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Defence to Amended Statement of Claim

Site [REDACTED]

Court Supreme Court of NSW
Division Common Law
List Common Law General
Registry Supreme Court Sydney
Case number 2014/00148790

THE PLAINTIFFS [REDACTED]

First Plaintiff Sean Johnston

First Defendant Endeavour Energy (ABN 59 253 130 878)
Second Defendant Osborne Aviation Services Pty Ltd

THE DEFENDANT [REDACTED]

Filed for Endeavour Energy (ABN 59 253 130 878), Defendant 1

Legal representative Jonathan Gregson Melville Hunt
Legal representative reference
Telephone 8020 7614
Your reference JHU:2037920

ATTACHED DOCUMENTS [REDACTED]

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

General Form (Johnston.pdf)

[attach.]

Form 7A (version 4)
UCPR 14.3

**DEFENCE TO SECOND THIRD FURTHER AMENDED STATEMENT
OF CLAIM**

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2014/148790

TITLE OF PROCEEDING

Plaintiff	Sean Johnston
First Defendant	Endeavour Energy (ABN 59 253 130 878)
Second Defendant	Osborne Aviation Services Pty Ltd (ABN 24 072 380 226)

FILING DETAILS

Filed for	Endeavour Energy (ABN 59 253 130 878), the First Defendant
Legal representative	Jonathan Gregson Melville Hunt Lander & Rogers Lawyers
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HEARING DETAILS

The proceedings are listed on 5 February 2016.

PLEADINGS AND PARTICULARS

The First Defendant pleads as follows in answer to the numbered paragraphs of the Second Third Further Amended Statement of Claim adopting the defined terms used in that document:

1 The First Defendant admits paragraph 1.

2 The First Defendant admits paragraph 2.

3 In response to paragraph 3, the First Defendant:

- a. admits there was a fire in the Springwood and Winmalee areas from 17 October 2013 ("**the fire***");
- b. does not know and cannot admit where the fire started.

4 As to paragraph 4, the First Defendant:

- a. refers to and repeats paragraph 3 above;
- b. admits that the proceedings are brought on behalf of anyone who suffered personal injury as defined in paragraph 4.1 as a result of the fire and/or as a result of the death of or injury to another person as a result of the fire, save in so far as those persons are listed in Schedule 1 to the Second Further Amended Statement of Claim filed in Supreme Court of NSW Proceedings 2014/313883 (Schedule 1):
- c. does not know and cannot admit the existence of any such injury or death or the identity of anyone who may have suffered such an injury or death;
- d. admits that the proceedings are brought on behalf of all those persons who suffered loss of or damage to property as a result of the fire, save in so far as those persons are listed in Schedule 1;
- e. admits that the proceedings are brought on behalf of anyone in the class identified in paragraph 4.3 who suffered economic loss of the kind alleged in paragraph 4.3 as a result of the fire;
- i. does not know and cannot admit the existence of any such economic loss or the identity of anyone who may have suffered such economic loss;
- g. admits that the proceedings are brought on behalf of any legal personal representatives of the estates of any deceased persons who were group members as at 16 May 2014, save in so far as those persons are listed in Schedule 1;
- h. does not know and cannot admit the existence of any such legal personal representatives.

- 5 In response to paragraph 5, the First Defendant:
- a. admits that seven or more persons suffered loss of or damage to their property as a result of the fire;
 - b. otherwise does not know and cannot admit the paragraph.
- 6 The First Defendant admits paragraph 6 ~~save that it says that it was and is an energy distributor within the meaning of the *Energy Services Corporation Act 1905* (NSW), rather than an electricity distributor, as alleged in paragraph 6.3-1.~~
- 7 As to paragraph 7, the First Defendant:
- a. says that LVABC extends east from pole 486903 and is electrically isolated from low voltage circuits running west which comprise three 230/400 volt low voltage conductors and one neutral conductor;
 - b. says that the installations also included high voltage covered conductor thick cabling to pole 486903 and later westward, 3 bare high voltage conductor mains; and
 - c. otherwise admits paragraph 7, save that it says that certain infrastructure on the poles, being part of the installations as defined, was owned by telecommunication providers.
- 7A The First Defendant admits paragraph 7A.
- 8 As to paragraph 8, the First Defendant
- a. admits the paragraph;
 - b. says further that section 8 of the *Energy Services Corporation Act 1995* (NSW), which sets out the principal objectives of energy distributors including the First Defendant, provided that each such objective is required to be treated as being of equal importance;
 - c. says further that, in addition to the objective of operating efficient, safe and reliable facilities for the distribution of electricity, the objectives set out in section 8 included:

- i. to be a successful business by:
 - (A) operating at least as efficiently as any comparable businesses;
 - (B) maximising the net worth of the State's investment in the Defendant;
 - (C) exhibiting a sense of social responsibility by having regard to the interests of the community in which it operates;
- ii. to protect the environment by conducting its operations in compliance with the principles of ecologically sustainable development;
- iii. to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates: and
- iv. to be an efficient and responsible supplier of electricity and for services relating to the use and conservation of electricity.

9 The First Defendant admits paragraph 9.

10 The First Defendant admits paragraph 10.

11 As to paragraph 11, the First Defendant:

- a. says that at all material times section 45 of the ES Act (as defined) empowered network operators including the First Defendant to carry out work connected with the erection, installation, extension, alteration, maintenance and removal of electricity works subject to the conditions and restrictions contained in that section;
- b. says that at all material times section 54 of the ES Act (as defined) empowered network operators including the First Defendant to enter any premises for the purpose of exercising any function conferred or imposed on it but only after service of a notice as required by section 55;
- c. says that at all material times section 48 of the ES Act (as defined) empowered § network operators including the First Defendant to trim or remove a tree situated on any premises which it had reasonable cause to believe could destroy, damage or interfere with its electricity works or could make its electricity works become a potential cause of bush fire or potential risk to public safety but, pursuant to subsections 48(2)(b) and 48(5), it

could only do so in emergencies or after first serving a notice which is not complied with; and

d. otherwise does not admit the paragraph.

12 As to paragraph 12, the First Defendant:

- a. admits that, by virtue of the matters alleged in paragraphs 6 and 7 of the ~~Second~~ Third Further Amended Statement of Claim (which are admitted subject to the matters pleaded in paragraphs 6 and 7 of this Defence) and of the matters alleged in paragraph 7c above it had responsibilities in relation to activities associated with the planning, design, construction, inspection, modification and maintenance of the power line;
- b. does not admit that its responsibilities are accurately summarised as "the ultimate responsibility" as alleged in paragraph 12.1;
- c. admits that it had the powers conferred on it by the *Electricity Supply Act 1995* (NSW) and other legislation including the powers under section 45 in relation to erection, installation, extension, alteration, maintenance and removal of electricity works;
- d. says that, subject to appropriate authorisation, persons other than the First Defendant were entitled to construct, modify, inspect, operate or repair the power line (as defined) in certain circumstances and if engaged by a third party, such as the Plaintiff or one of the group members;
- e. in the premises of sub-paragraph d above, denies that other persons were excluded from constructing, modifying, inspecting, operating or repairing the power line (as defined);
- f. admits that it exercised the powers conferred on it by the *Electricity Supply Act 1995* (NSW) and other legislation in relation to the power line; and
- g. in the premises of sub-paragraphs a to f above, admits that it had practical control over the power line (as defined) except to the extent that the power line (as defined) comprised service cables, transformers and fuses or other like installations located on private land.

