

## DEFENCE TO AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2015/310264

### TITLE OF PROCEEDINGS

Plaintiff	<b>Laurence Kelvin Eades</b>
First Defendant	<b>Endeavour Energy (ABN 59 253 130 878)</b>
Second Defendant	<b>Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424)</b>
Third Defendant	<b>Pinnacle Career Development Pty Ltd (ABN 73 115 138 236)</b>

### FILING DETAILS

Filed for	Endeavour Energy (ABN 59 253 130 878), the First Defendant
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### PLEADINGS AND PARTICULARS

The First Defendant pleads as follows in answer to the numbered paragraphs of the 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 admits the Mt Victoria fire started on or about Mt York Road on 17 October 2013 (**the fire**).
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 sub-paragraph 4.1 as a result of the fire and/or as a result of injury to another person as a result of the fire;
  - (c) 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;
  - (d) admits that the proceedings are brought on behalf of anyone in the class identified in sub-paragraph 4.3 who suffered economic loss of the kind alleged in sub-paragraph 4.3 as a result of the fire;
  - (e) 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;
  - (f) 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 the commencement of the proceedings; and
  - (g) 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.
7. The First Defendant admits paragraph 7, save that:
  - (a) in respect of paragraph 7.2.1, the First Defendant says that the three 11 kV conductors were aligned in a delta configuration rather than horizontally;

- (b) in respect of paragraph 7.3 the First Defendant says that the transmission of electricity on the 11 kV power line at 80-92 Mount York Road was for the purpose of, inter alia, the supply of one residential consumer rather than several residential consumers.

7A. The First Defendant admits paragraph 7A.

7B. The First Defendant admits paragraph 7B.

8. The First Defendant admits paragraph 8 and says further:

- (a) 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; and

- (b) 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 First Defendant; and

- (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 but only where it had reasonable cause to believe that such a tree 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 and further, by reason of subsections 48(2)(b) and 48(5), it could only do so in emergencies or after first serving a notice which was 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 Amended Statement of Claim (which are admitted subject to the matters pleaded in paragraphs 6 and 7 of this Defence) 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 ES Act (as defined) and other legislation including the powers under section 45 in relation to erection, installation, extension, alteration, maintenance and removal of electricity works;

- (d) in respect of paragraph 12.2, 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 12(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 ES Act (as defined) and other legislation in relation to the power line;
  - (g) in the premises of sub-paragraphs 12(a) to 12(f), admits that it had practical control over the power line (as defined); and
  - (h) does not admit the balance of the paragraph.
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) under normal operating conditions, the transmission of electricity along overhead power lines in accordance with accepted industry standards is a safe activity;
    - (ii) the transmission of electricity along overhead power lines necessarily involves a risk that extraneous objects may unintentionally come into contact with the power lines;
    - (iii) such objects may thereby create an unintended circuit and conduct electricity other than through the power lines;
    - (iv) 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;
    - (v) 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;

- (vi) if a fire is ignited, the First Defendant admits that the risk pleaded in paragraph 13.3.3 exists;
- (vii) the risks in sub-paragraphs (i) to (vi) above were and are risks that are known to the First Defendant;
- (viii) the First Defendant manages the known risks associated with the transmission of electricity in a number of ways, including:
  - (A) 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;
  - (B) by the installation and use of protection systems to cut off the supply of electricity in certain events; and
  - (C) by inspection of its network assets and of the relationship between network assets and other things.
- (ix) at all material times the nominal voltage of the power line was 11kV;
- (x) 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 under normal operating conditions;
- (c) in the premises of sub-paragraphs 13(a) and 13(b) above, the First Defendant says in answer to sub-paragraphs 13.3 and 13.4 that the transmission of electricity was an activity which carried a risk of harm, but does not otherwise admit the sub-paragraphs; and
- (d) in further answer to sub-paragraph 13.5, says that the First Defendant knew the risks referred to in 13(b) and (c) above but otherwise does not admit sub-paragraph 13.5.

