paragraph 183.
- 184. It denies the allegations in paragraph 184 insofar as they concern it and does not plead to the allegations concerning the Commonwealth.
- 185. It does not admit the allegations in paragraph 185.

**Common questions of law or fact**

- 186. It does not plead to paragraph 186, in which no allegations are made concerning it.

## COUNTERCLAIM

### ***Claim against the Commonwealth***

187. If, which is denied, Transfield Services is liable for any loss or damage suffered by the plaintiff and/or group members, then:

- (a) by reason of the matters alleged in the Second Amended Statement of Claim concerning the Commonwealth, the Commonwealth is liable to the plaintiff and group members in respect of the same damage;
- (b) accordingly, Transfield Services is entitled, pursuant to -
  - (i) section 37 of the *Wrongs (Miscellaneous Provisions) Act 1975* (PNG);
  - (ii) alternatively, section 7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 2002* (ACT);

to recover contribution from the Commonwealth in the amount which the Court finds to be just and equitable having regard to the respective responsibilities of the defendants for the damage.

### ***Claim against G4S***

188. Further, if, which is denied, Transfield Services is liable for any loss or damage suffered by the plaintiff and/or group members, then:

- (a) by reason of the matters alleged in the Second Amended Statement of Claim in respect of G4S, G4S is liable to the plaintiff and group members in respect of the same damage;
- (b) accordingly, Transfield Services is entitled, pursuant to -
  - (i) section 37 of the *Wrongs (Miscellaneous Provisions) Act 1975* (PNG);
  - (ii) alternatively, pursuant to sections 23B and 24 of the *Wrongs Act 1958* (Vic);

to recover contribution from G4S in the amount which the Court finds to be just and equitable having regard to the respective responsibilities of the defendants for the damage.

**AND TRANSFIELD SERVICES COUNTERCLAIMS**

**Against the Commonwealth**

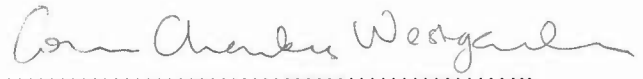
- A. Contribution
- B. Costs.
- C. Such further or other relief as to the Court seems appropriate.

**Against G4S**

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

**STEPHEN DONAGHUE**

**LISA NICHOLS**



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**Corrs Chambers Westgarth**  
Solicitors for the Third Defendant

**DATED: 7 August 2015**