- 13 As to paragraph 13, the First Defendant:
- a. admits sub-paragraph 13.1;
 - b. says as follows in answer to sub-paragraphs 13.2, 13.3 and 13.5:
 - i. the transmission of electricity along power lines necessarily involves a risk that the electricity will be conducted along a circuit created unintentionally by the interaction between the electricity network and other things;
 - ii. if electricity is conducted through a person, the person may die or be seriously injured as a result of electric shock, depending on the amount of electrical current involved;
 - iii. if electricity is conducted through an inanimate object, depending on the properties of the object and the amount of electricity involved, the object may be heated to some degree, and there may be a risk of ignition;
 - iv. if a fire is ignited, the First Defendant admits that the risk pleaded in paragraph 13.3.3 exists;
 - v. those risks were and are risks that are known to the First Defendant;
 - vi. the First Defendant manages the known risks associated with the transmission of electricity in a number of ways, including:
 1. by the construction and maintenance of its network assets in such a way as to minimise the risk of unintended circuits being created by the interaction between the electricity network and other things;
 2. by the installation and use of protection devices to cut off the supply of electricity in certain events;
 3. by inspection of its network assets and of the relationship between network assets and other things;
 4. by maintaining separation of conductors;
 5. by the spacing of supporting insulators; and

6. by the placement of line spreaders mid-span on low voltage lines;
 - vii. at all material times the nominal voltage on the power line was 230 volt single phase / 400 volt three phase (**230/400 volt**);
 - viii. at all material times, the risk of electric shock, burning by electric current or fire ignition as a result of the discharge of electricity from the power line was low;
- c. in the premises of sub-paragraphs a and b above, the First Defendant says in answer to sub-paragraph 13.4 that the transmission of electricity was an activity which carried a risk of harm, but does not otherwise admit the sub-paragraph; and
 - d. in further answer to sub-paragraph 13.5, says that the First Defendant knew the risks referred to in 13.b above but otherwise does not admit sub-paragraph 13.5.

14 As to paragraph 14, the First Defendant says:

- a. the power line west from pole 486903 consisted principally of three 230/400 volt low voltage conductors and one neutral conductor ("**street lines**") suspended from poles in Linksvie Road, Springwood, connected to each private home in that street by service cables which ran from poles to each house;
- b. the street lines were uninsulated aluminium conductors;
- c. the service cables were insulated service cables;
- d. as a result of the insulation on the service cables, there was little or no risk that contact between vegetation and the service cables would create an unintended circuit or otherwise result in an unintended discharge of electricity;
- e. from June 2008, July-2013, it caused Asplundh Tree Expert (Australia) Pty Ltd (**Asplundh**), Heli Aust Pty Ltd (**Heli Aust**), Osborne Aviation Services Pty Ltd (**Osborne**) and Active Tree Services Pty Ltd (**ATS**) to inspect vegetation in Linksvie Road, Springwood, to identify any vegetation

requiring trimming or removal as within the clearances prescribed by ~~MMI~~ 0001 and MMI 0013;

- f. it caused Asplundh Tree Experts (**Asplundh**) to trim or remove clear vegetation/trees in Linksvie Road, Springwood, outside the clearances as prescribed by MMI 0001 and MMI 0013 and, ~~at all relevant times, there was no vegetation within at least 1.5 metres of the street lines;~~
- g. in the premises of sub-paragraphs d, e and f above the risk alleged in sub-paragraph 14.1 (and in sub-paragraph 14.3 to the extent that it refers to the discharge of electricity and heat) was a low risk;
- h. the susceptibility of objects to ignition as a result of the objects conducting electricity is a function of the conductive properties of the objects and the amount of electricity;
- L the amount of electricity potentially capable of being conducted from the street lines or the service cables was limited by:
 - i. the voltage of the street lines (230/400 volt), which was the lowest distribution voltage of any conductors on the First Defendant's network;
 - ii. the sum of all of the impedances on the First Defendant's network between the power source and the street lines or the service cable; and
 - iii. by the protection devices (being devices which cut off the supply of electricity in certain events) in the First Defendant's network;
- j. in the premises of sub-paragraphs h and i above, the risk alleged in sub-paragraph 14.2 (and in sub-paragraphs 14.4 and 14.5 to the extent that they refer to the emission of electricity and heat) was a low risk;
- k. the emission of sparks would only be a possibility in the event of an external physical event causing either the severance of a conductor from a network pole or the severance of a service cable from a network pole or connection point to a private house ("severance"), or the clashing of two or more uninsulated conductors ("clashing") or some other extraordinary event;

- l. the street lines were equipped with spreaders designed for the purpose of preventing clashing between the conductors comprising the street lines;
- m. severance or clashing would only occur if the power lines (as defined) were subjected to substantial and unexpected external forces (over and above foreseeable local climatic conditions);
- n. in the premises of sub-paragraphs e, f, k, 1 and m above, the risks alleged in sub-paragraphs 14.3, 14.4 and 14.5 (to the extent that they refer to the discharge of sparks) were low risks;
- o. in the premises of sub-paragraphs a to n above, the risk of fire ignition existed but was a low risk;
- p. that it otherwise admits that the ignition of a fire can lead to a wide variety of consequences including the adverse consequences pleaded in sub-paragraphs 14.6 to 14.9; and
- q. that it admits sub-paragraph 14.10.

15 As to paragraph 15, the First Defendant:

- a. admits that members of the public who were present in, or who owned or had an interest in real or personal property which was located in, or who carried on business in, a fire affected area at the time of the fire were potentially subject to the impact of the fire;
- b. denies that all such persons were "vulnerable" in the sense that they had no capacity to protect themselves from the consequences of such fire;

Particulars

It was open to the some or all of the persons in the class identified in paragraph 4 of the Third Further Amended Statement of Claim to protect themselves by:

1. obtaining insurance in respect of the loss and damage referred to in paragraph 44 of the Second Further Amended Statement of Claim; and
2. preparing their properties to mitigate against the risk of damage caused by a bushfire.

and says that it was open to some or all of the persons in the class identified in sub-paragraph 4.3 of the Second Further Amended Statement of Claim to protect themselves by obtaining insurance in respect of economic loss;

- c. denies that all such persons had no ability, or no practical and effective ability, to prevent or minimise any risk of unintended electrical discharge occurring;

Particulars

Members of the public could contribute to electricity safety including by using electrical appliances in accordance with their directions; by using electricity safely in their homes and businesses; by fulfilling their responsibilities under the Electricity Supply Act; by complying with their contractual responsibilities related to electricity safety; by notifying the First Defendant of any apparently unsafe electricity infrastructure or any threats to electricity infrastructure; by complying with their obligations under the National Energy Customer Framework and obligations under Customer Connection Contracts.

- d. says that, save as provided for in sub-paragraph 12(d) above, members of the public were not in a position to discharge the functions of the First Defendant as pleaded in paragraph 9 of the Second Third Further Amended Statement of Claim and to that extent were dependent on the conduct of the First Defendant; and
- e. otherwise does not admit the paragraph.

16 As to paragraph 16, the First Defendant:

- a. repeats paragraph 4 above;
- b. in the premises of sub paragraph a. above, does not know and cannot admit there were persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or of injury to persons within the Springwood/Winmalee class; and
- c. otherwise admits the paragraph.

- 17 As to paragraph 17, the First Defendant:
- a. repeats paragraphs 7c to 16 above;
 - b. says that in determining whether the First Defendant has a duty of care of the kind pleaded in the paragraph, the principles set out in section 42(a) to (d) of the *Civil Liability Act 2002* (NSW) apply;
 - c. says in that regard that the First Defendant supplied electricity to approximately 2.2 million people and established, maintained and operated facilities for the distribution of electricity, across a region spanning more than 25,000 square kilometres and comprising the local government areas of Blacktown, Blue Mountains, Hawkesbury, Lithgow, Parramatta, Penrith, The Hills, parts of Hornsby, Mid-Western, Bathurst, parts of Oberon, Camden, Campbelltown, Fairfield, Holroyd, Liverpool, Wingecarribee and Wollondilly, parts of Upper Lachlan Shire, parts of Goulburn Mulwaree, Kiama, Shellharbour, Shoalhaven and Wollongong;
 - d. says that as at 17 October 2013, the network infrastructure of the distribution network operated by the First Defendant comprised equipment and assets including approximately 28,000 kilometres of overhead electricity lines;
 - e. says further that at all material times the resources available to the Defendant were constrained by the economic regulatory framework imposed on the First Defendant, as the holder of a distribution network service provider's licence and the matters pleaded in paragraph 8.kb of this Defence;

Particulars

Since 2009 the First Defendant is subject to regulation by the Australian Energy Regulator ("the **AER**"). The AER determines the maximum prices the Defendant is entitled to charge for the cost of distributing the service to the end customer, for each regulatory control period (being, generally, a period of five years).

