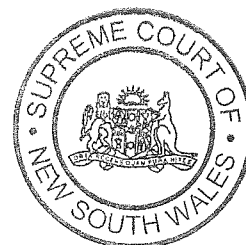


FILED

29 OCT 2014



DEFENCE TO 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 PROCEEDINGS

Plaintiff	Sean Johnston
Defendant	Endeavour Energy (ABN 59 253 130 878)

FILING DETAILS

Filed for	Endeavour Energy (ABN 59 253 130 878), Defendant
Legal representative	<u>Jonathan Gregson Melville Hunt</u> <u>Lander & Rogers Lawyers</u>
Legal representative reference	<u>COP:2037920:JHU</u>
Contact name and telephone	<u>Jonathan Hunt +61 2 8020 7614</u> <u>Colleen Palmkvist +61 2 8020 7644</u>
Contact email	<u>jhunt@landers.com.au</u>

HEARING DETAILS

The proceedings are listed on 31 October~~0 July~~ 2014.

PLEADINGS AND PARTICULARS

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

- 1 The Defendant admits paragraph 1.
- 2 The Defendant admits paragraph 2.
- 3 In response to paragraph 3, the 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 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;
- 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;
- 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;
- f. 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;
- h. does not know and cannot admit the existence of any such legal personal representatives.

5 In response to paragraph 5, the 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 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 1995* (NSW), rather than an electricity distributor, as alleged in paragraph 6.3.1.

7 As to paragraph 7, the 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, wasere owned by telecommunication providers.

8 As to paragraph 8, the Defendant:

- a. says that section 3 of the *Electricity Supply Act 1995* (NSW) sets out the objects of the Act which include:
 - i. to promote efficient and environmentally responsible production and use of electricity;
 - ii. to deliver a safe and reliable supply of electricity;
 - iii. to confer on network operators including the Defendant such powers as are necessary to enable them to construct, operate, repair and maintain their electricity works;
 - iv. to promote and encourage the safety of persons and property in relation to the generation, transmission, distribution and use of electricity;

but does not in terms impose any obligation on network operators including the Defendant;
- b. says that section 45 of the *Electricity Supply Act 1995* (NSW) empowers network operators including the 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 but does not in terms impose any obligation on network operators including the Defendant;
- c. says that section 191(1)(g1) of the *Electricity Supply Act 1995* (NSW) empowers the Governor to make regulations concerning the development and implementation by network operators including the Defendant of plans designed to ensure the safe operation of their distribution systems but does not impose any obligation on network operators including the Defendant;
- d. says that section 191(1A)(e) of the *Electricity Supply Act 1995* (NSW) empowers the Governor to make regulations with respect to safety in

connection with the distribution of electricity but does not impose any obligation on network operators including the Defendant;

- e. says that the *Electricity Supply (Safety and Network Management) Regulation 2008* (NSW) ("**Regulation**") ~~is a regulation~~ was made under section 191 of the *Electricity Supply Act 1995* (NSW);
- f. says that clause 8 of the Regulation requires network operators including the Defendant to lodge a network management plan with the Director-General if so directed in writing by the Director-General (which the Defendant admits has occurred) and to implement the plan;
- g. says that clause 9 of the Regulation requires network operators including the Defendant to prepare chapter 1 of the network management plan with the object of ensuring that the distribution system to which it relates provides an adequate, reliable and safe supply of electricity of appropriate quality, and in such a way as to include the matters specified in the clause;
- h. says that clause 9 of the Regulation requires network operators including the Defendant to prepare a specified schedule of reports and lodge them with the Director-General in accordance with the plan;
- i. says that clause 12 of the Regulation requires network operators including the Defendant to prepare chapter 4 of the network management plan with the object of ensuring public safety, establishing standards that must be met when electricity lines operate near vegetation, reducing interruptions to electricity supply that are related to vegetation and minimising the possibility of fire ignition by electricity lines and in such a way as to include the matters specified in the clause;
- j. says that clause 12 of the Regulation requires network operators including the Defendant to prepare a specified schedule of reports and lodge them with the Director-General in accordance with the plan;
- k. says that section 8 of the *Energy Services Corporation Act 1995* (NSW) sets out the principal objectives of energy distributors including the Defendant, each of which is required to be treated as being of equal importance, which include:
 - 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;
- iv. to operate efficient, safe and reliable facilities for the distribution of electricity;
- v. to be an efficient and responsible supplier of electricity and for services relating to the use and conservation of electricity;
- l. says further that by force of section 9 of the *Energy Services Corporation Act 1995* (NSW) its principal functions were:
 - i. to establish, maintain and operate facilities for the distribution of electricity and other forms of energy; and
 - ii. 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;
- m. denies it was subject to, or owed the Statutory Duty, as pleaded in paragraph 8, to the plaintiff, to the group members or at all.

