

**THIRD AMENDED STATEMENT OF CLAIM****COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2015 /

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Laurence Kelvin Eades</b>
<u>First Defendant</u>	<b>Endeavour Energy (ABN 59 253 130 878)</b>
<u>Second Defendant</u>	<b><u>Asplundh Tree Expert (Australia) Pty. Ltd.</u></b> <b><u>(ABN 83 055 140 424)</u></b>
<u>Third Defendant</u>	<b><u>Pinnacle Career Development Pty Ltd</u></b> <b><u>(ABN 73 115 138 326)</u></b>

**FILING DETAILS**

Filed for	Laurance Kelvin Eades, the plaintiff
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**TYPE OF CLAIM**

Torts – Negligence – Personal Injury – Nuisance - Property Damage

**RELIEF CLAIMED**

- 1 Damages.
- 2 Interest pursuant to section 100 of the *Civil Procedure Act* 2005 (NSW).

3 Costs including interest on costs.

## PLEADINGS AND PARTICULARS

### A. THE PLAINTIFF & GROUP MEMBERS

1. The plaintiff is and was at all material times the sole proprietor of real property situated at 1-3 St Georges Parade, Mount Victoria in the State of New South Wales (“**plaintiff’s land**”).

#### Particulars

The plaintiff’s land is more particularly described in certificate of title folio DP2455, Lots 7-8, Section 6.

2. The plaintiff brings this proceeding on his own behalf and on behalf of the group members.
3. The Mount Victoria fire (“**Mount Victoria fire**”) is the fire that started in Mount York Road, Mount Victoria in the State of New South Wales on 17 October 2013.
4. The group members (“**group members**”) to whom this proceeding relates are:
  - 4.1. all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of:
    - 4.1.1. the Mount Victoria fire; and/or
    - 4.1.2. the injury to another person as a result of the Mount Victoria fire, where “psychiatric injury” in this group definition means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 30 June 2016; and
  - 4.2. all those persons who suffered loss of or damage to property as a result of the Mount Victoria fire; and
  - 4.3. all those persons who at the time of the Mount Victoria fire resided in, or had real or personal property in, the Mount Victoria fire area and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property; and

- 4.4. the legal personal representatives of the estates of any deceased persons in 4.2 and/or 4.3 who were group members as at the date of commencement of this proceeding.
5. As at the date of commencement of this proceeding, there are seven or more persons who have claims against the first defendant.

## **B. THE DEFENDANTS**

### *Endeavour Energy*

6. The first Defendant (“**Endeavour Energy**”) at all material times:
- 6.1. is and was a company incorporated under the *Energy Services Corporations Act 1995* and capable of being sued;
- 6.2. carried on business as a distributor of electricity to residential and business consumers in New South Wales (“**the business**”);
- 6.3. in carrying on the business was:
- 6.3.1. an energy distributor within the meaning of the *Energy Services Corporation Act 1995* (NSW) (“**ESC Act**”) and
- 6.3.2. a network operator within the meaning of the *Electricity Supply Act 1995* (NSW) (“**ES Act**”);
7. In the course of and for the purposes of the business, at all material times, Endeavour Energy:
- 7.1. owned, further or alternatively had the use and management of, the poles, the pole fittings, conductors, fuses, transformers, and sub stations and like installations servicing Mount York Road, Mount Victoria (together and severally “**installations**”) comprising high voltage bare or uninsulated aluminium conductors suspended from poles;
- 7.2. as part of the installations, owned, further or alternatively had the use and management of:
- 7.2.1. an [22kV-11kV](#) 3-phase feeder line known as the Blackheath Feeder along Mount York Road, Mount Victoria, configured in the vicinity of 80-92 Mount York Road as an overhead array of 3 conductors **strung**

~~in a single row of horizontally aligned conductors in a delta configuration;~~

- 7.2.2. an 11kV distribution line from pole 5 on Mount York Road along the driveway to the premises at 80-92 Mount York Road configured as an overhead array of two bare seven-strand 4.5mm diameter aluminium alloy conductors supported by disc insulators on wooden cross-arms and wooden poles (“the power line”);

#### Particulars

The power line was constructed and installed in or around November 1985. Further particulars of the history of the construction, installation and maintenance of the power line will be provided following discovery and interrogation.

- 7.3. caused or allowed the transmission of electricity on the power line for the purposes of *inter alia* supply to one residential consumers.

#### Asplundh Tree Expert (Australia) Pty. Ltd.

- 7A. At all relevant times, the second Defendant (**Asplundh**) was incorporated pursuant to the Corporations Act 2001 (Cth).

#### Pinnacle Career Development Pty Ltd

- 7B. At all relevant times, the third Defendant (**Pinnacle**) was incorporated pursuant to the Corporations Act 2001 (Cth).

### **C. STATUTORY CONTEXT**

8. At all material times, Endeavour Energy had the principal statutory objectives set out in section 8 of the ESC Act, which included the objective to operate efficient, safe and reliable facilities for the distribution of electricity.
9. At all material times, Endeavour Energy had the principal statutory functions set out in section 9 of the ESC Act, being:
- 9.1. to establish, maintain and operate facilities for the distribution of electricity and other forms of energy, and

- 9.2. to supply electricity and other forms of energy, and services relating to the use and conservation of electricity and other forms of energy, to other persons and bodies.
10. At all material times, the objects of the ES Act were:
- 10.1. to promote the efficient and environmentally responsible production and use of electricity and to deliver a safe and reliable supply of electricity, and
- 10.2. to confer on network operators such powers as are necessary to enable them to construct, operate, repair and maintain their electricity works, and
- 10.3. to promote and encourage the safety of persons and property in relation to the generation, transmission, distribution and use of electricity.
11. At all material times, Endeavour Energy had power under the ES Act for the purpose of exercising its functions:
- 11.1. to carry out work connected with the erection, installation, extension, alteration, maintenance and removal of electricity works (s. 45);
- 11.2. to enter any premises by an authorised officer (s. 54-56);
- 11.3. to trim or remove any tree situated on any premises which it had reasonable cause to believe:
- 11.3.1. could destroy, damage or interfere with its electricity works, or
- 11.3.2. could make its electricity works become a potential cause of bush fire or a potential risk to public safety (s.48).

#### **D. ENDEAVOUR ENERGY'S DUTY OF CARE**

12. At all material times Endeavour Energy:
- 12.1. had the ultimate responsibility for all activities associated with the planning, design, construction, inspection, modification and maintenance of the power line;
- 12.2. had the right, to the exclusion of other private persons to:
- 12.2.1. construct, repair, modify, inspect and operate the power line; or
- 12.2.2. give directions as construction, repair, modification, inspection or operation of the power line;

- 12.3. exercised the right referred to in 12.2 above; and
- 12.4. in the premises, had practical control over the power line.

### Particulars

~~So far as the plaintiff is able to say prior to discovery,~~ Endeavour Energy constructed, repaired, modified and inspected and operated the power line, and further gave directions to its contractors regarding the construction, repair, modification, inspection or operation of the power line and in particular in relation to inspection for hazardous vegetation and tree clearances so as to ensure anything which could make the power line become a potential cause of fire or potential risk to public safety was clear from the power line. ~~Further particulars may be provided prior to trial.~~

- 13. At all material times:
  - 13.1. Endeavour Energy used the power line to transmit electricity;
  - 13.2. the transmission of electricity along the power line created a risk of unintended discharges of electricity from the power line;
  - 13.3. unintended discharges of electricity from the power line were highly dangerous in that they were capable of causing death or serious injury to persons, and destruction or loss of property by:
    - 13.3.1. electrocution;
    - 13.3.2. burning by electric current; further or alternatively;
    - 13.3.3. burning by fire ignited by the discharge of electricity;
  - 13.4. in the premises set out in “13.1” to “13.3” inclusive, the transmission of electricity along the power line was a dangerous activity;
  - 13.5. Endeavour Energy knew or ought reasonably to have known of the risks referred to in “13.1” to “13.4” above.
- 14. At all material times, it was reasonably foreseeable to Endeavour Energy that there were risks (“**the Risks**”) that:
  - 14.1. interference with conductors by trees might cause a discharge of electricity from the power line;

14.1A the risk of interference with conductors by trees referred to in 14.1 was higher if a large tree:

14.1A.1 located adjacent to the power line;

14.1A.1 affected by decay;

14.1A.1 had previously failed onto or in the direction of the power line; and

14.1A.1 which if it failed again was likely to come into contact and thereby interfere with conductors;

- 14.2. interference with conductors by trees might cause collapse of a conductor, if sections failed under mechanical load;
- 14.3. the risk referred to in 14.2 was higher if a crimp (also known as a connector)("crimp") used to join sections of the conductor was incorrectly installed resulting in weakness at the point of the crimp;
- 14.4. there is likely to be an unintended discharge of electricity from the power line as the conductor collapsed and contacted the ground or other objects around the power line;
- 14.5. the discharge of electricity from the power line could cause ignition of flammable material in the vicinity of the point of discharge;

#### **Particulars**

Flammable material is any material capable of ignition, including without limitation ignition by the application of electric current or by contact with molten or burning metal.

- 14.6. further and in the alternative to 14.5, a discharge of electricity from the power line could cause the emission of electricity, heat or molten metal particles ("**sparks**") from the point of discharge;
- 14.7. electricity, heat or sparks emitted from a point of discharge could cause electric shock or burns to persons or property in the vicinity of the point of discharge;
- 14.8. electricity, heat or sparks emitted from a point of discharge could cause the ignition of fire in flammable material exposed to / in the vicinity of the point of discharge of the electricity, heat or sparks;
- 14.9. such ignition could produce a fire which might spread over a wide geographic area, depending on *inter alia* wind direction and velocity;

#### **Particulars**

The fire spread also depended on the amount of combustible fuel, the terrain, the environmental conditions including humidity and precipitation, the effectiveness of human firefighting responses. Further particulars may be provided prior to trial.