- f. says that the class of persons to whom the First Defendant allegedly owed the Endeavour Duty was indeterminate, having regard to the definition of the claimants in paragraph 40 16 of the Second Third Further Amended

Statement of Claim and, in the premises, denies that it owed a duty of care to an indeterminate class of persons; and

g. otherwise denies the paragraph.

18 [Not used].

19 [Not used].

20 As to paragraph 20, the First Defendant:

- a. admits that Springwood in the vicinity of the power line was a bushfire-prone area within the meaning of its "Tree Management Plan";
- b. admits that Linksvie Road, Springwood, contained large numbers of trees;
- c. admits that one such tree ("the **Tree**") was an acacia located on private land bordering 108 Linksvie Road, in the vicinity of pole JU 267 on map U55675;
- d. says that no part of the Tree was growing within at least 1.5 metres of the street lines at any material time;
- e. denies that the Tree was overhanging the street lines;
- f. does not know and cannot admit the height or weight of the Tree;
- g. says that there was a risk that if the Tree or a branch fell across the service cables the service cables could be severed from their point of connection to pole JU 267;
- h. says that it is possible that a tree with sufficient mass which falls with sufficient force in such a way as to impact on the street lines could cause the street lines to be severed from a network pole, but does not admit that the Tree was sufficiently large and of sufficient mass to have that effect and says that, in any event, on 17 October 2013 the Tree did not fall in such a way as to sever the street lines from a network pole;
- i. says that a tree with sufficient mass falling on the power street lines with sufficient force could cause adverse electricity events including arcing, sparks or unintended circuits;

- j. says that the street lines could not come into contact with each other or arc with each other under foreseeable local conditions, but admits that that could occur if significant external force were applied to the street lines including by a falling tree coming into contact with the street lines;
- k. says that arcing between the street lines and a tree or branch was not likely to occur because of the poor conductivity of dry wood and the low voltage of the power lines;
- l. says that arcing between a broken service cable and vegetable matter under the power street lines was not likely to occur because, in the event that the service cable broke at the pole, it would immediately become disconnected from the First Defendant's network and cease to conduct electricity from the First Defendant's network; and
- m. otherwise does not admit the paragraph.

21 As to paragraph 21, the First Defendant:

- a. admits sub-paragraph 21.1 on the basis that by "the Conductors" the Plaintiff is referring to the street lines only;
- b. says that the street lines were the lowest voltage conductors on the defendant's network, being 230 volt single phase / 400 volt three phase;
- c. says, in answer to sub-paragraph 21.2, that the conductors were separated by approximately 500 millimetres and that separation was maintained by spreaders installed on the street lines;
- d. says, in answer to sub-paragraph 21.3, that the street lines could not come into contact with each other ("clash") or arc with each other under foreseeable local conditions, but admits that that could occur if significant external force were applied to the street lines including by a falling tree coming into contact with the street lines;
- e. says, in further answer to sub-paragraph 21.3, that arcing between the street lines and a tree or branch was not likely to occur because of the poor conductivity of dry wood and the low voltage of the power lines;
- f. says, in answer to sub-paragraph 21.4, that the emission of sparks would only be a possibility in the event of an external physical event causing either

severance or clashing, which were themselves unlikely events, or some other extraordinary event;

- g.** admits sub-paragraph 21.5;
- h.** says, in answer to sub-paragraph 21.6, that in the event of severance of a service cable from the pole of the kind which occurred at pole JU 267 on 17 October 2013, the service cable would have immediately become disconnected from the First Defendant's network and ceased to conduct electricity from the First Defendant's network;
- i.** says, in further answer to sub-paragraph 21.6, that no other component of the power lines (as defined) broke or fell to the ground at or near pole JU 267 on 17 October 2013 such that no risk of the kind alleged materialised on that day;
- j.** says, in further answer to sub-paragraph 21.6, that the First Defendant's protection systems were such that an earth fault would be created if a power line broke and fell to the ground provided the fallen components remained connected to the First Defendant's active (live) electrical components. The protection systems were designed to result in a discontinuation of electricity supply in that event, without being guaranteed to produce that result in all circumstances due to variable conditions such as the resistance of the earth in the area in question, the amount of voltage, environmental conditions and the like;
- k.** says, in answer to sub-paragraph 21.7, that sparks of sufficient energy are capable of igniting flammable material;
- l.** says, in further answer to sub-paragraph 21.7, that the risk of there being heat or electrical discharge from a fallen service cable which had been disconnected from the First Defendant's electricity supply by becoming severed from the pole would be minimal, and that even if such heat or electrical discharge existed it would be unlikely to be capable of igniting dry vegetation;
- m.** says, in answer to sub-paragraph 21.8, that wet conditions create better conductivity between electricity supply and inanimate objects than do dry conditions, but admits that dry, hot and windy conditions are more conducive to fire if there is a source of ignition;

- n. says, in answer to sub-paragraph 21.9, that high winds are more likely to cause a tree to **fall** or shed branches than calm conditions; and
- o. otherwise does not admit the paragraph.

22 As to paragraph 22, the First Defendant:

- a. admits that it knew of the matters pleaded in paragraphs 20 and 21 above;
- b. otherwise does not admit the paragraph.

23 The First Defendant admits paragraph 23.

24 The First Defendant admits paragraph 24.

24A In relation to paragraph 24A, the First Defendant:

- a. In response to subparagraph 24A.2
 - i. says that it identified its Mains Design and Maintenance Instructions as "Preventative Safeguards" in relation to the hazardous events "Fallen Conductors" and "Arcing Mains";
 - ii. says that its "Preventative Safeguards" were intended to manage the risk of the hazardous events occurring to as low as reasonably practicable; and
 - iii. otherwise does not admit the subparagraph.

Particulars

Board Policy 2.0.5 'Risk Management'¹ at paragraph 1.0

- b. admits subparagraph 24A.3, save that it says it also identified Company Policy 9.9.1 'Network Asset Maintenance' as a Primary Document in its Network Management Plan, which provides for the First Defendant's maintenance regime to manage risks such that network asset performance and service life is consistent with industry standards and defined business objectives; and
- c. relies on the terms of the Network Management Plan for their full force and effect.

24B The First Defendant admits paragraph 24B.

24C In relation to paragraph 24C, the First Defendant says that:

- a. subject to subparagraph (b) below, MMI 0013 contained requirements to the effect set out in paragraphs 24C.1 to 24C.4 of the Second Third Further Amended Statement of Claim;
- b. in relation to subparagraph 24C.2.1, the relevant requirement was to identify and remove all dead, dying, dangerous and visually damaged vegetation (including limbs or trees) that resided within or above the designated minimum safety or trimming clearance set in MMI 0013
- c. it will rely on the terms of the Network Management Plan and the Primary Documentation (as defined) for their full force and effect; and
- d. otherwise does not admit the paragraph.

24D In relation to paragraph 24D, the First Defendant:

- a. admits that the Network Management Plan and the Primary Documentation (as defined) contained requirements to conduct an annual **Pre-Summer Bushfire Inspection (PSBI)** in all designated bushfire prone areas;
- b. says that the Network Management Plan and the Primary Documentation (as defined) required network assets covered by MMI 0013 to be regularly inspected at least annually (or otherwise in accordance with the contract with any contractor engaged to undertake inspections of vegetation in proximity to its network assets);
- c. will rely on the terms the Network Management Plan and the Primary Documentation (as defined) for their **full** force and effect; and
- d. otherwise does not admit the paragraph.