14. As to paragraph 14, the First Defendant says:
- (a) crimps are believed to have been installed in or about August or early September 2005 during repairs to the power line following an incident involving contact by a tree outside of trimming clearances;
  - (b) the installation of crimps in accordance with industry standards is an accepted practice within the electricity supply industry;
  - (c) the first defendant inspected (and contracted with others to inspect) vegetation in the vicinity of the power line as alleged in paragraphs 33, 35, 38, 43, 44, 46, 49 and 50 below;
  - (d) in the above premises, the risks alleged in sub-paragraph 14.1, and in sub-paragraphs 14.4 to 14.8 to the extent that they refer to the discharge of electricity and heat, were low risks;
  - (e) in the above premises, the First Defendant admits sub-paragraphs 14.2 and 14.3;
  - (f) 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;
  - (g) the amount of electricity potentially capable of being conducted from the power line was limited by:
    - (i) the voltage of the conductors (11kV);
    - (ii) the sum of all of the impedances on the First Defendant's network between the power source and the power line; and
    - (iii) the protection systems (being systems and/or devices which cut off the supply of electricity in certain events) installed on the First Defendant's network;
  - (h) the emission of "sparks" (as defined) would only be a possibility in the event of an external physical event causing a live conductor to detach from a network pole or some other extraordinary event;

- (i) in the above premises, the risks alleged in sub-paragraphs 14.4 to 14.8 (to the extent that they refer to the discharge of electricity, heat and/or sparks) were low risks;
- (j) in the above premises, the risk of fire ignition existed but was a low risk;
- (k) 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 14.9 to 14.12;
- (l) that it admits sub-paragraph 14.13; and
- (m) that it does not otherwise admit the balance of the paragraph.

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 Amended Statement of Claim to protect themselves by:

- (i) obtaining insurance in respect of the loss and damage referred to in paragraph 107 of the Amended Statement of Claim; and
  - (ii) preparing their properties to mitigate against the risk of damage caused by a bushfire.
- (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 ES 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 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) does not admit there were persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the Mount Victoria class (as defined); and
  - (c) otherwise admits the paragraph.
17. As to paragraph 17, the First Defendant:
- (a) repeats paragraphs 7 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, at the time of the fire, 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 approximately 25,000 square kilometres and comprising the then 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 (now Cumberland),

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 First 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.b of this Defence;

### Particulars

Since 2009 the First Defendant has been subject to regulation by the Australian Energy Regulator ("the **AER**"). The AER determines the maximum prices the First Defendant is entitled to charge for the cost of electricity distribution services to the end customer, and/or the allowable revenue it can derive for the provision of such services, 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 (as defined) was indeterminate, having regard to the definition of the claimants in paragraph 16 of the 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. As to paragraph 18, the First Defendant:
- (a) says that Mount Victoria in the vicinity of the power line was a bushfire-prone area as defined by the Rural Fire Service Guide for Bush Fire Prone Land Mapping;
  - (b) admits that Mount York Road, Mount Victoria, as well as the driveway of 80-92 Mount York Road (**the driveway**), was in an area which contained large numbers of trees;
  - (c) admits that one such tree (**the Tree**) was a *Eucalyptus* located on private land, adjacent to the driveway;

- (d) says that no part of the Tree was growing within at least 2.5 metres of the power lines at any material time;
- (e) denies that the Tree was overhanging the power lines;
- (f) does not know and cannot admit the height or weight of the Tree;
- (g) says that it is possible that a tree or branch with sufficient mass which falls with sufficient force in such a way as to impact on power lines could cause power lines to break and/or detach from power poles;
- (h) says that the relevant Australian Standard (AS/NZS 7000) did not require conductors to be constructed to withstand such a force;
- (i) says that, in the event of a broken conductor, protection systems were used to minimise the risk of arcing between a broken conductor and the ground or vegetable matter under the power lines; and
- (j) otherwise does not admit the paragraph.

19. As to paragraph 19, the First Defendant:

- (a) admits sub-paragraph 19.1;
- (b) says, in answer to sub-paragraph 19.2:
  - (i) that the Conductors could not break under foreseeable local conditions, but admits that could occur if a significant force were applied to the Conductors, such as by a falling tree coming into contact with the Conductors; and
  - (ii) that protection systems were used to minimise the risk of arcing between the Conductors and the ground and/or vegetation on the ground;
- (c) says, in answer to sub-paragraph 19.3, that the First Defendant's protection systems in respect of the power line included overcurrent, earth fault and sensitive earth fault protection systems and that such systems are designed and operated to minimise the risks associated with faults on the network;
- (d) says, in answer to sub-paragraph 19.4, that the protection systems were designed to result in a discontinuation of electricity supply in the event of

damage to the network, including a conductor falling to the ground, 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;