- 14.10. such fire could cause death or injury to persons and loss of or damage to property within the area over which the fire spread ("**fire area**"), and consequential losses including economic losses;
- 14.11. such fire could cause damage to property and consequential losses including economic losses within areas:
  - 14.11.1. affected by the physical consequence of fire, such as smoke or debris; or
  - 14.11.2. the subject of emergency activity to prevent the spread of fire, including without limitation the clearing of firebreaks;

("affected areas")
- 14.12. such fire or its consequences could:
  - 14.12.1. disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
  - 14.12.2. impede the use or amenity of property located in the fire area or affected areas; or
  - 14.12.3. reduce the value of property or businesses located in the fire area or affected areas;

and thereby cause loss of a reasonable expectation of benefit or economic loss to those persons, or the owners of those properties or businesses;
- 14.13. the risks referred to in 14.8 to 14.12 above were likely to be higher during periods of high or extreme bushfire risk.
- 15. At all material times members of the public who:
  - 15.1. were from time to time; or
  - 15.2. owned or had an interest in real or personal property; or
  - 15.3. carried on business;

in the fire area or affected areas ("**Mount Victoria Class**):

- 15.3.1. had no ability, or no practical and effective ability, to prevent or minimize the risk of such discharge occurring; and
- 15.3.2. were vulnerable to the impact of such fire; and consequently
- 15.3.3. were to a material degree dependent, for the protection of their persons and property, upon Endeavour Energy ensuring that the power line was safe and operated safely in the operating conditions applying to it from time to time.

### **Particulars**

The Mount Victoria fire area is shown on the map being Annexure A to these particulars. The bushfire area included the residential streets of Darling Causeway and St Georges Parade. Particulars of the area affected by the Mount Victoria fire will be provided prior to trial.

The operating conditions referred to included the level of electrical current being transmitted along the power lines, the physical environment around the power lines including without limitation wind direction and speed, ambient temperature, the presence of objects capable of coming into contact with the power lines (including without limitation trees) and the amount of combustible fuel around or below the power lines.

- 16. At all material times the plaintiff and each of the group members were:
  - 16.1. persons within the Mount Victoria class; or
  - 16.2. dependents of persons within the Mount Victoria class; or
  - 16.3. persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the injury to persons within the Mount Victoria class.
- 17. In the premises set out in paragraphs 8 to 16 inclusive, alternatively paragraphs 8 and 12 to 16 inclusive, at all material times Endeavour Energy owed to the plaintiff and each of the group members a non-delegable duty:
  - 17.1. to take reasonable care, by its officers, servants and agents; and
  - 17.2. a duty to ensure that reasonable care was taken, by its agents or contractors, to avoid the materialisation of the Risks (“**Endeavour Duty**”).

## **E. STANDARD OF CARE**

### *General Circumstances*

18. At all material times, Mount Victoria in the vicinity of the power line:

18.1. was a high bushfire risk area for the purposes of tree management.

#### Particulars

Mount Victoria in the vicinity of the power line is a semi-rural area adjacent to the Blue Mountains National Park.

A copy of the document "*Tree Management Plan*" June 2007 prepared by Endeavour Energy pursuant to clause 137 of the *Electricity Supply (General) Regulation 2001* ("**Tree Management Plan**") may be inspected by appointment at the office of the plaintiff's solicitors.

18.2. featured a large number of trees, including a large *Eucalyptus* tree adjacent to the power line between Endeavour Energy poles 3 ([Endeavour Energy asset number PL479466](#)) and 4 ([PL479462, formerly PL479467](#)) ("**poles 3 and 4**") along the driveway to 80-92 Mount York Road, Mount Victoria ("**the Tree**") which was:

18.2.1. overhanging the power line; or

18.2.2. of such height and sufficiently close to the power line that if it fell or shed branches there was a material risk that it would fall onto or across the power line;

18.2.3. of such height and weight and supported branches of such size and weight, that there was a material risk that the Tree or branch falling across the power line would cause:

18.2.3.1. the power line conductors to break; and/or

18.2.3.2. electrical arcing to occur between [the tree or branch and a conductor on the power line or between](#) a broken conductor and the ground or vegetable matter under the power line.

19. At all material times:

19.1. the two conductors on the power line between Endeavour Energy poles 3 and 4 ("**the Conductors**") were bare or uninsulated high voltage 11kV aluminium aerial conductors;

- 19.2. there was a material risk that in the event of one or both of the Conductors being broken by a tree or branch they could arc with the ground and/or vegetation on the ground;

19.2A there was a material risk that in the event of one or both of the Conductors being in electrical contact with a tree or branch they could arc with the tree or branch;

- 19.3. the protection systems regulating the power line included sensitive earth fault protection at Blackheath zone substation and such other protection which is known by Endeavour Energy but is not known to the plaintiff;

#### **Particulars**

The power line was subject to three distinct protection systems, over current systems, sensitive earth fault protection systems and an earth fault protection system. The protection devices in operation at the Blackheath zone substation for the 11kV feeder (BK1299) including their functions, configurations and settings are recorded in END.823.001.0039 being 'Substation Protection Datasheet' dated 23 May 2011. Further particulars may be provided following the completion of discovery and receipt of expert evidence.

- 19.4. the protection systems regulating the power line were such that there was a material risk that, in the event of a conductor breaking and falling to the ground, or arcing between one or more of the Conductors with a tree or branch, the protection systems would or could allow current to continue to be transmitted through the power line to cause ignition of a fire, especially in dry and windy conditions.

#### **Particulars**

So far as the plaintiff is able to say prior to discovery, interrogation, and receipt of expert evidence, the protection systems on the power line were such that after a conductor failure, electricity would or could continue to be transmitted, during which ignition of dry vegetation could occur.

- 19.5. there was a material risk that an arc or current transmitted between a fallen conductor and the ground and/or vegetation on the ground alternatively between one or more of the Conductors and a tree or branch could produce heat or electrical discharge;

- 19.6. there was a material risk that heat or electrical discharge from a fallen conductor or a conductor in electrical contact with a tree or branch could ignite dry vegetation in the vicinity;
- 19.7. the risk referred to in “19.6” was higher when conditions around the power line were dry and hot and windy than when conditions were moist, cool and calm;
- 19.8. the dry, hot and windy conditions which increased the risk referred to in “19.7” above were also likely to increase the risks of a tree falling, or shedding branches, across the power line.

19A. In or about August 2005:

19A.1 a large branch 350mm in diameter affected by decay failed from the lower branch from the primary crotch of the Tree;

**Particulars**

The plaintiff refers to the particulars of the Tree at paragraph 51 below.

19A.2 the large branch fell in the direction of and onto or across the Conductors causing damage to the Conductors, and a fire (2005 fire);

**Particulars**

The plaintiff relies upon Integral Energy System Operations Branch Report No. 0507765 and Fire Investigation Report No. 507797, both dated 31 August 2005 [END.811.001.0001].

19A.3 in the alternative to 19A.2, the large branch fell onto the Conductors.

19B. At all material times from August 2005:

19B.1 Endeavour Energy knew or ought to have known that the Tree was affected by decay;

19B.2 there was a material risk that the Tree which had previously failed and fallen onto the Conductors:

19B.2.1 might fail again;

19B.2.2 if it failed again was likely to fall in the direction of the Conductors, if it was not trimmed or removed.

20. At all material times:

- 20.1. between poles 3 and 4, the Conductors were aligned in an approximate east-west direction;
- 20.2. one of the Conductors (“**the southern conductor**”) had three crimps installed within its length between poles 3 and 4 joining original or replacement sections of conductor in the power line;

**Particulars**

The Conductors have been removed from the power line and are in the possession of Endeavour Energy.

- 20.3. the crimps on the southern conductor were installed by or on behalf of Endeavour Energy:

~~20.3.1 during construction of the power line;~~

~~Particulars~~

~~Further particulars shall be provided following discovery and interrogation.~~

- 20.3.2. ~~further and in the alternative,~~ as a consequence of previous interaction(s) between vegetation and the power line resulting in damage to the southern conductor, and a fire;

**Particulars**

The plaintiff relies upon *Integral Energy System Operations Branch Report No. 0507765* and *Fire Investigation Report No. 507797*, both dated 31 August 2005 [END.811.001.0001]; and the affidavit of David Mate made 25 October 2017, at par. [39].

~~Further particulars shall be provided following discovery and interrogation.~~

- 20.3.3. further and in the alternative, as a consequence of other incident(s) resulting in damage to the southern conductor;

**Particulars**

Further particulars shall be provided following discovery and interrogation.

- 20.4. there was a material risk that:
  - 20.4.2. incorrectly installed crimps;
  - 20.4.3. damaged aluminium conductor placed within crimps;

- 20.4.4. dyes incorrectly applied to crimps and/or incorrectly positioned conductor within the crimp resulting in damage to conductors; and/or
- 20.4.5. insufficient conductor being placed within the crimp, when joining or replacing sections of conductor would result in reduced and inadequate tensile strength in the southern conductor;
- 20.5. there was a material risk that reduced and inadequate tensile strength in the southern conductor would result in:
  - 20.5.2. conductor failure upon interaction between the southern conductor and vegetation; and
  - 20.5.3. realisation of the risks referred to in “19.2” to “19.8” above;
- 20.6. the risks referred to in “20.5” were higher when there was a tree and/or a branch of sufficient height and weight in proximity to the power line.
- 21. At all material times Endeavour Energy:
  - 21.3. knew; or
  - 21.4. being the network operator ought reasonably to have known; the matters set out in the ~~three~~five preceding paragraphs.

*Endeavour Energy’s Investigation of Fires caused by network assets*

21A. At the time of the 2005 fire, as a network operator Endeavour Energy was required to:

21A.1 record details of incidents where a fire is suspected to have been caused by network assets;

21A.1 investigate the circumstances of such incidents including the root cause for the purpose of determining and recording actions taken or proposed to be taken to prevent recurrence.

**Particulars**

The Plaintiff relies upon upon Integral Energy System Operations Branch Report No. 0507765 and Fire Investigation Report No. 507797, both dated 31 August 2005 [END.811.001.0001].

The obligation also arises as an incident of the Endeavour Duty.

Further particulars shall be provided following discovery and interrogation in relation to the policies and procedures in place in 2005.

Endeavour Energy's Network Management Plan - 2005

21B. At the time of the 2005 fire, as a network operator, Endeavour Energy was required to lodge a network management plan and a bush fire risk management plan with the Director General of the Department of Energy, Utilities and Sustainability.

**Particulars**

Clause 5 of the *Electricity Supply (Safety and Network Management) Regulation 2002*. Further particulars of Endeavour Energy's network and bush fire risk management plans in 2005 shall be provided following discovery.