9 As to paragraph 9, the Defendant:

- a. refers to and repeats paragraph 8 above;
- b. says that, on their proper construction, the *Electricity Supply Act 1995* (NSW), the Regulation and the *Energy Services Corporation Act 1995* (NSW) do not have the object of benefitting or protecting a particular class of person;
- c. denies the paragraph.

10 As to paragraph 10, the Defendant:

- a. repeats paragraphs 4, 8 and 9 above; and
- b. denies the paragraph.

11 As to paragraph 11, the Defendant:

- a. repeats paragraphs 8, 9 and 10 above; and
- b. denies the paragraph.

12 As to paragraph 12, the Defendant:

- a. admits that, by virtue of the matters alleged in paragraphs 6 and 7 of the 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 8 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 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 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 Defendant admits that the risk pleaded in paragraph 13.3.3 exists;
- v. those risks were and are risks that are known to the Defendant;
- vi. the 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 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 Endeavour knew the risks referred to in 13.b above but otherwise does not admit sub-paragraph 13.5.

14 As to paragraph 14, the Defendant says:

- a. the power line west from pole 486903 (as defined) 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. it caused Active Tree Services Pty Ltd (ATS) to inspect vegetation in Linksvie Road, Springwood, to identify any vegetation within the clearances prescribed by MMI 0013 and, at all relevant times, there was no vegetation within at least 1.5 metres of the street lines;
- f. in the premises of sub-paragraphs d and e 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;
- g. 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;

- h. 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 Defendant's network;
 - ii. the sum of all of the impedances on the 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 Defendant's network;
- i. in the premises of sub-paragraphs g and h 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;
- j. 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;
- k. the street lines were equipped with spreaders designed for the purpose of preventing clashing between the conductors comprising the street lines;
- l. 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);
- m. in the premises of sub-paragraphs j, k and l 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;
- n. in the premises of sub-paragraphs a to m above, the risk of fire ignition existed but was a low risk;
- o. that it otherwise admits that the ignition of a fire can lead to a wide of variety of consequences including the adverse consequences pleaded in sub-paragraphs 14.6 to 14.9; and
- p. that it admits sub-paragraph 14.10.

15 As to paragraph 15, the 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 and says that it was open to some or all of the persons in the class identified in sub-paragraph 4.3 of the 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 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 Defendant as pleaded in paragraph 8 above and to that extent were dependent on the conduct of the Defendant; and
- e. otherwise does not admit the paragraph.

16 As to paragraph 16, the 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 or of injury to persons within the Springwood/Winmalee class; and

c. otherwise admits the paragraph.

17 As to paragraph 17, the Defendant:

- a. repeats paragraphs 8 to 16 above;
- b. says that in determining whether the 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 Defendant supplied electricity to approximately 2.2 million people and established, maintained and operated facilities for the distribution of electricity, across a region spanning 24,500 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 Defendant comprised equipment and assets including approximately 23,400 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 Defendant, as the holder of a distribution network service provider's licence and the matters pleaded in paragraph 8.k of this Defence;

Particulars

Since 2009 the 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 Endeavour allegedly owed the General Duties was indeterminate, having regard to the definition of the claimants Springwood/Winnalee Class in paragraph 105 of the 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 Defendant:

- a. admits that Springwood in the vicinity of the power line was a bushfire-prone area within the meaning of the its "Tree Management Plan";
- b. admits says 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 a large gum tree or~~ 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 cable 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 sufficiently mass ~~large tree~~ 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 line 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 line was not likely to occur because, in the event that the service cable broke at the pole, it would immediately become disconnected from the Defendant's network and cease to conduct electricity from the Defendant's network; and
- m. otherwise does not admit the paragraph.