- (e) says, in answer to sub-paragraph 19.5, that the risk of an arc or current being transmitted between a fallen conductor and the ground and/or vegetation was a low risk having regard to the low risk of conductor breakage and the use of protections systems to minimise the risk;
- (f) says, in answer to sub-paragraph 19.6, the risk of heat or electrical discharge from a fallen conductor igniting dry vegetation in the vicinity of the conductor is a low risk having regard to the low risk of conductor breakage, properties of the arc, local environmental conditions and the use of protections systems to minimise the risk;
- (g) says, in answer to sub-paragraph 19.7, 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;
- (h) says, in answer to sub-paragraph 19.8, that high winds are more likely to cause a tree to fall or shed branches than calm conditions; and
- (i) otherwise does not admit the paragraph.

20. As to paragraph 20, the First Defendant:

- (a) admits sub-paragraph 20.1;
- (b) admits sub-paragraph 20.2;
- (c) says, in answer to sub-paragraph 20.3, that it is more likely that the crimps on the southern conductor (as defined) were installed at or around the time of the 2005 incident referred to in paragraph 20.3.2 rather than at the time of construction;
- (d) says, in answer to sub-paragraph 20.4, that:
  - (i) the crimps on the southern conductor (as defined) were correctly installed;

- (ii) damaged aluminium conductors were not placed within crimps;
  - (iii) dyes were not incorrectly applied to the crimps and the conductors were correctly positioned within the crimps;
  - (iv) sufficient conductor lengths were placed within the crimps; and
  - (v) in any event, the alleged risk was a low risk;
- (e) as to sub-paragraph 20.5, denies that the tensile strength of the southern conductor was reduced in any material respect and says that the alleged risk was a low risk, not a material risk; and
- (f) says further, as to sub-paragraphs 20.4 and 20.5, that it does not know what is meant by "inadequate" tensile strength;
- (g) as to sub-paragraph 20.6, admits that the risks referred to in paragraph 20.5 would be higher if there was a tree and/or a branch of sufficient height and weight in proximity to the conductor, and that tree and/or a branch fell onto the conductor, but repeats sub-paragraph 20(e) above; and
- (h) does not admit the balance of the paragraph.
21. As to paragraph 21, the First Defendant:
- (a) admits that it knew of the matters pleaded in paragraphs 18, 19 and 20 above; and
  - (b) otherwise does not admit the paragraph.
22. The First Defendant admits paragraph 22.
23. In relation to paragraph 23, the First Defendant:
- (a) admits paragraph 23.3;
  - (b) relies upon clauses 8 to 12 of the ES Regulations (as defined); and
  - (c) otherwise does not admit the paragraph.
24. In relation to paragraph 24, the First Defendant:
- (a) admits sub-paragraph 24.1;

- (b) in response to sub-paragraph 24.2:
  - (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 sub-paragraph.

### **Particulars**

Board Policy 2.0.5 'Risk Management' at paragraph 1.0

- (c) admits sub-paragraph 24.3, 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
  - (d) relies on the terms of the Network Management Plan for its full force and effect.
25. The First Defendant admits paragraph 25.
26. In relation to paragraph 26, the First Defendant says that:
- (a) in response to sub-paragraph 26.1, the First Defendant's policy is to ensure that its network is designed and maintained at an appropriate standard to mitigate the levels of risk with respect to safety, reliability and quality of supply and impact on the environment (as stated in its Network Management Plan, Chapter 4, paragraphs 3.1 and 4.1);
  - (b) it admits sub-paragraph 26.2;
  - (c) in response to sub-paragraphs 26.3 to 26.5, MMI 0013 contained relevant provisions which required:
    - (i) the removal of dead, dying, dangerous or visually damaged vegetation (including limbs or trees) that can be climbed or reside within or above

the designated minimum safety or trimming clearances or that could come into contact with an electric power line having regard to foreseeable local conditions (as stated in MMI 0013, paragraphs 5.1.6 and 5.1.7);

(ii) outside the minimum trimming clearance space, the trimming or removal of dead, dying, dangerous or visually damaged trees that are situated above a line projected at 45 degrees from the vertical from the lowest conductor design height (as stated in MMI 0013, paragraph 5.1.8);

(d) it will rely on the terms of the Network Management Plan and the Primary Documentation (as defined) for their full force and effect; and

(e) otherwise denies the paragraph.