21C At all material times in 2005, Endeavour Energy was required by:

21C.1 its network management plan;

21C.2 its bush fire risk management plan;

21C.3 the 'Guide to Tree Planting And Maintaining Safety Clearances Near Powerlines', ISSC3, October 1996;

21C.4 further and in the alternative, the Endeavour Duty,

to trim or remove vegetation which had:

21C.4.1 previously failed onto a power line; and

21C.4.2 was likely to fail again onto the same power line under foreseeable local conditions.

**Particulars**

Endeavour Energy's network management plan in 2005 required it to, inter alia, analyse hazardous events: (Clause 6(2)(e) of the *Electricity Supply (Safety and Network Management) Regulation 2002*).

Endeavour Energy's 2005 bush fire risk management plan required it to, inter alia, minimise the possibility of fire ignition by electricity lines: (Clause 9(1) of the *Electricity Supply (Safety and Network Management) Regulation 2002*).

Clause 7.1 and Appendix 1 of ISSC 3 October 1996 required it to remove every limb or tree in the inspection space considered liable to break off and/or fall and contact a bare conductor.

Further particulars shall be provided following discovery and interrogation.

*Endeavour Energy's Network Management Plan – 2011 to 2013*

22. As a network operator, Endeavour Energy was required to and did lodge a Network Management Plan for the period 2011 to 2013 with the Director General of the Department of Trade and Investment.

**Particulars**

Pursuant to clause 8 of the *Electricity Supply (Safety and Network Maintenance) Regulation 2008 (ES Regulations)* Endeavour Energy lodged the Endeavour Energy Network Management Plan 2011-2013 (Network Management Plan).

23. Endeavour Energy's Network Management Plan was required to include and did include, among other things:
- 23.3. a systematic identification of hazardous events that might be expected to occur;
- 23.4. a specification of the operational, maintenance and organisational safeguards intended to prevent those events from occurring; and
- 23.5. provision for bushfire risk management with the objects:
- 23.5.2. to ensure public safety;
- 23.5.3. to establish standards that must be observed when electricity lines operate near vegetation;
- 23.5.4. to reduce interruptions to electricity supply that are related to vegetation;
- 23.5.5. to minimise the possibility of fire ignition by electricity lines.

**Particulars**

Clauses 8 and 9 of the ES Regulations.

24. In its Network Management Plan, Endeavour Energy:
- 24.3. identified trees and systems failures as potential causes of hazardous events, being fallen conductors and/or arcing mains, and bushfire (Chapter 1 para [5.3.4]);
- 24.4. specified its Mains Designs and Maintenance Standards as the safeguards intended to prevent those hazardous events from occurring (Chapter 1 para [5.3.4]); and

24.5. identified its primary documentation applicable to the minimisation of bushfire risk, including (Chapter 4 para [3.2]):

24.5.2. Mains Maintenance Instruction MMI 0001- Routine Above and Below Pole and Line Inspection & Treatment Procedures (“**MMI 0001**”);

24.5.3. Mains Maintenance Instruction MMI 0013- Clearances to be Maintained Between Power Lines and Trees (“**MMI 0013**”);

24.5.4. Workplace Instruction WNV 1012 – Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and

24.5.5. Workplace Instruction WNV 0811 – Vegetation Management Pre-Summer Bushfire Requirements

(“**the Primary Documentation**”).

25. Endeavour Energy was obliged to implement its Network Management Plan.

#### **Particulars**

Clause 8(4) of the ES Regulations

26. At all material times, Endeavour Energy was required by the Network Management Plan and the Primary Documentation to:

26.1. construct, repair and maintain conductors forming part of its network assets at an appropriate and safe standard so as to mitigate the risk of conductor failure;

26.2. maintain the minimum clearances between vegetation and its network assets in accordance with MMI 0013 (“**Clearance Space**”);

#### **Particulars**

(a) MMI 0001 (Am 15) - [5.2], [5.12.4.5], [5.23], [5.21.7], Annexure 7;

(b) MMI 0013 (Am 9) - [5.0].

26.3. identify and remove:

26.3.2. all dead, dying, dangerous or visually damaged vegetation, including limbs or trees; and

26.3.3. any tree that could come into contact with an electric power line having regard to foreseeable local conditions;

**(“Hazardous Trees”)**

**Particulars**

MMI 0013 (Am 9) - [5.1.6] and [5.1.7];

Dead, dying, dangerous or visually damaged vegetation, including limbs or trees, is any vegetation that has the potential to adversely impact on the reliability of the network under normal or adverse weather conditions, including vegetation that is dead, dying, dangerous or visually damaged or is potentially unsafe for any reason (MMI 0013 - [4.0])

- 26.4. for all uncovered network assets, inspect the space outside the Clearance Space to identify any Hazardous Trees situated above a line projected at 45° from the vertical from the lowest conductor at a design height of 5.5 metres above ground (**“the Hazard Space”**);
- 26.5. trim to at least the lowest conductor height or, at the request of the land owner or manager, remove, any Hazardous Tree located in the Hazard Space.

**Particulars**

MMI 0013 (Am 9) - [5.1.8].

27. At all material times, Endeavour Energy was required by the Network Management Plan and the Primary Documentation to conduct:
- 27.1. annual Pre-Summer Bushfire Inspections (**“PSBI”**) in all designated bushfire prone areas (**“PSBI program”**);

**Particulars**

- (a) Network Management Plan [3.4];
- (b) MMI 0001 (Am 15) - [5.2], [5.12.4.5], [5.23], [5.21.7], Annexure 7;
- (c) Workplace Instruction WNV 1012 – Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and
- (d) Workplace Instruction WNV 0811 – Vegetation Management Pre-Summer Bushfire Requirements.
- 27.2. Vegetation Management inspections of its network assets ~~to be undertaken~~ as frequently as provided for in the contract with any contractor engaged to undertake the inspections and, in any event, at least annually (**“the Vegetation Management program”**);

**Particulars**

- (a) Network Management Plan [3.4];
- (b) MMI 0013 (Am 9) - [4.0], [5.5].

28. The purpose of the PSBI program was to identify any factors associated with Endeavour Energy's overhead mains within designated bushfire prone areas that could lead to the ignition of a bushfire.
29. A purpose of the Vegetation Management program was to minimise the risk of bushfires caused by contact between vegetation and overhead powerlines.
30. As part of its Vegetation Management and PSBI programs, Endeavour Energy was required to inspect for, identify and trim or remove any Hazardous Trees located within the Clearance Space or the Hazard Space in accordance with MMI 0013.

#### *Training to Identify Hazardous Trees*

31. In order to comply with the requirements of the Network Management Plan and the Primary Documentation to inspect for and identify Hazardous Trees, Endeavour Energy was required to ensure that the persons whom it employed or engaged to conduct its Vegetation Management and PSBI programs were competent to inspect for and identify potentially Hazardous Trees.
32. To be competent to inspect for and identify potentially Hazardous Trees, a vegetation inspector requires appropriate training in the inspection and identification of Hazardous Trees ("**Appropriate Training**").

#### **Particulars**

Appropriate Training is that necessary to enable a person without any previous arboricultural or horticultural qualifications or experience to be able to identify signs that a tree was potentially a Hazardous Tree. Appropriate training would include:

- (a) a visual tree assessment training course, such as that offered by QTRA;
- (b) an appropriately designed in-house training course conducted by a qualified arborist;

Additional training in tree risk assessment would enable an inspector to both identify and assess potentially Hazardous Trees. Such training would include:

- (c) a tree risk assessment training course, such as that offered by QTRA;

- (d) an appropriately designed in-house tree risk assessment course conducted by a qualified arborist.

*Endeavour Energy's Vegetation Inspection Contracts*

33. At all relevant times ~~prior to August 2012~~:
- 33.1. line inspections pursuant to MMI-0001 ("OLI/GLI line inspections") at Mount York Road, including of the power line were conducted by Walpole Pty Ltd, a contractor to Endeavour Energy;
- 33.2. prior to August 2012, inspections and cutting pursuant to the Vegetation Management program and inspections pursuant to the the PSBI program in the Northern Region (which included Mount York Road) were conducted by persons employed by Endeavour Energy.
34. If (which is denied) the Endeavour Duty was delegable and could be discharged by the appointment of competent contractors, the Endeavour Duty included a duty to exercise reasonable care in the appointment and supervision of the contractors.
35. On or about 1 August 2012, Endeavour Energy entered into a contract with Asplundh Tree Expert (Australia) Pty Ltd ("**Asplundh**") by which it appointed Asplundh to supply vegetation management services in the Northern Region effective from October 2012 ("**Asplundh Contract**").

**Particulars**

The Asplundh Contract is in writing and comprises Master Supply Agreement and Supply Schedule No. 1523/12C between Endeavour Energy and Asplundh for the Narellan, Katoomba and Springhill Areas – Distribution only, executed by Asplundh on or about 13 July 2012.

36. Pursuant to the Asplundh Contract, Asplundh was required within the Northern Region (which included Mount York Road) to, among other things:
- 36.1. perform (on a rolling basis) quarterly inspections of vegetation in proximity to overhead electricity network assets (cl. 7.5.1.1), as part of the Vegetation Management program;
- 36.2. achieve and maintain minimum clearances between vegetation and Endeavour Energy's overhead network assets in accordance with MMI 0013, including the identification and rectification of Hazardous Trees within the clearances to be maintained (cl. 2.1, 7.2, 7.5.1);

- 36.3. carry out PSBI and defect rectification of all designated bushfire prone areas prior to the commencement of the declared bushfire season, normally 1 October each year (cl. 7.3);
- 36.4. perform discretionary works approved by Endeavour Energy's Vegetation Control Manager (cl. 2.1, 7.7); and
- 36.5. comply with Endeavour Energy's mandatory training requirements outlined in Workplace Instruction WVM 0812 (cl. 4.7).

### **Particulars**

The clauses referred to above are those contained in in Annexure B- Technical Specification to the Supply Schedule No. 1523/12C between Endeavour Energy and Asplundh.

- 37. There were written terms of the Asplundh Contract that:
  - 37.1. Asplundh would comply with Endeavour Services' policies and procedures, and all applicable legislative requirements [cl. 2.3 and 3];
  - 37.2. Asplundh would ensure that all personnel engaged to carry out the services were fully trained, qualified and authorised prior to commencing work, and were competent to carry out their duties [cl 4.5, 4.8];
  - 37.3. a defect is any vegetation identified to be within the Minimum Safety Clearances specified in MMI 0013 [cl. 7.2];
  - 37.4. 100% of all bushfire prone area shall be patrolled/inspected and any identified defects shall be cut to MMI 0013 Minimum Trimming Clearances for bushfire prone areas [cl.7.3]; and
  - 37.5. all dead, dying, dangerous and visually damaged vegetation/trees within the clearances to be maintained between network assets and vegetation (MMI 0013) are to be removed at minimum to a height equivalent to that of the lowest conductor [cl. 7.5.1(e)].