21 As to paragraph 21, the Defendant:

- a. admits sub-paragraph 21.1 on the basis that by "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 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 Defendant's network and ceased to conduct electricity from the 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 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 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 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 Defendant:

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

23 As to paragraph 23, the Defendant:

- a. refers to and repeats paragraphs 11 and 17 above;
- b. says further that it could not have owed any duty which had the effect of requiring it to insulate low voltage conductors as alleged in paragraph 23.2.2 because that duty could not be confined to the insulation of low voltage conductors on the power line (defined in the Further Amended Statement of Claim as comprising conductors and other like assets servicing Linksvie Road) or on the section of the power line near pole JU 267, but must extend to the insulation of an indeterminate number of low voltage conductors on the Defendant's network area; and
- c. otherwise denies the paragraph.

24 As to paragraph 24, the Defendant:

- a. refers to and repeats its responses to paragraphs 20 and 21 above;
- b. admits that it knew of the matters referred to in paragraphs 20 and 21 above;
- c. otherwise does not admit the paragraph.

25 As to paragraph 25, the Defendant:

- a. says that the documents referred to in sub-paragraphs 25.1 to 25.3 were guidelines which contemplated that:
 - i. ~~contemplated that~~ the Defendant would inspect vegetation in the vicinity of its network assets;
 - ii. ~~contemplated that~~ the Defendant would endeavour to maintain certain minimum specified clearance distances between conductors and vegetation;
 - iii. ~~contemplated that~~ the Defendant might prune vegetation where the specified clearance distances were not maintained, except where the vegetation was on private property; and

iv. ~~contemplated that, where the vegetation was on private property, the Defendant would advise owners that clearance distances had not been maintained, send follow-up correspondence and re-inspect on an audit basis and that ultimately disconnection may occur should the defect not be rectified;~~

b. otherwise does not admit the paragraph.

26 The Defendant admits paragraph 26.

27 As to paragraph 27, the Defendant:

a. says that Asplundh Tree Experts (Australia) Pty Ltd and ATS, contractors engaged by it, inspected trees and vegetation adjacent to pole JU 267 on the power line in January 2012, February 2012 and July 2013;

b. otherwise does not admit the paragraph.

~~c. says that in or about July 2013 a contractor engaged by it identified that foliage around the service cables connecting pole JU 267 to the properties at 108 Linksview Road and 110 Linksview Road required trimming in order to achieve a minimum clearance of 500 millimetres;~~

Particulars

~~*Customer vegetation report no 48177 issued to the occupier of 108 Linksview Road, Springwood on 9 July 2013.*~~

~~*Customer vegetation report no 48178 issued to the occupier of 110 Linksview Road, Springwood on 9 July 2013.*~~

~~d. otherwise denies the paragraph.~~

28 As to paragraph 28, the Defendant:

a. refers to and repeats paragraph 2327 above;

b. ~~denies that the tree was identified as a hazardous tree;~~

c. denies that any notices Customer Vegetation Report was were issued in July 2012 to the occupiers (as defined);

d. admits that Customer Vegetation Reports notices were issued by ATS to the occupiers (as defined) in July 2013 requiring trimming of foliage around the service cable to achieve a minimum clearance of 500 millimetres ~~but denies that the notices required removal of the tree;~~

e. otherwise does not admit the paragraph.

29 As to paragraph 29, the Defendant:

a. ~~denies does not know and cannot admit that there was no pruning of the foliage and/or the tree that was the subject of the Customer Vegetation Report issued to the occupier of 108 Linksview Road and says that the tree was pruned by the occupier of 110 Linksview Road after receipt of the notice referred to in paragraph 28~~

Particulars

Customer Vegetation Report no 48178 completed by Marilyn Stubbs on 19 October 2013.

b. says that the foliage and/or the tree that was the subject of the Customer Vegetation Report issued to the occupier of 110 Linksview Road was pruned after receipt of the said Customer Vegetation Report;

Particulars

Customer Vegetation Report no 48178 completed by Marilyn Stubbs on 19 October 2013.