27. In relation to paragraph 27, 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) admits that MMI 0013 provided that all network assets covered by MMI 0013 shall be regularly inspected in accordance with the contract, and at least annually, to ensure that the required vegetation clearances have been maintained;

(c) 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.

28. The First Defendant admits paragraph 28.

29. In relation to paragraph 29, 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.
30. In relation to paragraph 30, the First Defendant:
- (a) repeats paragraphs 26 to 29 above; and
  - (b) otherwise denies the paragraph.
31. The First Defendant denies paragraph 31.
32. The First Defendant does not admit paragraph 32 and says that the definition of "Appropriate Training" in the particulars means that the allegation is circular and embarrassing.
33. As to paragraph 33, the First Defendant:
- (a) says that:
    - (i) its overhead line and ground line (**OLI/GLI**) inspection program was, at all material times, conducted by Warpole Pty Ltd, a contractor to the First Defendant;
    - (ii) inspections and cutting pursuant to the vegetation management program were conducted by employees of the First Defendant prior to and during 2012 and, from October 2012 and August 2012, respectively, by Asplundh Tree Expert (Australia) Pty Ltd (**Asplundh**) and Pinnacle Career Development Pty Ltd (**Pinnacle**), contractors to the First Defendant; and
    - (iii) inspections pursuant to the PSBI program were conducted by the First Defendant's employees prior to 2012 and, thereafter, Heli-Aust Pty Ltd and Osborne Aviation Services Pty Ltd;



- (b) does not admit the balance of the paragraph.
34. In response to paragraph 34, the First Defendant:
- (a) repeats paragraph 17 above;
  - (b) says that any duty it owed (which is denied) was delegable; and
  - (c) otherwise denies the paragraph.
35. The First Defendant admits that it entered into a contract with Asplundh to provide vegetation management services in the Katoomba area from 1 October 2012.
36. In response to paragraph 36, the First Defendant:
- (a) relies on clauses 2.1, 4.7, 7.2, 7.3, 7.5.1 and 7.5.1.1 as if fully set out herein;
  - (b) admits sub-paragraph 36.4; and
  - (c) does not admit the balance of the paragraph.
37. In response to paragraph 37, the First Defendant:
- (a) relies on clauses 2.3, 3, 4.5 and 4.8 as if fully set out herein;
  - (b) admits sub-paragraphs 37.3, 37.4 and 37.5; and
  - (c) does not admit the balance of the paragraph.
38. The First Defendant admits paragraph 38.
39. In response to paragraph 39, the First Defendant:
- (a) relies on clauses 7.1 and 7.2 as if fully set out herein;
  - (b) admits sub-paragraph 39.1; and
  - (c) does not admit the balance of the paragraph.
40. In response to paragraph 40, the First Defendant:
- (a) relies on clauses 2.3 and 3 as if fully set out herein;
  - (b) admits paragraphs 40.3 to 40.5; and

- (c) does not admit the balance of the paragraph.
- 41. In response to paragraph 41, the First Defendant:
  - (a) repeats paragraph 26 above; and
  - (b) otherwise does not admit the balance of the paragraph.
- 42. In response to paragraph 42, the First Defendant admits:
  - (a) that it provided to Asplundh and Pinnacle a copy of MMI 0013 prior to the commencement of the Asplundh Contract and the Pinnacle Contract, and from time to time thereafter; and
  - (b) otherwise does not admit the paragraph.
- 43. The First Defendant admits paragraph 43 and relies on the terms of the Heli-Aust Contract (as defined) for its full force and effect.
- 44. The First Defendant admits paragraph 44.
- 45. In response to paragraph 45, the First Defendant:
  - (a) admits sub-paragraphs 45.1, 45.2 and 45.4; and
  - (b) otherwise does not admit the balance of the paragraph and relies on the terms of the Osborne Contract (as defined) for its full force and effect.
- 46. The First Defendant admits paragraph 46.
- 47. The First Defendant admits paragraph 47 and relies on the terms of the ATS Contract (as defined) for its full force and effect.
- 48. The First Defendant admits paragraph 48.
- 49. In response to paragraph 49, the First Defendant:
  - (a) admits that an OLI/GLI inspection was undertaken on or about 22 August 2012 by Warpole Pty Ltd;
  - (b) as to sub-paragraph 49.2:
    - (i) admits sub-paragraph (a);