### **Particulars**

The clauses referred to above are those contained in Annexure B- Technical Specification to the Supply Schedule No. 1523/12C between Endeavour Energy and Asplundh. ~~Further particulars may not be provided until discovery is provided.~~

The plaintiff will rely at trial on the Asplundh Contract for its full terms and effect.

38. On or about 20 July 2012, Endeavour Energy entered into a contract with Pinnacle by which it appointed Pinnacle to supply vegetation management maintenance and audit services in the Northern and Central Regions ~~effective from August 2012~~ (“Pinnacle contract”).

**Particulars**

The Pinnacle Contract is in writing and comprises “Services Agreement 1523/12C Vegetation Management Maintenance and Audit Northern and Central” between Endeavour Energy and Pinnacle executed on behalf of Pinnacle on 16 July 2012 and on behalf of Endeavour Energy on 20 July 2012 [END.806.001.0001]. The Pinnacle Contract includes Technical Specification, Tender, and Correspondence being Annexures A, B and C respectively to the Pinnacle contract.

~~Further particulars may not be provided until discovery is provided.~~

39. Pursuant to the Pinnacle Contract, Pinnacle was required within the Northern Region (which included Mount York Road) to, among other things:
- 39.1. Scope and audit as necessary to provide clearance to Endeavour Energy’s overhead network along roadsides, public lands and/or private property (“Services”) [cl 7.2];
- 39.2. Audit maps and defects to the Minimum Trimming Clearances specified in MMI 0013 [cl 7.1 and 7.2.2];
- 39.3. perform the Services with due care and skill.

**Particulars**

~~Further particulars may be provided prior to trial.~~

The plaintiff will rely at trial on the Pinnacle Contract for its full terms and effect.

40. There were written terms of the Pinnacle Contract that:
- 40.1. Pinnacle would comply with Endeavour Services’ policies and procedures, and all applicable legislative requirements [cl. 2.3 and 3];
- 40.2. Pinnacle would ensure that all personnel engaged to carry out the services were fully trained, qualified and authorised prior to commencing work, and were competent to carry out their duties [cl 4.5, 4.8];
- 40.3. a defect is any vegetation identified to be within the Minimum Safety Clearances specified in MMI 0013 [cl. 7.1];

- 40.4. 100% of all program maps will be scoped to the clearances required between vegetation/trees and Endeavour Energy's overhead network assets including the transmissions and distribution ground type substations, overhead powerlines, regulators, switching stations and other electrical apparatus (refer MMI 0013) [cl.7.2.1(a)]; and
- 40.5. all dead, dying, dangerous and visually damaged vegetation/trees within the clearances to be maintained between network assets and vegetation (MMI 0013) are to be identified for removal at minimum to a height equivalent to that of the lowest conductor [cl. 7.2.1(b)].

### **Particulars**

The clauses referred to above are those contained in Annexure A-Technical Specification to the Pinnacle Contract.

~~Further particulars may be provided prior to trial.~~

The plaintiff will rely at trial on the Pinnacle Contract for its full terms and effect.

41. The plaintiff refers to and repeats paragraph 26 above as to the identification of the version of MMI 0013 and the procedures set out therein, in accordance with which:
- 41.1. Asplundh were required to conduct services under the Asplundh Contract; and
- 41.2. Pinnacle were required to conduct services under the Pinnacle Contract.
42. From the commencement of the:
- 42.1. Asplundh Contract; and
- 42.2. Pinnacle Contract,
- and from time to time thereafter Endeavour provided to Asplundh and Pinnacle copies of its policies as amended from time to time, including MMI 0001, WNV 1012 and WNV 0811, and in particular procedure MMI 0013.
43. In or about 2012, Endeavour Energy entered into a contract with Heli-Aust Pty Ltd ("**Heli-Aust**") for Heli-Aust to undertake a PSBI video review and ground line inspection services for the period 2 April 2012 to 1 April 2015 ("**Heli-Aust Contract**").

### **Particulars**

The Heli-Aust Contract is in writing and comprises the "*Services Agreement 1515/11C*".

44. On or about 28 April 2013, Endeavour Energy entered into a contract with Osborne for Osborne to undertake a PSBI program (**Osborne Contract**).

#### Particulars

The Osborne Contract is in writing and comprises the “*Services Agreement – 6332/12 Endeavour Energy Pre-Summer Bushfire Inspection Program*” executed on behalf of Osborne on 28 April 2013 and on behalf of Endeavour Energy on 29 April 2013.

45. Under the Osborne Contract, Osborne was required to:
- 45.1. inspect Endeavour Energy’s electricity works within the PSBI Bushfire Map area (which included Mount York Road) and the vegetation in proximity to the electricity works by helicopter patrols or, where helicopter patrols could not be performed, by ground line inspections;
  - 45.2. comply with policies issued by Endeavour Energy and provided to Osborne, including MMI 0001 and MMI 0013;
  - 45.3. identify any Hazardous Trees for rectification or removal in accordance with MMI 0013;
  - 45.4. act in a professional, efficient and safe manner and without negligence in carrying out its contractual duties.

#### Particulars

Osborne Contract, cl 5.1, 5.2; Schedule 2, Sections 5.4, 7.0, 14.0 and 17.0.

46. On or about 22 May 2013, Endeavour Energy entered into a contract with Active Tree Services (**‘ATS’**) by which it engaged ATS to provide vegetation management services within specified Endeavour Energy franchise areas (**“ATS Contract”**).

#### Particulars

The ATS Contract is in writing and comprises:

- (a) Master Supply Agreement for the Supply of Goods and Services between Endeavour Energy and ATS with an effective date of on or about 22 May 2013; and
- (b) Supply Schedule No.6383/12C under the Master Supply Agreement referred to in (a) with an effective date of 1 June 2013.

The specified Endeavour Energy franchise areas were varied from about 9 September 2013 to include distribution lines in Katoomba including Mount York Road.

47. Pursuant to the ATS Contract, ATS was required within the specified Endeavour Energy franchise areas (which included Mount York Road from 9 September 2013) to, among other things:
- 47.1. perform inspections (scoping) of vegetation in proximity to overhead electricity network assets (cl 2.1);
  - 47.2. scope to the clearances required between vegetation and Endeavour Energy's overhead network assets in accordance with MMI 0013 (cl. 7.2.1(a));
  - 47.3. identify Hazardous Trees within the clearances to be maintained (cl. 7.2.1(d)).

#### **Particulars**

The clauses referred to above are those contained in Annexure B to Supply Schedule No.6383/12C, '*Technical Specification- Scoping*'.

48. ATS as agent of Endeavour Energy did not inspect the Conductors, trees and vegetation, including the Tree along the driveway to the premises at 80-92 Mount York Road pursuant to the ATS Contract prior to the Mount Victoria bushfire.

#### **Particulars**

Endeavour Energy's database called AM4 records that ATS did not inspect the power line until 15 November 2013.

#### *Known Inspections of the Tree prior to the Mount Victoria fire*

49. In the period from 2011 to the Mount Victoria fire, Endeavour Energy and/or contractors as agents of Endeavour Energy:
- 49.1. carried out OLI/GLI ~~line~~ inspections at Mount York Road.

#### **Particulars**

- (a) ~~During the period 15~~ On or about 22 August to 5 September 2012, OLI/GLI ~~line~~ inspections at Mount York Road were carried out by Gordon Lee of Gorson Contracting Pty Ltd on behalf of Warpole Pty Ltd. The plaintiff refers to the statement of Jim Battersby, Chief Engineer of Endeavour Energy, to NSW Police dated 25 March 2014, and the letter from Warpole Pty Ltd to the NSW Coroner's Court dated 19 August 2015.
- (b) Further particulars of OLI/GLI ~~line~~ inspections by Endeavour Energy and its contractors as agents of Endeavour Energy may be provided after discovery.

49.2. conducted PSBI program inspections of the Conductors, trees and vegetation, including the Tree, in proximity to poles 3 and 4 along the driveway to the premises at 80-92 Mount York Road (“**PSBI Program Inspections**”):

- (a) on dates in the period from 2008 to 2011 known to Endeavour Energy but not to the plaintiff, vegetation inspectors employed by Endeavour Energy conducted inspections of the power line as part of its PSBI Program;

**Particulars**

The plaintiff relies upon the statement of Ty Christopher dated 19 May 2015 filed in the Coronial Inquiry in to the Springwood and Mount Victoria Fires, at paragraph [88].

Further particulars may be provided after discovery.

- (b) on or about 18 February 2011, Endeavour Energy conducted a ground line inspection;
- (c) on or about 31 July 2012, Heli-Aust pursuant to the Heli-Aust contract and as agent for Endeavour Energy conducted an aerial inspection which identified a defect on pole 4;

**Particulars**

The plaintiff relies upon document [END.810.001.1632].

- (d) on or about 26 May 2013, Osborne Aviation pursuant to the Osborne contract and as agent for Endeavour Energy conducted an aerial inspection which identified a defect on pole 4;

**Particulars**

The plaintiff refers to the statement of Jim Battersby, Chief Engineer of Endeavour Energy, to NSW Police dated 25 March 2014.

- (e) on or about 9 June 2013, Osborne pursuant to the Osborne contract and as agent for Endeavour Energy conducted a LiDAR inspection;

**Particulars**

The plaintiff relies upon document [END.825.001.0002].

(ea) on or about 18 June 2013, Endeavour Energy reviewed LiDAR data inspection data provided to it by Osborne;

**Particulars**

The plaintiff relies upon document [END.809.001.0012].

(f) on or about ~~14~~15 November ~~2012~~ 2013, Active Tree Services pursuant to the Active Tree Services contract and as agent for Endeavour Energy conducted a ground line inspection, and notified Endeavour Energy of defects involving vegetation within trimming clearances;

**Particulars**

The plaintiff refers to tab 50 of exhibit EE-1, produced to the Coroners Court for the inquest into the Springwood and Mount Victoria fires.

(g) further particulars may be provided after discovery.