24E The First Defendant admits paragraph 24E.

24F In relation to paragraph 24F, the First Defendant:

- a. says that the general purpose of vegetation management was to:
 - i. reduce potential risk to public safety;

- ii. prevent damage or interference with the First Defendant's overhead network (including during adverse weather conditions);
 - iii. reduce the number of electricity supply interruptions caused by vegetation;
 - iv. establish and maintain access for asset maintenance purposes;
 - v. minimise the risk of fires caused by contact between vegetation and overhead power lines; and
 - vi. reduce damage caused to overhead network assets by bushfires.
- b. otherwise does not admit the paragraph

24G In relation to paragraph 24G, the First Defendant:

- a. repeats paragraphs 24C to 24E above; and
- b. otherwise does not admit the paragraph.

24H The First Defendant does not admit paragraph 24H.

24I The First Defendant does not admit paragraph 24I.

25 The First Defendant admits paragraph 25,

25A In relation to paragraph 25A, the First Defendant:

- a. says that pursuant to the Asplundh Contract (as defined), Asplundh was required to (among other things):
 - i. undertake a maintenance program to maintain vegetation in its contract areas to a distance outside the Minimum Safety Clearances set out in MMI 0013 at all times, pursuant to clauses D2.3(a) and D2.12;
 - ii. provide a continuous cyclic program of inspection in its contract areas on a three month basis to identify vegetation that had grown within the Minimum Safety Clearance and rectify this defect by trimming the vegetation to at least the Minimum Trimming Clearance set out in MMI 0013 pursuant clause D2.3(c);

- iii. identify and trim/remove dead, dying, dangerous and visually damaged trees or limbs pursuant to D2.3(e), D6.2 and D12.2;
- iv. inspect Bushfire Prone Areas pursuant to clause D2.12 to identify any vegetation that was within, or that could grow into, the Minimum Safety Clearance within the designated bushfire period and trim that vegetation to the Minimum Trimming Clearance for bushfire prone areas; and
- v. carry out discretionary works allocated to it pursuant to clause D12;

b. does not admit the balance of the paragraph and relies on the terms of the Asplundh Contract for their full force and effect.

25B The First Defendant admits paragraph 25B.

~~and refers to and repeats subparagraph 25C(b) below.~~

25C ~~In relation to~~ The First Defendant admits paragraph 25C.

~~a. says that pursuant to the ATS Contract 2008 (as defined), ATS was required to (among other things):~~

~~i. undertake a maintenance program to maintain vegetation in its contract areas to a distance outside the Minimum Safety Clearances set out in MMI 0013 at all times, pursuant to clauses D2.3(a) and **D2.12;**~~

~~ii. provide a continuous cyclic program of inspection in its contract areas on a three month basis to identify vegetation that had grown within the Minimum Safety Clearance and rectify this defect by trimming the vegetation to at least the Minimum Trimming Clearance set out in MMI 0013 pursuant clause D2.3(c);~~

~~iii. identify and trim/remove dead, dying, dangerous and visually damaged trees or limbs pursuant to clause D6.2;~~

~~iv. inspect Bushfire Prone Areas pursuant to clause ~~D2.12~~ to identify any vegetation that was within, or that could grow into, the Minimum Safety Clearance within the designated bushfire period and trim that vegetation to the Minimum Trimming Clearance for bushfire prone areas;~~

~~v. carry out discretionary works allocated to it pursuant to clause D12;~~

~~fer — denies that the ATS Contract 2008 (as defined) had any operation in relation to Linksview Road, Springwood because the contract areas to which the ATS Contract 2008 applied did not include the Penrith contract area in which Linksview Road, Springwood is contained; and~~

~~e. — does not admit the balance of the paragraph and relies on the terms of the ATS Contract 2008 (as defined) for their full force and effect.~~

25D In relation to paragraph 25D, the First Defendant admits that it entered into the ATS Contract 2013 (as defined), save that it says ATS (as defined) executed the ATS Contract 2013 on or about 12 May 2013 and the First Defendant executed the ATS Contract 2013 on or about 22 May 2013.

Particulars

Master Supply Agreement for the Supply of Goods and Services and the Supply Schedule No. 6383/12C under that Master Supply Agreement effective 16 May 2013

25E In relation to paragraph 25E, the First Defendant:

- a. says that pursuant to the ATS Contract 2013 (as particularised above), ATS was required to (among other things):
 - i. Scope certain contract areas (including Linksview Road, Springwood) for vegetation in proximity to the First Defendant's network assets to identify and record Vegetation Defects for rectification by the First Defendant's Delivery Contractor, as set out in clause 1;
 - ii. identify and record the following types of Vegetation Defects pursuant to clause 7.2.1:
 1. vegetation/trees that had grown within the clearances to be maintained between network assets and vegetation set out in MMI 0013; and
 2. dead, dying, dangerous and visually damaged vegetation/trees within the clearances to be maintained between network assets and vegetation set out in MMI 0013;

- iii. identify and record dead, dying, dangerous and visually damaged vegetation/trees outside the clearances to be maintained between network assets and vegetation set out in MMI 0013 pursuant to clauses 7.2.1(h) and 8.5.1;
- iv. carry out discretionary works allocated to it pursuant to clause 7.4;

Particulars

The clauses referred to above are those contained in Annexure B: Technical Specification - Scoping to the Supply Schedule No. 6383/12C of the ATS Contract 2013.

- b. relies on the terms of the ATS Contract 2013 (as defined) for their full force and effect;
- c. otherwise denies the paragraph.

25F The First Defendant admits paragraph 25F.

25G The First Defendant admits paragraph 25G and relies on the terms of the Osborne Contract (as defined) for their full force and effect, save that it:

- a. says that Osborne was required to comply with policies issued by the First Defendant and provided to Osborne, including MMI 0001 and MMI 0013; and
for relies on the terms of the Osborne Contract (as defined) for their full force and effect.

26 In relation to paragraph 26, the First Defendant:

repeats paragraph 25C(b) above;

- a. does not admit that Asplundh undertook the 2011 Inspections (as defined) as the agent of the First Defendant;
- b. in relation to sub-paragraph 26.1, says that:
 - i. in or about March 2011 Asplundh inspected trees and vegetation adjacent to pole JU267 in Linksvie Road, Springwood; and

- ii. it does not know and cannot say whether Asplundh inspected the Tree (as defined);
- c. in relation to sub-paragraph 26.2, admits that Asplundh identified that a tree encroached within the minimum clearance space set out in MMI 0013 to the service cables to 108 and/or 110 Linksvie Road, Springwood but does not know and cannot admit whether that tree was the Tree as defined;
- d. in relation to sub-paragraph 26.4, admits that Asplundh issued Customer Vegetation Report No. 83088 to the occupants of the property at 110 Linksvie Road requiring them to trim foliage near the service lines between the premises and power pole JU 267;
- e. in relation to subparagraph 26.5, admits that Asplundh did not identify the Tree as a Hazardous Tree (as defined);
- f. does not know and cannot admit subparagraph 26.6; and
- g. otherwise does not admit the paragraph.

27 As to paragraph 27, the First Defendant:

- a. does not admit that Asplundh undertook the early 2012 Inspections (as defined) as the agent of the First Defendant;
- a. says in relation to sub-paragraph 27.1 that:
 - i. in or about January and February 2012 Asplundh inspected trees and vegetation adjacent to pole JU267 in Linksvie Road, Springwood;
 - ii. it does not know and cannot say whether Asplundh inspected the Tree (as defined);
- b. admits sub-paragraph 27.3;
- c. does not know and cannot admit subparagraph 27.4; and
- d. otherwise does not admit the paragraph.

27A As to paragraph 27A, the First Defendant.