- c. admits that it did not trim or remove the foliage and/or the tree;
- d. says it was under no obligation to trim or remove the tree in accordance with section 48 of the ES Act or otherwise;
- e. otherwise does not admit the paragraph.

30 As to paragraph 30, the Defendant:

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

~~says that, on the Plaintiff's implied definition of a "hazardous tree" as one which, "if it fell onto the power line, had the propensity to cause a bush fire", many thousands of trees in the area serviced by the Defendant had that characteristic (assuming that the reference to a tree having a "propensity" to cause a bush fire is a reference to a tree which, if it fell onto a power line, could cause a bush fire); and otherwise denies paragraph 30 and~~

31 As to paragraph 31, the Defendant:

- a. refers to and repeats paragraphs 8, 17 and 30 above;

- b. in answer to paragraph 31.2.1, refers to and repeats paragraph 23 above;
- c. in answer to paragraphs 31.2.2 and 31.2.3, says that it could not have owed any duty which had the effect of requiring it, acting reasonably, to ensure the removal of the tree on the basis that it was a “hazardous tree” for the following reasons:
- i. according to paragraph 30 of the Further Amended Statement of Claim, a “hazardous tree” is a tree which whose location was such that if it fell it represented a serious risk to network assets, whose 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 which, if it falls fell onto the power line, hasd the propensity to cause a bush fire;
 - ii. a duty to remove trees so described would require the Defendant to assess the state of health of any tree whose height is greater than the distance from the base of the tree to the power line, irrespective of whether the tree is located on private property or on public land and irrespective of whether the tree appears healthy on a visual inspection undertaken without entering private land; ~~that description is applicable to any tree whose height is greater than the distance from the base of the tree to the power line;~~
 - iii. ~~that duty the duty to remove hazardous trees (in the sense defined in paragraph 30 Amended Statement of Claim), if it exists, cannot be confined to potentially unhealthy trees which if they fell might fall onto the power line (as defined in the Further Amended Statement of Claim as comprising conductors and other like assets servicing Linksvie Road) but must extend to the removal of any potentially unhealthy the many thousands of trees capable of falling onto any of the 23,400 kilometres of overhead electricity lines across the Defendant’s 24,500 square kilometre network area;~~
~~this would require the removal of many thousands of trees, involving prohibitive costs and also the destruction of the amenity of the areas serviced by the Defendant;~~
- d. otherwise denies the paragraph.

32 As to paragraph 32, the Defendant:

- a. repeats paragraphs 20 to 31 above;
- b. admits that it did not insulate the low voltage conductors on the power line beyond pole 486903;
- c. otherwise denies the paragraph.

~~in answer to paragraph 32.1, says that it complied with its own general procedures and applicable industry standards with regard to the maintenance of clearance distances between conductors and vegetation at pole JU-267, in that no part of the tree was growing within at least 1.5 metres of the street lines at any material time~~

Particulars

~~The Defendant relies on Mains Maintenance Instruction MMI0013: "Clearances to be maintained between network assets and vegetation" and Industry Safety Steering Committee Guideline for Managing Vegetation Near Power Lines, dated December 2005 (ISSC 3).~~

~~in answer to paragraphs 32.2 and 32.3, says that there was no occasion for it to trim or remove the tree, or ensure that the occupiers did so, so that appropriate clearance distances were maintained between the conductors and vegetation; and vegetation at pole JU-267, given there was at least a 1.5 metre clearance between the tree and the street lines at all material times~~

33 As to paragraph 33, the Defendant:

- a. refers to and repeats paragraphs 8, 17, 30, 31 and 32(a) and (b) above;
- b. denies the paragraph;
- c. if (which is denied) it owed the duties as alleged in the Further Amended Statement of Claim, it discharged those duties by:
 - i. engaging ATS to inspect vegetation in Linksview Road, Springwood, to identify any vegetation within the clearances prescribed by MMI 0013;
and
 - ii. 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.
- d. says further that it complied with its own general procedures and applicable industry standards with regard to the insulation of low voltage

conductors on the power line and the installation of aerial bundled cabling and in that regard says that:

- i. its general procedures and applicable industry standards required that where existing low voltage overhead cables are otherwise to be replaced, the cables be replaced with low voltage aerial bundled cable.