49.3. conducted Vegetation Management program inspections of the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road (“**Vegetation Management Inspections**”):

**Particulars**

(a) On dates in the period from 1 July 2008 to about August 2012 known to Endeavour Energy but not to the plaintiff:

(i) vegetation inspectors employed by Endeavour Energy conducted inspections of the power line as part of its Vegetation Management Inspections program;

**Particulars**

The plaintiff relies upon the statement of Ty Christopher dated 19 May 2015 filed in the Coronial Inquiry in to the Springwood and Mount Victoria Fires, at paragraph [18]. Further particulars may be provided after discovery.

(ii) which inspections were audited for compliance by ~~employees of Endeavour Energy contractors.~~

**Particulars**

Further particulars may be provided after discovery.

- (b) in or about 2011/early 2012, vegetation inspectors employed by Endeavour Energy completed the inspection and trimming process, and confirmed compliance on 20 February 2012;
- (c) on 24 February 2012, Pinnacle verified to Endeavour Energy that the work completed by Endeavour Energy in or about 2011/2012 referred to in the previous sub-paragraph was compliant;

**Particulars to sub-paragraphs 49.3 (b) and (c)**

The plaintiff refers to the statement of Jim Battersby, Chief Engineer of Endeavour Energy, dated 25 March 2014 to NSW Police. Further particulars may be provided after discovery.

(ca) on or about 28 October 2012, Asplundh pursuant to the Asplundh Contract and as agent for Endeavour Energy:

- (i) inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road;
- (ii) identified that 5+ eucalyptus trees required ground line clearing between poles 5 and 4;
- (iii) identified that two eucalyptus trees overhung the power line between poles 4 and 3;
- (iv) identified that three eucalyptus trees required ground line clearing between poles 4 and 3;
- (v) notified Endeavour Energy of the vegetation clearance defects in (ii), (iii) and (iv) above;

**Particulars**

The plaintiff refers to *Katoomba - 2013 Scope & Notification Sheet - Map No 28827 - Mt Victoria* dated 28 October 2012 [ASP.001.011.0001].

(cb) in or about November 2012, Pinnacle pursuant to the Pinnacle Contract and as agent for Endeavour Energy:

- (i) inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road;
- (ii) identified an HV defect inside trimming clearances between Poles 3 and 4 (scoping data);

### Particulars

The work to be undertaken involved trimming the Tree alternatively another eucalyptus tree and some scrub near a gate (work). The plaintiff refers to Pinnacle scoping data sheet for December 2012 [PIN.001.001.1033]; and [ASP.001.014.0009 at .0010].

(cc) on 12 November 2012, Pinnacle submitted to Endeavour Energy the work and scoping data;

(cd) on 13 November 2012, Endeavour Energy notified the work and scoping data to Asplundh;

(d) from or about 22 November 2012, Asplundh pursuant to the Asplundh Contract and as agent for Endeavour Energy:

(ai) in the course of undertaking cutting works in the driveway to the premises at 80-92 Mount York Road;

- (i) inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road;
- (ii) identified that atwo eucalyptus trees overhung the power line between poles 5 and 4;
- (iii) notified Endeavour Energy that atwo trees overhung the power line between poles 5 and 4;

### Particulars

The plaintiff refers to *Katoomba - 2013 Scope & Notification Sheet - Map No 28827 - Mt Victoria* dated 22 November 2012 [ASP.001.011.0008 at .0009]. ~~Further particulars may be provided after discovery.~~

- (da) between 22 November 2012 and 20 December 2012, Asplundh undertook clearance works including the work between poles 3 and 4;
- (db) on 20 December 2012, Asplundh notified Endeavour Energy that the work was completed and compliant;
- (dc) on 9 January 2013, Endeavour Energy notified Pinnacle to audit clearance works including the work between poles 3 and 4 performed by Asplundh;
- (dd) between 9 January 2013 and 17 January 2013, Pinnacle again inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road; and
- (de) on 17 January 2013, Pinnacle verified to Endeavour Energy that the work was compliant.

**Particulars to sub-paragraphs  
49.3(cc), (cd) and (da) to (de)**

The plaintiff refers to the statement of Jim Battersby, Chief Engineer of Endeavour Energy, dated 25 March 2014 to NSW Police; Affidavit of George Popovski made 13 November 2017.

- 49.4. did not identify the Tree as encroaching within the minimum clearances or within the space above the minimum clearances set out in MMI 0013;
- 49.5. did not identify the Tree as a Hazardous Tree;
- 49.6. took no action in relation to the Tree.

~~50. Further:~~

~~50.1 in or about November 2012, Pinnacle pursuant to the Pinnacle Contract and as agent for Endeavour Energy:~~

- ~~(a) inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road;~~
- ~~(b) identified an HV defect inside trimming clearances between Poles 3 and 4 (**scoping data**);~~

**Particulars**

~~The work to be undertaken involved trimming the Tree alternatively another eucalyptus tree and some scrub near a gate (work). Further particulars may be provided after discovery.~~

~~50.2 on 12 November 2012, Pinnacle submitted to Endeavour Energy the work and scoping data;~~

~~50.3 on 13 November 2012, Endeavour Energy notified this work and scoping data to Asplundh;~~

~~50.4 between 13 November 2012 and 9 January 2013, Asplundh undertook clearance works including the work between poles 3 and 4;~~

~~50.5 on 9 January 2013, Asplundh notified Endeavour Energy that the work was completed and compliant;~~

~~50.6 between 9 January 2013 and 17 January 2013, Pinnacle again inspected the inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road; and~~

~~50.7 on 17 January 2013, Pinnacle verified to Endeavour Energy that the work was compliant.~~

**Particulars to sub-paragraphs 50.1 to 50.7**

~~The plaintiff refers to the statement of Jim Battersby, Chief Engineer of Endeavour Energy, dated 25 March 2014 to NSW Police. Further particulars may be provided after discovery.~~

51. At the time of the 2005 fire, alternatively in the course of one or each of the Vegetation Management Inspections and/or the PSBI Program Inspections, and/or the inspections and works referred to in the previous paragraph, the Tree should have been identified by persons conducting the inspections and/or the works as a Hazardous Tree, in that:
- 51.1. its condition was such that it could come into contact with the Conductors in foreseeable local conditions;
  - 51.2. its condition was such that it had the potential to adversely impact on the reliability of the network under normal or adverse weather conditions;
  - 51.3. its location was such that if it fell it represented a serious risk to network assets;

51.3A. one of its branches with a diameter of 350mm had previously failed onto or in the direction of the power line;

- 51.4. its health was such that it was a potential serious hazard under the range of weather conditions that could reasonably be expected to prevail in the locality; and
- 51.5. if it fell onto the power line it had the propensity to cause a bush fire.

#### **Particulars of the tree**

The Tree is *Eucalyptus*.

Prior to the October 2013 failure the Tree was at least 20 metres high, 10 metres wide and with a trunk diameter at breast height of approximately 500-600mm.

The base of the Tree was horizontally approximately 8.1 metres from the nearest power line. The closest vegetation of the Tree was approximately 3.5 metres from the northern conductor.

The Tree overhung the power line and/or was both within, and within the space above, the minimum trimming clearance of 4.0 2.5 metres.

~~Further particulars will be provided as to~~ The spatial relationship between the Tree and the Conductors is recorded in the reports of Scott Gatenby dated 19 June 2018 [EXP.EAD.010.001.0015] and 20 September 2018 [EXP.EAD.010.001.XXX]; 2013 LiDAR data [EAD.825.001.0001] and [EAD.825.001.0002]; and the report of Nicholas Davies dated 20 July 2018 [EXP.EAD.001.001.0003].

The Tree was approximately 50-60 to 80 years old at the time of its failure.

The structure of the Tree was fair to poor being strongly asymmetric and exhibiting a trunk lean to the south-west of approximately twenty eight to thirty five forty degrees (28-3540°) from vertical and towards the power lines. A vertical first order branch of approximately 300mm in diameter (the remaining trunk) is present at 3.6m above ground level and forms the primary crotch with the lower branch from the primary crotch which failed (failed trunk). ~~A partially occluded wound is present on the south side of the primary crotch with branch diameter at the wound being approximately 450mm.~~

The Tree suffered from extensive fungal decay with termite activity affecting the main trunk of the Tree from below the primary crotch and affecting the integrity of the Tree. The lower branch from the primary crotch which failed trunk was approximately 80% decayed on a diameter basis. Termite workings were present.

The canopy health of the Tree was fair at the time of its failure.

The main trunk diameter at the point of failure in October 2013 was approximately 400mm.

Branches over 75mm diameter were in close proximity to the power lines and above a 45 degree line of clearance from the power lines.

The location, form and attitude of the Tree were such that should the main trunk or part of its upper canopy fail, it would contact the power lines.

Signs that the Tree was at risk of failing upon an appropriate inspection included:

- (a) the 40° lean of the Tree from perpendicular toward the power lines;
- (b) the majority of the canopy being located to the south-west of the centre of the root crown;
- (c) an absence of adaptive growth on the tension face of the root crown to improve structure and improve stability;
- (ca) a partially occluded wound on the south side of the primary crotch with trunk diameter at the wound being approximately 450mm.
- (d) an open cavity on the upper surface of the failed branch-trunk, approximately 4 metres above ground;
- (e) severe termite damage and fungal decay in the partially occluded wound on the south side of, and the cavity just above, the primary crotch;
- (f) a large branch stub measuring approximately 350mm in diameter at its point of attachment to the Tree to 150mm at its distal end (the stub) created by a previous branch failure in approximately August 2005 from the lower branch from the primary crotch (failed lower branch) with a large-100mm diameter cavity ("**the stub cavity**"), and severe fungal decay, including cubical brown rot) at its fractured distal end, and termite activity being present;
- (g) wound wood on the failed lower branch around the stub cavity in (f);
- (h) a further wound on the failed lower branch just back from the stub cavity;
- (i) the presence of termite mud guts and workings at ground level around the base of the Tree; in the visible wound holes/cavities near the primary crotch and further up the failed trunk; and in the stub cavity; and termite galleries up the outside of the Tree in bark fissures;
- (j) the overall health of the Tree indicated by its canopy.

Upon one or more of the above signs being observed which indicated decay with termite activity or other health issues with the Tree, further

investigation would have confirmed the existence of the rot and termites by:

- (i) tapping the Tree trunk at breast-3 to 4 metres height with an inspection mallet which would have resulted in an obvious hollow sound indicating the extent of the decay; and
- (ii) if further proof of the dry rot and its extent was needed pushing a screw driver into the Tree at the site of the cavity referred to in (ca) or (d) above which would clearly demonstrate the decay and its extent.