- a. does not admit that Heli-Aust undertook the Heli-Aust Inspections (as defined) as the agent of the First Defendant;

- b. admits sub-paragraphs 27A.1, 27A.2 and 27A.3 save that it does not know and cannot say whether Heli-Aust inspected the Tree (as defined): and
- c. does not know and cannot admit sub-paragraph 27A.4; and
- d. otherwise does not admit the paragraph,

28 As to paragraph 28, the First Defendant:

- a. does not admit that ATS undertook the July 2013 Inspections (as defined) as the agent of the First Defendant;
- b. admits that on or about 9 July 2013, ATS, pursuant to the ATS Contract, inspected trees and vegetation adjacent to pole JU 267 on Linksvie Road, Springwood;
- c. does not know and cannot say whether ATS inspected the Tree (as defined);
- d. admits that ATS identified that a tree encroached within the minimum clearance space set out in MMI 0013 to the service cables to 108 and/or 110 Linksvie Road, Springwood but does not know and cannot admit whether that tree was the Tree as defined;
- e. admits that ATS (as defined) issued Customer Vegetation Reports to the occupants of properties at 108 and 110 Linksvie Road requiring them to trim foliage near the service lines between the premises and power pole JU 267;
- f. admits that ATS (as defined) did not identify the Tree (as defined) as a Hazardous Tree (as defined); and
- g. does not know and cannot admit whether ATS took any other action in relation to the Tree; and
- h. otherwise does not admit the paragraph.

29 As to paragraph 29, the First Defendant:

- a. does not admit that Osborne undertook the Osborne Inspections (as defined) as the agent of the First Defendant;

- b. admits sub-paragraphs 29.1, 29.2 and 29.3 save that it does not know and cannot say whether Osborne inspected the Tree (as defined); ~~and~~
- c. does not know and cannot admit sub-paragraph 29.4; and
- d. otherwise does not admit the paragraph.

30 As to paragraph 30, the First Defendant:

- a. denies paragraph 30;
- b. further refers to paragraphs 30A and 31 below.

30A The First Defendant denies paragraph 30A.

31 As to paragraph 31, the First Defendant:

- a. refers to and repeats paragraphs 8 to 30A, ~~9, 17, 30 and 30A~~ above;
- b. in answer to paragraphs ~~31.2 and 31.3~~, says that it could not have owed any duty which had the effect of requiring it, acting reasonably, to ensure the removal or trimming of the Tree on the basis that it was a Hazardous Tree (as defined) for the following reasons:
 - i. a duty to remove or trim Hazardous Trees would require the First Defendant to assess the state of health and the degree of danger posed by any tree whose height is greater than the distance from the base of the tree to overhead electricity lines, irrespective of whether the tree is located on private property or public land, and irrespective of whether the tree appears healthy or safe on a visual inspection undertaken without entering private land;
 - ii. says further that any such duty must extend to the identification, removal, trimming and making safe of Hazardous Trees (as defined) across approximately 28,000 kilometres of overhead electricity lines and approximately 25,000 square kilometres of the First Defendant's network area; and
- c. otherwise denies the paragraph.

31A1 The First Defendant denies paragraph 31A1.

31A Paragraph 31A of the Second ~~Third~~ Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

31B Paragraph 31B of the ~~Second~~ Third Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

31C Paragraph 31C of the Second ~~Third~~ Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

31D Paragraph 31D of the Third Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

~~In relation to paragraph 31D, the First Defendant:~~

- ~~a. refers to and repeats paragraphs 17, 29, 30 and 30A above; and~~
- ~~b. denies paragraph 31D.~~

32 As to paragraph 32, the First Defendant:

- a. repeats paragraphs ~~8 20~~ to 31A1 above; and
- b. otherwise denies the paragraph.

~~-admits that it did not insulate the low-voltage conductors on the power line beyond pole 486903;~~

32A As to paragraph 32A, the First Defendant:

- a. had in place, at all material times, a process by which Hazard Trees (as defined) could be identified to it, including:
 - i. by Asplundh, Heli Aust, Osborne and ATS;
 - ii. by its Tree Management Officers.

Particulars

The First Defendant relies on Division Workplace Instruction WNV 1047: "Vegetation Discretionary Works Process".

- b. says that Asplundh, Heli Aust, Osborne and/or ATS had the skills and expertise to provide the services the subject of the Heli-Aust Contract, the ATS Contract 2013, Osborne Contract and the Asplundh Contract;
- c. says that Asplundh, Heli-Aust, Osborne and/or ATS represented and warranted to the First Defendant that they had the skills and expertise to provide the services the subject of the Heli-Aust Contract, the ATS Contract 2013, Osborne Contract and the Asplundh Contract;

Particulars

Heli-Aust Response to Request for Tender 1515/11T- Part C: Compliance to Specification.

Heli-Aust Contract (as defined), Clause 6.2(a).

Osborne Response to Request for Tender 6332/12T- Part C: Compliance to Specification.

Osborne Contract (as defined) Clause 6.2(a).

Asplundh response to the Request for Tender 957/07T

2008 Asplundh Contract (as defined), Clause 3.3 of Part (Services Agreement)

ATS Response to Request for Tender 6383/12T- Part C: Compliance to Specification.

Master Supply Agreement of the ATS Contract 2013 (as defined) Clause 7.5(b).

- d. says that the employees of the First Defendant that audited the services the subject of the Asplundh Contract, Heli-Aust Contract and Osborne Contract had appropriate skills and expertise;

e. says that the employees of the First Defendant that it appointed to inspect for trees outside minimum clearance distances which presented a serious risk to overhead power lines had appropriate skill and expertise;

f. repeats paragraphs 8 to 32 above; and

g. denies the balance of the paragraph.

32B As to paragraph 32B, the First Defendant:

a. repeats paragraph 32A above;

b. repeats paragraph 33 below; and

c. denies the balance of the paragraph.

33 As to paragraph 33, the First Defendant:

a. repeats paragraph 32A above;

b. says that if (which is denied) it owed the duties as alleged in the Third Further Amended Statement of Claim, it discharged those duties by:

i. engaging Asplundh to provide the services (amongst others) in paragraph 25A above, together with services pursuant to a Master Supply Agreement for the Supply of Goods and Services and Supply Schedule 6383/12B for the period 1 July 2013 to 31 May 2016;

ii. engaging Heli-Aust to provide the services (amongst others) in paragraph 25B above;

iii. engaging ATS to provide the services (amongst others) in paragraph 25E above;

iv. engaging Osborne to provide the services (amongst others) in paragraph 25G of the Third Further Amended Statement of Claim;

v. undertaking annual pre-summer bushfire inspections of bushfire prone areas (including Linksvie Road, Springwood) in advance of the 2008, 2009, 2010 and 2011 bushfire seasons;

Particulars

The First Defendant relies on the affidavit of Barry James Lowe sworn 23 March 2015, paragraphs 32 to 52.

Pre-summer bushfire inspections of map U55675 (on which 108 and 110 Linksview Road, Springwood, are located) occurred on or about 5 August 2009, 28 September 2010 and 31 May 2011.

- vi. appointing Tree Management Officers, being persons with at least ten years' experience as a linesman and provided with training in visual tree assessment, who inspect for trees that are outside minimum clearance distances and presented a serious risk to overhead power lines.

Particulars

The First Defendant relies on the affidavit of Ty Christopher affirmed 25 November 2015, paragraphs 69 - 75 as well as the affidavit of Anthony Boys affirmed 19 November 2015, paragraphs 22, 51 and 55.

- vii. undertaking a program of overhead line inspection and below ground line inspection every 4.5 years (OLI/GLI Program) in all parts of its franchise area (including Linksview Road, Springwood) to ensure compliance with the provisions of Mains Maintenance Instruction MMI 0001: Routine above and below ground pole and line inspection and treatment procedures.

Particulars

The First Defendant relies on the affidavit of Barry James Lowe sworn 23 March 2015, paragraphs 7 to 31.