Particulars

Tree Management Plan 2006

Company Policy Network Asset Management 9.2.5: Network Asset Design

- ii. no occasion arose to replace the low voltage conductors on the power line beyond pole 486903 at any time before 17 October 2013.
- e. 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 Defendant relies on Mains Maintenance Instruction MMI0013: "Clearances to be maintained between network assets and vegetation" and ISSC 3.

- ii. on 9 July 2013, ATS, a contractor engaged by the Defendant for the purpose of implementing the Defendant's general procedures and applicable standards, identified that foliage on the properties at 108 and 110 Linksvie Road had encroached within 500 millimetres of the service cables;
- iii. ATS ~~the contractor~~ issued notices to the residents of 108 and 110 Linksvie 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 Defendant's general procedures and applicable standards, it was the responsibility of the residents of 108 and 110 Linksvie 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."

- f. 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 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;
- g. says further that it complied with its own general procedures and applicable standards with regard to the removal of hazard trees 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 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 Defendant relies on Mains Maintenance Instruction

MMI0013: "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.
- h. 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 Defendant in not taking steps to insulate the power lines or install aerial bundled cabling and 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 Statutory Duty or General Duties (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 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 Statutory Duty or General Duties on the ground that in the circumstances the 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 insulate the power lines or install aerial bundled cabling or 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.

34 As to paragraph 34, the 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 Defendant refers to and repeats paragraph 34 of this Defence and otherwise admits the paragraph.

36 As to paragraph 36, the Defendant:

- a. admits sub-paragraphs 36.1 and 36.3 other than the description of the tree as hazardous;
- b. 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 108 Linksview Road; the street lines in the vicinity of where the tree fell onto them; the fuses from the sub-station associated with Linksview Road; the tree; 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. says further that to the best of the Defendant's knowledge:
 - i. the point where the service cable to premises at 108 Linksview 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, the Defendant:

- a. denies the paragraph 37; and
- b. says further that if the fire was caused by the events alleged in paragraph 36, trimming the tree would not have averted the fire since even had the tree been trimmed the matters pleaded in sub-paragraphs 36.1 and 36.3 would still have occurred.

38 [Not used].

39 The Defendant denies paragraph 39.

40 The Defendant denies paragraph 40.

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

42 As to paragraph 42, the 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 Defendant denies paragraph 43.

44 The Defendant denies paragraph 44.

45 As to paragraph 45, the 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 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 Defendant denies paragraph 47.

48 As to paragraph 48, the Defendant:

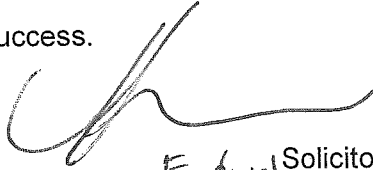
- a. admits sub-paragraph 48.1;

- 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 48.6 and therefore does not admit that paragraph.

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 Defendant.

Date of signature

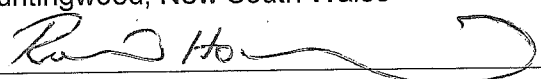
27/10/14

AFFIDAVIT VERIFYING

Name Rod Howard
 Address 51 Huntingwood Drive
 Huntingwood NSW 2148
 Occupation Chief Operating Officer, Endeavour Energy
 Date 28 October 2014

I say on oath/affirm:

- 1 I am the Chief Operating Officer of the 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 Huntingwood, New South Wales
 Signature of deponent 
 Name of witness Anthony Weaver
 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 35.7B.

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name	Endeavour Energy
Address	51 Huntingwood Drive Huntingwood NSW 2148

Legal representative for filing party

Name	Jonathan Gregson Melville Hunt
Practising certificate number	35647
Firm	Lander & Rogers Lawyers
Contact solicitor	Jonathan Gregson Melville Hunt
Address	Level 19 123 Pitt Street Sydney NSW 2000 DX 10212 Sydney t: +61 2 8020 7700 f: +61 2 8020 7701