52. Further, by reason of the matters set out in paragraph 44-51 above, in the course of one or each of the inspections and/or the work set out in the particulars to paragraph 43-48 and 49 and 50 above, the Tree should have been identified by Endeavour Energy by itself or its agents as a tree that could:

52.1. damage or interfere with its electricity works, or

52.2. make its electricity works become a potential cause of bush fire or a potential risk to public safety.

53. In the premises set out in paragraphs 18 to 32, 44-51 and 45-52 above, at all material times, the Endeavour Duty required Endeavour Energy, acting reasonably to exercise reasonable care:

53.1. to install crimps correctly when joining or replacing sections of conductor;

53.1A. to investigate the circumstances surrounding fires caused by Endeavour Energy's distribution network, including the root cause;

53.1B. to trim or remove trees which fail onto power lines which are at risk of further failure, in particular trees or tree branches which strike conductors and cause a fire;

53.2. to identify Hazardous Trees located within:

53.2.2. the Clearance Space; and/or

53.2.3. the Hazard Space; and

53.3. to trim or remove Hazardous Trees identified within the Clearance Space and/or the Hazard Space.

**F. ASPLUNDH'S DUTY OF CARE**

54. At all material times, Asplundh knew or ought reasonably to have known of the risks referred to in paragraphs 13.1 to 13.4 above.
55. At all material times:
- 55.1. the Risks defined in paragraph 14 above were reasonably foreseeable to Asplundh;
- 55.2. Asplundh knew or ought reasonably to have known of the Risks.
56. During the term of the Asplundh Contract, Asplundh provided services to Endeavour Energy, including in respect of the power line referred to in sub-paragraph 7.2.2 above.
57. By reason of the matters alleged at paragraphs 35 to 37, and 56 56 above, Asplundh had a responsibility for and a degree of control over:
- 57.1. the assessment of vegetation clearances surrounding parts of Endeavour Energy's distribution network, including the power line;
- 57.2. the implementation and observance by its employees of the requirements of the Asplundh Contract and of Endeavour Energy's policies and procedures, including MMI 0013, during and for the purposes of assessing vegetation clearances and related clearance works;
- 57.3. the knowledge, training and experience of the employees it engaged to perform services under the Asplundh Contract, including the assessment of vegetation within the Clearance Space and/or the Hazard Space.
58. During the term of the Asplundh Contract, it was reasonably foreseeable that any failure by Asplundh, its servants or agents, to observe and implement the requirements of the Asplundh Contract and of Endeavour Energy's policies in respect of the assessment of vegetation clearances could result in the materialisation of the Risks alleged in paragraph 55 above.
59. Throughout the term of the Asplundh Contract, the plaintiff and group members were:
- 59.1. vulnerable to the Risks materialising; and
- 59.2. for the purposes of protecting themselves and their property and their economic interests against the Risks, reliant on Asplundh by its servants and

agents exercising reasonable care in undertaking services under the Asplundh Contract.

60. In the premises, throughout the term of the Asplundh Contract, Asplundh and its relevant employees owed to the plaintiff and group members a duty to take reasonable care and to ensure that reasonable care was taken by them:
- 60.1. in providing services, in particular, in conducting assessments of vegetation outside the Clearance Space that could fall within the Clearance Space and come into contact with power lines;
- 60.2. to ensure that the assessment of vegetation outside the Clearance Space was undertaken in accordance with the requirements of the Asplundh Contract and of Endeavour Energy's policies and procedures including MMI 0013;
- 60.3. to ensure that persons engaged to conduct the assessments of vegetation outside the Clearance Space were competent to inspect for and identify Hazardous Trees;
- 60.4. alternatively, in providing services under the Asplundh Contract to avoid the materialisation of the Risks ("**Asplundh Duty**").
61. During the term of the Asplundh Contract, and prior to the Mount Victoria fire, Asplundh, by an employee:
- 61.1. conducted one or more inspections of the power line in the vicinity of the Tree;
- 61.2. performed clearance works on or near the Tree between 13 November 2012 and ~~9 January 2013~~ 20 December 2012.
62. By reason of the matters alleged in paragraphs 54 to 61 above, in exercising reasonable care, Asplundh, its employees or agents, ought reasonably to have:
- 62.1. ensured that the persons engaged by it to conduct PSBI and Vegetation Management program tree inspections, and perform work under the Asplundh Contract had Appropriate Training;
- 62.2. identified the Tree as a Hazardous Tree;
- 62.3. identified the Tree as a potential hazard;
- 62.4. determined that the Tree was at risk of failure or shedding limbs;
- 62.5. determined that the Tree was at risk of coming into contact with power lines;

- 62.6. determined that the Tree had poor structure;
  - 62.7. trimmed or removed the Tree;
  - 62.8. in the alternative to 62.7, notified Endeavour of the matters set out at sub-paragraphs 62.2 to 62.6 above.
63. The persons engaged by Asplundh to conduct tree inspections under the Asplundh Contract did not have Appropriate Training.

**G. PINNACLE'S DUTY OF CARE**

64. At all material times, Pinnacle knew or ought reasonably to have known of the risks referred to in paragraphs 13.1 to 13.4 above.
65. At all material times:
- 65.1. the Risks defined in paragraph 14 above were reasonably foreseeable to Pinnacle;
  - 65.2. Pinnacle knew or ought reasonably to have known of the Risks.
66. During the term of the Pinnacle Contract, Pinnacle provided services to Endeavour Energy, including in respect of the power line referred to in sub-paragraph 7.2.2 above.
67. By reason of the matters set out in paragraphs 38 to 40 and 66 above, Pinnacle had a responsibility for and a degree of control over:
- 67.1. the assessment of vegetation clearances surrounding parts of Endeavour Energy's distribution network, including the power line;
  - 67.2. the implementation and observance by its employees of the requirements of the Pinnacle Contract and of Endeavour Energy's policies and procedures, including MMI 0013, during and for the purposes of assessing vegetation clearances;
  - 67.3. the knowledge, training and experience of the employees it engaged to perform services under the Pinnacle Contract, including the assessment of vegetation within the Clearance Space and/or the Hazard Space.
68. During the term of the Pinnacle Contract, it was reasonably foreseeable that any failure by Pinnacle, its servants or agents, to observe and implement the requirements of the Pinnacle Contract and of Endeavour Energy's policies in respect

of the assessment of vegetation clearances could result in the materialisation of the Risks alleged in paragraph 65 above.

69. Throughout the term of the Pinnacle Contract, the plaintiff and group members were:
- 69.1. vulnerable to the Risks materialising; and
- 69.2. for the purposes of protecting themselves and their property and their economic interests against the Risks, reliant on Pinnacle by its servants and agents exercising reasonable care in undertaking services under the Pinnacle Contract.
70. In the premises, throughout the term of the Pinnacle Contract, Pinnacle and its relevant employees owed to the plaintiff and group members a duty to take reasonable care and to ensure that reasonable care was taken by them:
- 70.1. in providing services, in particular, in conducting assessments of vegetation outside the Clearance Space that could fall within the Clearance Space and come into contact with power lines;
- 70.2. to ensure that the assessment of vegetation outside the Clearance Space was undertaken in accordance with the requirements of the Pinnacle Contract and of Endeavour Energy's policies and procedures including MMI 0013;
- 70.3. to ensure that persons engaged to conduct the assessments of vegetation outside the Clearance Space were competent to inspect for and identify Hazardous Trees;
- 70.4. alternatively, in providing services to scope and audit under the Pinnacle Contract to avoid the materialisation of the Risks ("**Pinnacle Duty**").
71. During the term of the Pinnacle Contract, and prior to the Mount Victoria fire, Pinnacle, by an employee, conducted one or more inspections of the power line in the vicinity of the Tree.
72. By reason of the matters alleged in paragraphs 64 to 71 above, in exercising reasonable care, ~~Asplundh~~Pinnacle, its employees or agents, ought reasonably to have:
- 72.1. identified the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 51; and
- 72.2. notified Endeavour Energy of the fact that the Tree was a Hazardous Tree.

## H. BREACHES OF DUTY OF CARE BY ENDEAVOUR ENERGY

73. In the circumstances:

73.1. the probability that the harm referred to in sub-paragraphs 14.10 to 14.12 would occur if Endeavour Energy failed to take care was not insignificant;

### Particulars

- (a) The plaintiff refers to and repeats the matters set out in paragraphs 13, 14 and 18 to 20;
- (b) The risk that bushfires could be ignited by fallen conductors was identified by the 2009 Victorian Bushfires Royal Commission [VBRC Report, Ch 4];
- (c) The VBRC found that contact between vegetation and power lines poses a considerable risk for causing fires and that trees outside regulated clearance spaces pose a risk of causing fires by contacting power lines when they break or fall [VBRC Report, Ch 4, [4.6.2]];
- (d) Endeavour Energy knew of the findings of the VBRC and of the significant bushfire risk posed by Hazardous Trees. The plaintiff relies upon the Network Management Plan, 2011-2013, Ch 4, [1.1]-[1.3];

73.2. in the event that the Risks materialised, the harm was potentially catastrophic;

73.3. any burden on Endeavour Energy in taking precautions to avoid the Risks was slight and not unreasonable having regard to its available resources, the seriousness of the harm and the risk of the occurrence of the harm;

### Particulars

- (a) There was no relevant financial constraint on Endeavour Energy taking the precautions set out in paragraph 75.1 below by reason that there is no additional cost incurred in correctly installing crimp(s) to join conductors;
- (b) There was no relevant financial constraint on Endeavour Energy taking the precautions set out in paragraphs 50.2 to 50.5 ~~below~~ above by reason that:
  - (i) from about 1 January 2008, Endeavour Energy was subject to economic regulation by the Australian Energy Regulator (**AER**);
  - (ii) the AER was required to make a Distribution Determination for distribution network service providers, including Endeavour Energy, for the period from 1 July 2009 to 30 June 2014 (**2009 Regulatory Control Period**);
  - (iii) Endeavour Energy submitted to the AER that its forecast direct operating and maintenance expenditure for the 2009 Regulatory Control Period was \$881 million, including \$198.1 million for

vegetation management [Endeavour Energy Regulatory Proposal dated 2 June 2008 at p 140-1];

- (iv) the AER Distribution Determination for Endeavour Energy for the 2009 Regulatory Control Period approved Endeavour Energy's forecast direct operating and maintenance expenditure;
  - (v) Endeavour Energy's actual expenditure on vegetation management during the 2009 Regulatory Control Period was \$136.5m less than its approved forecast vegetation management inspection expenditure [Endeavour Energy Regulatory Proposal 1 July 2015 to 30 June 2019 at 74];
  - (vi) the cost of taking the precautions was significantly less than the budget available to Endeavour Energy for vegetation management during the 2009 Regulatory Control Period;
- (c) further particulars of the cost of the precautions may be provided prior to trial.