An OLI/GLI inspection of map U55675 was undertaken in or about August 2009.

- viii. auditing the work undertaken by Asplundh in accordance with Division Workplace Instructions WNV0804 and WNV1046;

Particulars

The First Defendant relies on the affidavit of George Popovski affirmed 23 March 2015, paragraphs 20 to 28.

- ix. auditing the work undertaken by Heli-Aust;

Particulars

The First Defendant relies on the affidavit of Ty Christopher affirmed 25 November 2015, paragraphs 125- 127


- x. auditing the work undertaken by ATS in accordance with Division Workplace Instruction WNV1046;

Particulars

The First Defendant relies on the affidavit of George Popovski affirmed 23 March 2015, paragraph 21.

- xi. auditing the work undertaken by Osborne;

Particulars

The First Defendant relies on the affidavit of Ty Christopher affirmed 25 November 2015, paragraphs 125 - 127. 

- c. says that it complied with its own general procedures and applicable industry standards with regard to the maintenance of clearance distances between the conductors and the Tree near pole JU 267 and in that regard relies on the following:
- i. its general procedures and applicable industry standards required the maintenance of a clearance distance of 1.5 metres between vegetation and street lines;

Particulars

The First Defendant relies on Mains Maintenance Instruction MMI0013: "Clearances to be maintained between network assets and vegetation" and ISSC 3.

- ii. at all material times there was a 1.5 metre clearance between the Tree and the street lines:

- d. says further that it complied with its own general procedures and applicable standards with regard to the removal of Hazardous Trees (as defined) at pole JU 267 and in that regard relies on the following:
 - i. its general procedures required it to remove all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances and/or that are situated above a line projected at 45° from the vertical from the lowest conductor design height:

Particulars

The First Defendant relies on Mains Maintenance Instruction MMI0013: "Clearances to be maintained between network assets and vegetation".

- ii, the Tree was not dead, dying, dangerous or visually damaged within the meaning of that expression in MMI 0013 because for practical purposes the condition of the Tree was not detectable;

~~tho-Tree-was-neither-dead, dying, dangerous nor-visually-damaged-at all-or-in-any-material-respect~~

- iii. its general procedures required it to remove hazard trees, being trees outside the minimum trimming clearances, that could come into contact with an electric power line having regard to foreseeable local conditions:

Particulars

The First Defendant relies on Mains Maintenance Instruction MMI 0013: "Clearances to be maintained between network assets and vegetation".

- iv. the Tree was not different in appearance to a healthy and structurally sound tree of the same species such that it could reasonably be detected as being one that could come into contact with an electric power line having regard to foreseeable local conditions;

~~the Tree was not one that could come into contact with an electric power line having regard to foreseeable local conditions~~

- e. says that it is a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW) and relies on section 43A of the *Civil Liability Act 2002* (NSW) and says that it is not liable for any breach of the alleged Endeavour Duty on the ground that in the circumstances the First Defendant's conduct, in allegedly failing to exercise any special statutory power available to it, including the power conferred by s 48 of the *Electricity Supply Act 1995* (NSW), to trim or remove the Tree was not so unreasonable that no authority having that statutory power could properly consider the conduct a reasonable exercise of the power: and
- f. denies the balance of the paragraph.

33A1 As to paragraph 33A1, the First Defendant:

- a. repeats paragraph 32A above;
- b. does not admit the balance of the paragraph.

33A2. As to paragraph 33A2, the First Defendant:

- a. repeats paragraph 32A above;
- b. denies the balance of the paragraph.

33A3. As to paragraph 33A3, the First Defendant:

- a. repeats paragraph 30 above;
- b. denies the balance of the paragraph.

33A4 Paragraph 33A4 of the Third Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

33A5 Paragraph 33A5 of the Third Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

As to paragraph 33, the First Defendant:

- g. ~~— refers to and repeats paragraphs 8, 17, 30, 30A, 31 and 32(a) and (b) above;~~
- fe ~~— denies the~~ paragraph;
- h. ~~— if (which is denied) it owed the duties as alleged in the Second Further Amended Statement of Claim, it discharged those duties by:~~
 - i. ~~— engaging ATS to inspect vegetation in Linksvier Road, Springwood, to identify any vegetation within the clearancos prescribed by MMI 0013; and~~
 - ii. ~~— engaging Osborne Aviation Services Pty Ltd to undertake a pre-summer bushfire inspection in Linksvier Road, Springwood to identify any defect that could lead to a bushfire.~~
- j. ~~— engaging Asplundh pursuant to the Asplundh Contract to undertake the steps in paragraph 25A above;~~
- k. ~~— engaging Asplundh as the 'Delivery Contractor' referred to in paragraph 25E(a)(i) above to undertake the steps in paragraph 25A above pursuant to a Master Supply Agreement for the Supply of Goods and Services and Supply Schedule 6383/12B for the period 1 July 2013 to 31 May 2016 (2013 Asplundh Contract);~~
- l. ~~— auditing the vegetation maintenance work undertaken by Asplundh in accordance with Division Workplace Instruction WNW1046;~~

Particulars

The First Defendant relies on the affidavit of George Popovski affirmed 23 March 2015, paragraphs 20 to 28.

- ~~m. engaging ATS pursuant to the ATS Contract 2013 to undertake the steps in paragraph 25E above; and~~
- ~~n. undertaking annual pre-summer bushfire inspections of bushfire-prone areas (including Linksview Road, Springwood) in advance of the 2008, 2009, 2010 and 2011 bushfire seasons;~~

Particulars

The First Defendant relies on the affidavit of Barry James Lowe sworn 23 March 2015, paragraphs 32 to 52.

Pre-summer bushfire inspections of map U55675 (on which 108 and 110 Linksview Road, Springwood, are located) occurred on or about 5 August 2009, 28 September 2010 and 31 May 2011.

- ~~o. engaging Heli Aust Pty Ltd to undertake a pre-summer bushfire inspection in Linksview Road, Springwood in advance of the 2012 Bushfire Season pursuant to Services Agreement 1515/11C for the Provision of PSBI Video Review and Ground Line Inspection Services between Endeavour Energy (which inspection occurred on or about 31 August 2012);~~
- ~~p. engaging Osborne Aviation Services Pty Ltd to undertake a pre-summer bushfire inspection in Linksview Road, Springwood to identify any defect that could lead to a bushfire in advance of the 2013 Bushfire Season pursuant to the Osborne Contract (as defined and pleaded further from paragraph 50 below) (which inspection occurred on or about 30 July 2013); and~~
- ~~q. undertaking a program of overhead line inspection and below ground line inspection every 4.5 years (OLI/GLI Program) in all parts of its franchise area (including Linksview Road, Springwood) to ensure compliance with the provisions of Mains Maintenance Instruction MMI-0004: Routine above and below ground pole and line inspection and treatment procedures;~~

Particulars

~~The First Defendant relies on the affidavit of Barry James Lowe sworn 23 March 2015, paragraphs 7 to 31.~~

~~An OLI/GLI inspection of map U55675 was undertaken in or about August 2009.~~

~~It~~ says further that it complied with its own general procedures and applicable industry standards with regard to the maintenance of clearance distances between service cables and vegetation at pole JU-267 and in that regard relies on the following:

- i. ~~its general procedures and applicable industry standards required the maintenance of a clearance distance of 500 millimetres between vegetation and service cables, and required that where any vegetation came within these clearances, the defect be notified to customers;~~

Particulars

~~The First Defendant relies on Mains Maintenance Instruction MMI-0013: "Clearances to be maintained between network assets and vegetation" and ISSC-3.~~