73.4. Hazardous Trees are of no, or alternatively, very limited social utility; and

73.5. the Tree was of no social utility.

74. In the premises set out in paragraphs 18 to 73 inclusive above, as at 17 October 2013 Endeavour Energy had failed to:

74.1. correctly install one of the crimps in the southern conductor;

74.2. identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 51 ~~50~~; or

74.3. trim or remove the Tree.

75. A reasonable person in the position of Endeavour Energy would have taken the following precautions to avoid the materialisation of the Risks:

*Engineering precautions*

75.1. taken reasonable care when replacing or joining sections of conductor during construction, repair and/or maintenance of its overhead network to ensure:

75.1.2. crimps were correctly installed on aluminium conductors;

75.1.3. damaged aluminium conductor was not placed within crimps; and/or

75.1.4. dyes were correctly applied to crimps so as not to damage and weaken aluminium conductors;

*Vegetation Management precautions*

75.1A. investigated the circumstances surrounding the 2005 fire, including the root cause;

75.1B. identified the Tree as a tree likely to fail onto the conductors at the time of investigating the circumstances surrounding the 2005 fire by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 51;

75.1C. upon identifying the Tree as a tree likely to fail onto the conductors, trimmed or removed the Tree as soon as practicable and in any event by 1 October 2013;

75.2. ensured that the persons who conducted the Vegetation Management Inspections and the PSBI Program on its behalf had Appropriate Training;

75.3. taken reasonable care to ensure that the contractors it engaged to conduct the Vegetation Management Inspections and the PSBI Program on its behalf discharged the obligation to inspect for and identify Hazardous Trees;

75.4. identified the Tree as a Hazardous Tree in the course of its Vegetation Management Inspections and/or the PSBI Program by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph ~~50~~51;

75.5. upon identifying the Tree as a Hazardous Tree trimmed or removed the Tree as soon as practicable and in any event by 1 October or the start of the fire season, whichever is the earlier.

76. Endeavour Energy failed:

76.1. to take reasonable care when replacing or joining sections of conductor during construction and/or maintenance of its overhead network to ensure:

76.1.2. crimps were correctly installed on aluminium conductors;

76.1.3. damaged aluminium conductor was not placed within crimps; and/or

76.1.4. dyes were correctly applied to crimps so as not to damage and weaken aluminium conductors;

**Particulars**

The southern conductor was damaged and weakened in the course of installation of a crimp between poles 3 and 4. The date prior to the Mount Victoria fire when the crimp was installed is known to the first defendant but not to the plaintiff.

~~Further particulars shall be provided following discovery and receipt of expert evidence.~~

76.1A. to investigate the circumstances surrounding the 2005 fire, including the root cause;

76.1B. to identify the Tree as a tree likely to fail onto the conductors at the time of investigating the circumstances surrounding the 2005 fire by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 51;

76.1C. upon identifying the Tree as a tree likely to fail onto the conductors, to trim or remove the Tree as soon as practicable and in any event by 1 October 2013;

76.2. to ensure that the persons who conducted the Vegetation Management Inspections and the PSBI Program on its behalf had Appropriate Training;

#### **Particulars**

- (a) Endeavour Energy did not provide any training in the inspection and identification of Hazardous Trees to the persons whom it engaged or whom its contractors engaged to inspect vegetation in the course of the Vegetation Management Inspections and/or PSBI Program;
- (b) Endeavour Energy did not require Asplundh, ATS, Heli Aust, Pinnacle or Osborne to:
  - (i) engage qualified arborists; or
  - (ii) provide Appropriate Training to the persons whom they did engage

to inspect vegetation in the course of the Vegetation Management Inspections, and/or the PSBI Program;

76.3. to take reasonable care to ensure that the contractors it engaged to conduct the Vegetation Management Inspections and the PSBI Program on its behalf discharged the obligation to inspect for and identify Hazardous Trees;

#### **Particulars**

- (a) Endeavour Energy engaged Tree Management Officers (“TMOs”) to supervise and audit the work performed by its contractors none of whom had the Appropriate Training;

- (b) Endeavour Energy knew that none of the individuals conducting the Vegetation Management Inspections and the PSBI Program inspections on its behalf and none of its TMOs responsible for supervising and auditing that work had the Appropriate Training or were otherwise competent to inspect for and identify Hazardous Trees;
- (c) TMOs were not required to supervise or audit the inspection for Hazardous Trees;
- (d) Endeavour Energy did not adequately direct its contractors to inspect for and identify Hazardous Trees, particularly:
  - (i) Hazardous Trees outside the Clearance Space;
  - (ii) Hazardous Trees adjacent to sections of conductor which had previously failed as a result of vegetation interaction;
- (e) further particulars may be provided prior to trial.

76.4. to identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 49-51.

76A. An investigation into the circumstances surrounding the 2005 fire conducted with due care, skill and diligence by Endeavour Energy, its servants or agents would have identified that the Tree:

76A.1 was a potential hazard;

76A.2 was a tree likely to fail onto the conductors.

77. A vegetation inspection and assessment conducted with due care, skill and diligence by an assessor with Appropriate Training in the course of a PSBI or Vegetation Management Program tree inspection would have identified that the Tree:

77.1. was a potential hazard;

77.2. was a Hazardous Tree.

78. In the premises, as at 17 October 2013, by the failures identified in paragraph 50-76, Endeavour Energy had breached, and continued to be in breach of the Endeavour Duty:

#### **Particulars**

But for the breaches of duty:

- (a) the crimp in the southern conductor which failed upon the Tree falling on the Conductors would have been installed correctly or not at all;

- (b) the Tree would have been identified as a tree likely to fail onto the conductors, alternatively a Hazardous Tree; and
- (c) the Tree would have been removed or trimmed in accordance with MMI 0013 or otherwise, such that the appropriate clearances were maintained between the Conductors and at the Tree near poles 3 and 4 on 17 October 2013.

79. The failure of Endeavour Energy to take the precautions in paragraph 4975 were not acts or omissions involving the exercise of, or failure to exercise, a special statutory power within the meaning of s 43A of the *Civil Liability Act* 2002 (NSW).
80. Further, or alternatively, to the extent that the failure of Endeavour Energy to take any of the precautions in paragraph 4975 were acts or omissions which involved the exercise of, or failure to exercise, a special statutory power, the acts or omissions were so unreasonable that no authority having the special statutory power could consider them to have been reasonable having regard to the matters set out in paragraph 4773.

#### **I. BREACHES BY ASPLUNDH**

81. In the circumstances:

- 81.1. by reason of the matters set out in paragraphs 18, 19, 54 and 55, the probability that the harm referred to in sub-paragraphs 14.10 to 14.12 would occur if Asplundh failed to take care was not insignificant;
- 81.2. in the event that the Risks materialised, the harm was potentially catastrophic;
- 81.3. any burden to Asplundh in taking precautions to avoid the Risks was slight and not unreasonable having regard to the seriousness of the harm and the risk of its occurrence;

#### **Particulars**

So far as Asplundh's inspections of trees along the driveway to the premises at 80-92 Mount York Road under the Asplundh Contract are concerned, no additional burden would have arisen in undertaking them with due skill and care.

- 81.4. Hazardous Trees are of no, or alternatively, very limited social utility; and
- 81.5. the Tree was of no social utility.

82. A reasonable person in the position of Asplundh would have taken the following precautions to avoid the materialisation of the Risks:

82.1. ensuring that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Asplundh Contract had Appropriate Training;

**Particulars**

The plaintiff relies upon clause 4.5 and 4.8 of Annexure B to Supply Schedule 1523/12C of the Asplundh Contract.

82.2. identifying the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 51;

**Particulars**

The plaintiff relies upon clauses 7.2, and 7.3 of of Annexure B to Supply Schedule 1523/12C of the Asplundh Contract; and Endeavour Energy policies WNV 1012, MMI-0001 and MMI-0013.

82.3. upon identifying the Tree as a Hazardous Tree, trimming or removing the Tree.

**Particulars**

Clauses 7.5.1 (e) of Annexure B to Supply Schedule 1523/12C of the Asplundh Contract.

83. In breach of the Asplundh Duty, Asplundh failed to:

83.1. ensure that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Asplundh Contract had Appropriate Training;

83.2. identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 51; and/or

83.3. trim or remove the Tree; or

83.4. alternatively, notify Endeavour Energy of the fact that the Tree was a Hazardous Tree.

84. In the premises, Asplundh itself, or by its employees or agents, breached the duty of care alleged in paragraph 60 above.
85. By reason of the matters alleged in paragraphs 35 to 37, 54 to 63 and 81 to 84 above, the Mount Victoria fire was caused by the negligence of Asplundh, its agents or employees.
86. By reason of the negligence of Asplundh, its agents or employees:
- 86.1. the plaintiff;
- 86.2. each of the group members referred to in sub-paragraphs 4.1 to 4.3 hereof; and
- 86.3. each of the deceased persons referred to in sub-paragraph 4.4 hereof as the case may be, suffered loss and damage of the kinds referred to in sub-paragraphs 14.10 to 14.12 above.
87. The Mount Victoria fire was a natural and foreseeable consequence of the negligence of the negligence of Asplundh, its agents or employees.

**J. BREACHES BY PINNACLE**

88. In the circumstances:
- 88.1. by reason of the matters set out in paragraphs 18, 19, 64 and 65, the probability that the harm referred to in sub-paragraphs 14.10 to 14.12 would occur if Pinnacle failed to take care was not insignificant;
- 88.2. in the event that the Risks materialised, the harm was potentially catastrophic;
- 88.3. any burden to Pinnacle in taking precautions to avoid the Risks was slight and not unreasonable having regard to the seriousness of the harm and the risk of its occurrence;

**Particulars**

So far as Pinnacle's inspections of trees along the driveway to the premises at 80-92 Mount York Road under the Pinnacle Contract are concerned, no additional burden would have arisen in undertaking them with due skill and care.

- 88.4. Hazardous Trees are of no, or alternatively, very limited social utility; and
- 88.5. the Tree was of no social utility.

89. A reasonable person in the position of Pinnacle would have taken the following precautions to avoid the materialisation of the Risks:

89.1. ensuring that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Pinnacle Contract had the Appropriate Training;

**Particulars**

The plaintiff relies upon clause 4.5 and 4.8 of Annexure A to Services Agreement 1523/12C to the Pinnacle Contract of the Pinnacle Contract.

89.2. identifying the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 51;

**Particulars**

The plaintiff relies upon clause 7.2 of Annexure A to Services Agreement 1523/12C of the Pinnacle Contract and Endeavour Energy policies WNV 1012, MMI-0001 and MMI-0013.

89.3. upon identifying the Tree as a Hazardous Tree notifying Endeavour Energy that the Tree was a Hazardous Tree.

**Particulars**

The plaintiff relies upon clause 7.2.1(b) of Annexure A to Services Agreement 1523/12C of the Pinnacle Contract.

90. In breach of the Pinnacle Duty, Pinnacle failed to:

90.1. ensure that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Pinnacle Contract had Appropriate Training;

90.2. identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 50; and

90.3. notify Endeavour Energy of the fact that the Tree was a Hazardous Tree.

**K. BREACHES OF DUTY CAUSED MOUNT VICTORIA FIRE**

91. At approximately 12.15pm on 17 October 2013 at Mount York Road, Mount Victoria:

91.1. vegetation in and adjacent to Mount York Road was dry;

91.2. there was low humidity in local atmospheric conditions;

- 91.3. there was a very high ambient temperature;
- 91.4. there were strong winds blowing.
- 92. Each of the:
  - 92.1. dry vegetation;
  - 92.2. low humidity;
  - 92.3. ambient temperature;
  - 92.4. wind speed and direction;

on 17 October 2013 were within the range of foreseeable operating conditions for the power line.
- 93. At approximately 12.15pm on 17 October 2013:
  - 93.1. the Tree fell onto the Conductors between poles 3 and 4 on the power line;

#### **Particulars**

The lower branch from the primary crotch (failed trunk) failed ~~at approximately 2.1m above ground level~~. The failure occurred on the underside of the stem with the resultant wound being approximately 4m long and finishing its lowest point being approximately 3.6m above ground level.

- 93.2. as a result of the Tree falling onto the Conductors:
  - 93.2.1. the southern conductor separated within a crimp located to the west of the mid-point between poles 3 and 4;
  - 93.2.2. the other (northern) conductor did not break but detached from pole 3 at the pin insulator;
  - 93.2.3. the failed southern conductor:
    - 93.2.3.1. fell to the ground;
    - 93.2.3.2. each end of it recoiled back towards its respective point of attachment on pole 3 and pole 4, and
    - 93.2.3.3. was in contact with the ground and/or vegetable matter on the ground adjacent to the driveway to 80-92 Mount York Road;

93.2.4. there was a discharge of electricity from the collapsed southern conductor;

93.2.5. the electricity discharged from the southern conductor ignited vegetable matter on the ground between poles 3 and 4;

93.2A. further and in the alternative to 93.2, as a result of the Tree falling onto the Conductors:

93.2A.1 the northern conductor was in electrical contact with part(s) of the Tree:

93.2A.2 there was a discharge of electricity from the northern conductor;

93.2A.3 the electricity discharged from the northern conductor ignited embers from the Tree where contact occurred;

93.2A.4 the embers were released from the Tree and ignited vegetable matter on the ground between poles 3 and 4;

93.3. the electricity ignited vegetation thereby started a fire which subsequently spread over a wide geographic area being the Mount Victoria fire.

94. If the precautions referred to in paragraph 75 49 had been undertaken by Endeavour Energy, the Mount Victoria fire would not have occurred because:

94.1. had Endeavour Energy taken the precautions in paragraph ~~49.1~~ 75.1, the southern conductor would not have failed when the Tree fell onto the Conductors with the result that the Mount Victoria fire could not have occurred;

94.2. had Endeavour Energy taken the precautions in paragraph ~~49.2~~ 75.2 or ~~49.3~~ 75.3, the Tree would have been identified as a Hazardous Tree either directly by Endeavour Energy or by its agents Asplundh, Pinnacle, Heli-Aust and/or Osborne during inspections of the Tree by no later than about August 2013;

94.3. had the Tree been identified as a Hazardous Tree, Endeavour Energy would have taken the precaution in paragraph 75.5 ~~49.5~~ with the result that, by no later than 1 October 2013, the Tree would have been removed or trimmed to the height of the lowest conductor with the result that the Mount Victoria fire could not have occurred.

95. In the premises the Mount Victoria fire was caused by Endeavour Energy's breaches of the Endeavour Duty.
96. If the precautions referred to in paragraph 82 had been undertaken by Asplundh, the Mount Victoria fire would not have occurred because:
- 96.1. had Asplundh taken the precautions in paragraph 82.1, the Tree would have been identified as a Hazardous Tree by no later than about August 2013  
[December 2012](#);
- 96.2. had the Tree been identified as a Hazardous Tree, Asplundh would have taken the precaution in paragraph 82.3 with the result that, by no later than 1 October 2013, the Tree would have been removed or trimmed to the height of the lowest conductor with the result that the Mount Victoria fire could not have occurred.
97. In the premises the Mount Victoria fire was caused by Asplundh's breaches of the Asplundh Duty.
98. If the precautions referred to in paragraph 89 had been undertaken by Pinnacle, the Mount Victoria fire would not have occurred because:
- 98.1. had Pinnacle taken the precautions in paragraph 89.1, the Tree would have been identified as a Hazardous Tree by no later than about August 2013  
[January 2013](#);
- 98.2. had the Tree been identified as a Hazardous Tree, Pinnacle would have taken the precaution in paragraph 89.3 with the result that, by no later than 1 October 2013, the Tree would have been removed or trimmed to the height of the lowest conductor with the result that the Mount Victoria fire could not have occurred.
99. In the premises the Mount Victoria fire was caused by Pinnacle's breaches of the Pinnacle Duty.
100. The Mount Victoria fire was a natural and foreseeable consequence of the breaches of duty alleged in this proceeding.

**L. SUB GROUP CLAIM – PRIVATE NUISANCE**

101. Further to paragraph 4 above, the plaintiff brings this proceeding on behalf of those group members ("**sub group members**") who suffered loss of or damage to property,

further or alternatively economic loss, in connection with the Mount Victoria fire's interference in their use and enjoyment of interests in land.

102. At all material times each of:

102.1. the risks referred to in paragraph 14 above; and

102.2. the risks that a fire ignited by a discharge of electricity from the power line would unreasonably interfere with the use or enjoyment of interests in land:

102.2.1. over which the fire passed; further or alternatively

102.2.2. that was affected by physical consequences of the fire or by emergency responses to the fire;

102.2.3. by the persons entitled to the said use or enjoyment;

were reasonably foreseeable to Endeavour Energy.

103. By transmitting electric current along the power line, alternatively doing so at a time, being the afternoon of 17 October 2013, when the power line was not safe or operating safely, Endeavour Energy created the risk referred to in the preceding paragraph.

104. Endeavour Energy by the conduct alleged in the preceding paragraph in fact caused a fire beside Mount York Road being the Mount Victoria fire, which fire spread to land including land in which the plaintiff and sub group members had interests ("**sub group lands**").

105. The Mount Victoria fire unreasonably interfered with the plaintiff's and sub group members' use and enjoyment of their interests in sub group lands.

106. In the premises the plaintiff and sub group members suffered a nuisance created by Endeavour Energy ("**nuisance**").

#### **M. CAUSATION AND LOSS AND DAMAGE**

107. By reason of:

107.1. the breaches by Endeavour Energy of the Endeavour Duty; further or alternatively

107.2. the breaches by Asplundh of the Asplundh Duty; further or alternatively

107.3. the breaches by Pinnacle of the Pinnacle Duty; further or alternatively

107.4. the nuisance;

alleged herein, the plaintiff and each of the group members or sub group members as the case may be suffered loss and damage of the kinds referred to in sub-paragraphs 14.10 to 14.12 (inclusive) above.

### **Particulars of loss and damage of the plaintiff**

The plaintiff has lost upon the property his home, its contents, shed and contents thereof, fencing, garden and vehicles. The plaintiff further has suffered inconvenience.

Further particulars of the plaintiff's loss and damage will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions.

### **N. COMMON QUESTIONS OF LAW OR FACT**

108. The questions of law or fact common to the claims of the plaintiff and each of the group members or sub group members are:
- 108.1. how the Mount Victoria fire started;
  - 108.2. whether the Endeavour Duty was owed by Endeavour Energy to the plaintiff and group members and if so the content of the duty;
  - 108.3. whether the Endeavour Duty was non-delegable;
  - 108.4. if the Endeavour Duty was delegable, whether the duty was discharged by Endeavour Energy engaging contractors to undertake vegetation inspections on its behalf;
  - 108.5. whether the Asplundh Duty was owed by Asplundh to the plaintiff and group members and if so the content of the duty;
  - 108.6. whether the Pinnacle Duty was owed by Pinnacle to the plaintiff and group members and if so the content of the duty;
  - 108.7. whether Endeavour Energy breached the Endeavour Duty;
  - 108.8. whether Asplundh breached the Asplundh Duty;
  - 108.9. whether Pinnacle breached the Pinnacle Duty;
  - 108.10. whether the Mount Victoria fire was caused by a breach by:
    - 108.10.1. Endeavour Energy of the Endeavour Duty;

108.10.2. Asplundh of the Asplundh Duty;

108.10.3. Pinnacle of the Pinnacle Duty;

108.11. whether the plaintiff and sub group members suffered actual nuisance created by Endeavour Energy;

108.12. what are the principles for identifying and measuring compensable losses suffered by the plaintiff and each of the group members resulting from the breaches of duty or negligence alleged herein.

### SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature

### NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

### HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.

- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by:
  - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed**, by:
  - Paying the plaintiff that part of the money that is claimed.
  - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at [www.lawlink.nsw.gov.au/ucpr](http://www.lawlink.nsw.gov.au/ucpr) or at any NSW court registry.

## REGISTRY ADDRESS

Street address	Supreme Court of New South Wales Law Courts Building, Queens Square 184 Phillip Street, Sydney NSW 2000 Australia
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001 Australia DX: 829 Sydney
Telephone	(02) 9230 8111