- ii. ~~on 9 July 2013, ATS, a contractor engaged by the First Defendant for the purpose of implementing the First Defendant's general procedures and applicable standards, identified that foliage on the properties at 108 and 110 Linksview Road had encroached within 500 millimetres of the service cables;~~
- iii. ~~ATS issued notices to the residents of 108 and 110 Linksview Road on 9 July 2013 which required the trimming of foliage so that it no longer encroached within 500 millimetres of the service cables;~~
- iv. ~~pursuant to the First Defendant's general procedures and applicable standards, it was the responsibility of the residents of 108 and 110 Linksview Road to ensure that the foliage was trimmed so that it no longer encroached within 500 millimetres of the service cables;~~

Particulars

~~“The Defendant relies on Mains Maintenance Instruction
MMI0021: “Guide to rights and obligations for electricity mains
located on private property.”~~

~~4. says further that it complied with its own general procedures and applicable industry standards with regard to the maintenance of clearance distances between the conductors and the tree near pole JU-267 and in that regard relies on the following:~~

- ~~i. its general procedures and applicable industry standards required the maintenance of a clearance distance of 1.5 metres between vegetation and street lines;~~

Particulars

~~“The First Defendant relies on Mains Maintenance Instruction
MMI0013: “Clearances to be maintained between network
assets and vegetation” and ISSC-3.~~

- ~~ii. at all material times there was a 1.5 metre clearance between the Tree and the street lines;~~

~~4. says further that it complied with its own general procedures and applicable standards with regard to the removal of hazard trees Hazardous Trees (as defined) at pole JU-267 and in that regard relies on the following:~~

- ~~i. its general procedures required it to remove all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances;~~

Particulars

~~The First Defendant relies on Mains Maintenance Instruction MMI0013: "Clearances to be maintained between network assets and vegetation".~~

~~ii. the tree was neither dead, dying, dangerous nor visually damaged at all or in any material respect;~~

~~iii. its general procedures required it to remove hazard trees, being trees outside the minimum trimming clearances, that could come into contact with an electric power line having regard to foreseeable local conditions;~~

Particulars

~~The First Defendant relies on Mains Maintenance Instruction MMI 0013: "Clearances to be maintained between network assets and vegetation".~~

~~iv. the tree was not one that could come into contact with an electric power line having regard to foreseeable local conditions.~~

~~u. — says that it is a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW) and:~~

~~i. relies on section 43 of the *Civil Liability Act 2002* (NSW) and says that the conduct of the First Defendant in not taking steps (other than those referred to at paragraph 33 above) to trim or remove the tree, does not constitute a breach of the alleged Endeavour Duty (as defined and which are in any event denied) on the ground that that conduct was not, in the circumstances so unreasonable that no authority having the functions of the First Defendant could properly consider the conduct to be a reasonable exercise of its functions; and~~

~~ii. relies on section 43A of the *Civil Liability Act 2002* (NSW) and says that it is not liable for any breach of the alleged Endeavour Duty on the ground that in the circumstances the First Defendant's conduct, in allegedly failing to exercise any special statutory power available to it, including the power conferred by s 48 of the *Electricity Supply Act*~~

~~1995 (NSW); to trim or remove the Tree was not so unreasonable that no authority having that statutory power could properly consider the conduct a reasonable exercise of the power.~~

33A Paragraph 33A of the Second Third Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

34 As to paragraph 34, the First Defendant:

- a. admits that the environmental conditions were dry but does not know and cannot admit the dryness or otherwise of all of the vegetation in and adjacent to Linksvie Road;
- b. admits that there was low humidity in local atmospheric conditions,
- c. admits that there was a high ambient temperature; and
- d. admits that there were strong winds blowing.

35 In response to paragraph 35, the First Defendant refers to and repeats paragraph 34 of this Defence and otherwise admits the paragraph.

36 As to paragraph 36, the First Defendant:

- a. admits sub-paragraph 36.1; ~~other than the description of the Tree as hazardous;~~
- b. admits there was a fire in the Springwood and Winmalee areas from 17 October 2013; and at the time of pleading does not know and cannot admit sub-paragraphs ~~36.2, 36.4, 36.5 or 36.6~~ in circumstances where it does not have available to it at the time of pleading any of the following: ~~the service cables to 408 Linksvie Road; the street lines in the vicinity of where the Tree fell onto them; the fuses from the sub-station associated with Linksvie Road; the Tree; or any physical evidence from the area under or around the points at which the Tree impacted the street lines and where the service cable impacted the ground~~
- c. does not admit the balance of the paragraph, know and cannot admit the time at which the events alleged in paragraphs 36.1 to 36.6 occurred but admits that, ~~if and to the extent they did occur, they occurred on 17 October 2013;~~

d. ~~says further that to the best of the First Defendant's knowledge:~~

- i. ~~the point where the service cable to premises at 108 Linksvie Road, Springwood, fell onto the ground was a gravel driveway, and there was no evidence of fire on that driveway or among the vegetation immediately proximate to it;~~
- ii. ~~there was no evidence of fire on the conductors on the power line at or about the point where the Tree fell onto them, or among the vegetation beneath those conductors; and~~
- iii. ~~there was no evidence of fire or burning on the Tree.~~

37 As to paragraph 37, ~~t~~The First Defendant denies paragraph 37,

- a. ~~denies the paragraph 37; and~~
- b. ~~says further that if the fire was caused by the events alleged in paragraph 36, which is denied (including the allegation that the Tree was a hazardous tree) trimming the Tree would not have averted the fire as the Tree would have fallen onto and remained upon the conductors even if it had been trimmed.~~

38 In relation to paragraph 38, the First Defendant:

- a. repeats paragraphs 36 and 37 above; and
- b. otherwise does not admit the paragraph.

39 The First Defendant denies paragraph 39.

40 The First Defendant denies paragraph 40.

41 The First Defendant repeats paragraph 4 above but otherwise admits paragraph 41.

42 As to paragraph 42, the First Defendant:

- a. repeats paragraph 13 above;
- b. admits that it was aware that fire could have adverse consequences including to owners or occupiers of property in the fire affected area; and
- c. otherwise does not admit the paragraph.

- 43 The First Defendant denies paragraph 43.
- 44 The First Defendant denies paragraph 44.
- 45 As to paragraph 45, the First Defendant:
- a. admits that the fire had adverse consequences for a large number of owners or occupiers of property in the fire affected areas; and
 - b. otherwise does not admit the paragraph.
- 46 As to paragraph 46, the First Defendant:
- a. denies paragraph; and
 - b. says further that it is not liable for any nuisance as alleged by reason of the fact that its conduct in transmitting electric current along the power line on 17 October 2013 was carried out:
 - i. in the exercise of the functions conferred on it by section 9 of the *Energy Services Corporation Act 1995* (NSW); and
 - ii. pursuant to the authority conferred on it by a distribution network service provider's licence granted under section 14 of the *Electricity Supply Act 1995* (NSW);
 - c. relies on sections 43 and 43A of the *Civil Liability Act 2002* (NSW) and in that regard repeats paragraphs 33(d) and (e) above.
- 47 The First Defendant denies paragraph 47.
- 48 As to paragraph 48, the First Defendant:
- a. admits sub-paragraph 48.1;
 - b. says that the questions as to whether it owed and breached the alleged duties are not necessarily common to the Plaintiff and all group members because the circumstances in which a duty may be recognised and the content of any duty which is recognised vary in part according to the nature of the loss claimed; and
 - c. says that it does not know and cannot admit what the Plaintiff intends by the allegation in paragraph 48.56 and therefore does not admit that paragraph.

49 If, contrary to the forgoing denial, the First Defendant is liable to the Plaintiff or group members as alleged in the ~~Second~~ Third Further Amended Statement of Claim, then for the purpose of pleading a proportionate liability defence only, the First Defendant makes the following allegations.

50 On or about 28 April 2013, Osborne Aviation Services Pty Ltd (Osborne) entered into a contract with the First Defendant to undertake a pre-summer bushfire inspection program (PSBI Program) (**Osborne Contract**).

Particulars

The terms and conditions of the Osborne Contract are wholly in writing and contained in 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 the Defendant on 29 April 2013

51 The purpose of the PSBI Program was to identify and rectify any defects that could lead to a bushfire within the PSBI Bushfire Map area.

Particulars

Osborne Contract, Schedule 2, Sections 3.0 and 4.0

52 The Osborne Contract provided that the PSBI Bushfire Map area is an area defined by the Rural Fire Service and encompassing certain specified areas, including the Penrith area.

Particulars

Osborne Contract, Schedule 2, Section 4.0

53 The Osborne Contract required that all inspections, along with the issuing of defect notifications, are completed no later than last week of July each year.

Particulars

Osborne Contract, Schedule 2, Section 3.0

54 Pursuant to the Osborne Contract, Osborne was required, inter alia, to conduct ground line patrols in areas where helicopter patrols cannot be performed (such as no-fly zones, urban areas, stock sensitive areas and general aviation no fly zones,

and areas where the vegetation canopy prevents image capture of assets) so as to, inter alia:

- a. identify, classify, prioritise, photograph, record and report defects on both the First Defendant's and private poles and lines which could lead to the ignition of a bushfire;
- b. issue PSBI Defect Report of Inspections notices to private customers detailing private line defects identified;
- c. notify the First Defendant of defects on the First Defendant's network and any privately owned network (a "defect" being defined as a condition that requires rectification work);
- d. liaise with the defendant and private customers to arrange ground line inspections of private poles and lines where access is not available of the initial time of inspection.

Particulars

Osborne Contract, Schedule 2, Section 5.4

- 55 Pursuant to the Osborne Contract, examples of defects which may cause bushfires were stipulated to include an insufficient clearance between mains and trees including hazardous trees outside the clearance zone.

Particulars

Osborne Contract, Schedule 2, Section 7.0

- 56 Pursuant to the Osborne Contract, Osborne was required to comply with policies issued by the First Defendant and made available to Osborne from time to time.

Particulars

Osborne Contract, Schedule 2, Section 17.0

- 57 Pursuant to the Osborne Contract, the policies issued by the First Defendant and made available to Osborne included Mains Maintenance Instruction MM10001 (**MMI0001**) and Mains Maintenance Instruction MMI0013 (**MMI0013**);

Particulars

Osborne Contract, Schedule 2, Section 14.0.

- 58 At all material times, Osborne owed to the Plaintiff and group members a duty to take reasonable care in carrying out the PSBI Program pursuant to the Osborne Contract.

Particulars

The First Defendant refers to and repeats paragraphs 14 to 16 of the Second Third Further Amended Statement of Claim and says that:

- (i) the risks alleged in paragraph 14 were reasonably foreseeable to Osborne; and
- (ii) if and to the extent that the members of the Springwood/Winmalee Class were dependent, for the protection of their persons and property, upon the First Defendant in ensuring that the power line was safe and operated safely in the operating conditions applying to it from time to time as alleged in paragraph 15.3.3 of the Second Third Further Amended Statement of Claim, they were likewise dependent on Osborne because Osborne was the entity engaged by the First Defendant to undertake the PSBI Program so as to identify and rectify any defects that could lead to a bushfire occurring within the Penrith area.

- 59 At all material times, MMI0001 stipulated, inter alia, that:
- a. minimum tree clearances of all mains, including aerial service mains, must be inspected in accordance with those specified in MMI0013;
 - b. particular attention must be given to the likelihood of vegetation outside the clearance zone that may be dead or dying and at a height that, if failure occurred, impact to the overhead mains would result. Vegetation in this condition was required to be reported for removal;

- c. the general purpose of the pre-summer patrol is to identify any factors associated with the overhead mains that could lead to the initiation of a bushfire. These may include inadequate tree clearances, impact damage, lightning damage, or any other defect;
- d. examples of defects that may cause bushfires included insufficient clearance between mains and trees including hazardous trees outside the clearance zone.

60 At all material times, MMI0013 required that, inter alia:

- a. all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances, shall be removed;
- b. hazard trees (being trees outside the minimum trimming clearances, including the allowance the bushfire prone areas, that could come into contact with power lines having regard to foreseeable local conditions) shall be removed.

61 The power line in Linksvie Road, Springfield is part of an urban area.

62 In or about 30 July 2013, Osborne carried out a ground line inspection of trees and vegetation adjacent to pole JU 267 on the power line as part of the PSBI Program.

63 In the course of the said inspection, the tree should have been identified by Osborne as a tree requiring removal or trimming in accordance with:

- a. the contractual obligations identified in paragraphs 54 to 56 above; and
- b. the provisions of MMI0001 and MMI0013.

Particulars

The First Defendant repeats paragraphs 20, 30.1a, 30.1 b, 30.2, 30.3 and 30.4 of the Second Third Further Amended Statement of Claim and the particulars thereto and says that in the premises, the tTree was:

- (i) a defect that may cause bushfires within the meaning of Schedule 2, Section 7.0 of the Osborne Contract and MMI0001;

- (ii) dead or dying and at a height that, if failure occurred, impact to the overhead mains would result, within the meaning of MM1001;
- (ii) dead, dying, dangerous or visually damaged vegetation, and/or a hazard tree, within the meaning of MM10013.

64 In breach of its duty of care alleged in paragraph 58 above, Osborne failed to identify the tTree as a tree requiring removal or trimming.

65 The First Defendant repeats paragraphs 34 to 36 of the ~~Second~~ Third Further Amended Statement of Claim and says that if Osborne had identified the tTree as a tree requiring removal or trimming:

- a. the tTree would have been removed or trimmed before 17 October 2013; and
- b. the Springwood/Winmalee fire would not have occurred.

66 In the premises, by reason of Osborne's breaches of duty as alleged above, the claimants have suffered the loss and damage alleged in paragraph 47 of the ~~Second~~ Third Further Amended Statement of Claim.

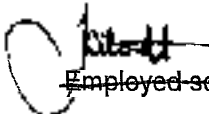
67 In the premises, if (which is denied) the First Defendant is liable to the claimants as alleged in the ~~Second~~ Third Further Amended Statement of Claim, then:

- a. the First Defendant and Osborne will have caused the same loss or damage;
- b. accordingly, the First Defendant and Osborne will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2005*, s 34(3); and
- c. pursuant to the *Civil Liability Act 2005*, s 35, the liability of the First Defendant is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just having regard to the extent of the First Defendant's responsibility for the said damage or loss.

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 defence to the claim for damages in these proceedings has reasonable prospects of success

Signature



Capacity

Employed solicitor of the Solicitor for the First Defendant

Date of signature

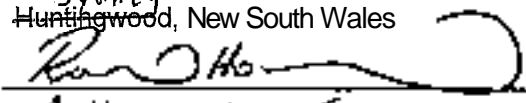
27 November 2015



Name Rod Howard
 Address 51 Huntingwood Drive
 Huntingwood NSW 2148
 Occupation Deputy Chief Executive Officer, Endeavour Energy
 Date 27 November 2015

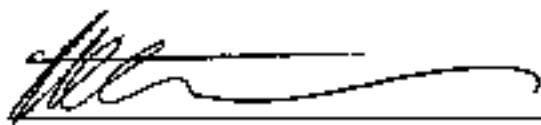
I say on oath/affirm:

- 1 I am the Deputy Chief Executive Officer of the First Defendant.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN/AFFIRMED at ^{Sydney} Huntingwood, New South Wales
 Signature of deponent 
 Name of witness Anthony Lewis
 Address of witness 51 Huntingwood Drive, Huntingwood, NSW 2148
 Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent
- 2 I have known the deponent for at least 12 months.

Signature of witness 

Note: The deponent and witness must sign each page of the affidavit. See UCPR 357B.

FURTHER DETAILS ABOUT FILING PARTY

Filing party

Name Endeavour Energy
Address 51 Huntingwood Drive
Huntingwood NSW 2148

Legal representative for filing party

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