- (ii) admits sub-paragraph (b);
  - (iii) admits that Heli-Aust conducted an aerial inspection on or about 31 July 2012;
  - (iv) admits sub-paragraph (d) and says further that the defect was not a vegetation defect;
  - (v) admits that Osborne conducted a LiDAR inspection on or about 9 June 2013; and
  - (vi) denies sub-paragraph (f).
- (c) as to sub-paragraph 49.3:
- (i) admits sub-paragraph (a)(i);
  - (ii) denies sub-paragraph (a)(ii);
  - (iii) admits sub-paragraphs (b) and (c);
  - (iv) in respect of sub-paragraph (d);
    - (A) admits that Asplundh inspected the Conductors, trees and vegetation, including the Tree, along the driveway to the premises at 80-92 Mount York Road;
    - (B) admits that Asplundh identified that a tree overhung the power line between poles 5 and 4;
    - (C) admits that on or around 22 November 2012, Asplundh notified Endeavour Energy that a tree overhung the power line between poles 5 and 4;
- (d) admits sub-paragraph 49.4;
- (e) admits sub-paragraph 49.5;
- (f) does not admit the balance of the paragraph.

50. In response to paragraph 50, the First Defendant:

- (a) as to sub-paragraph 50.1, admits that Pinnacle:

- (i) undertook an inspection of the Conductors and vegetation along the driveway to the premises at 80-92 Mount York Road; and
  - (ii) identified a HV defect inside trimming clearances between Poles 3 and 4.
- (b) as to sub-paragraph 50.2, admits that Pinnacle submitted scoping data on or about 12 November 2012;
  - (c) as to sub-paragraph 50.3, admits that it submitted scoping data to Asplundh on or about 13 November 2012;
  - (d) as to sub-paragraph 50.5, admits that Asplundh notified it that works it had undertaken between Poles 3 and 4 were completed and compliant;
  - (e) as to sub-paragraph 50.7, admits that Pinnacle verified that the works in sub-paragraph (d) were completed and compliant.
  - (f) does not admit the balance of the paragraph.
51. In response to paragraph 51, the First Defendant:
- (a) denies the paragraph; and
  - (b) further refers to paragraphs 52 and 53 below.
52. The First Defendant denies paragraph 52.
53. In response to paragraph 53, the First Defendant:
- (a) refers to and repeats paragraphs 8 to 52 above;
  - (b) 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; and

- (ii) 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.

- 54. Paragraph 54 is not pleaded against the First Defendant who does not plead in response to it.
- 55. Paragraph 55 is not pleaded against the First Defendant who does not plead in response to it.
- 56. Paragraph 56 is not pleaded against the First Defendant who does not plead in response to it.
- 57. Paragraph 57 is not pleaded against the First Defendant who does not plead in response to it.
- 58. Paragraph 58 is not pleaded against the First Defendant who does not plead in response to it.
- 59. Paragraph 59 is not pleaded against the First Defendant who does not plead in response to it.
- 60. Paragraph 60 is not pleaded against the First Defendant who does not plead in response to it.
- 61. Paragraph 61 is not pleaded against the First Defendant who does not plead in response to it.
- 62. Paragraph 62 is not pleaded against the First Defendant who does not plead in response to it.
- 63. Paragraph 63 is not pleaded against the First Defendant who does not plead in response to it.

64. Paragraph 64 is not pleaded against the First Defendant who does not plead in response to it.
65. Paragraph 65 is not pleaded against the First Defendant who does not plead in response to it.
66. Paragraph 66 is not pleaded against the First Defendant who does not plead in response to it.
67. Paragraph 67 is not pleaded against the First Defendant who does not plead in response to it.
68. Paragraph 68 is not pleaded against the First Defendant who does not plead in response to it.
69. Paragraph 69 is not pleaded against the First Defendant who does not plead in response to it.
70. Paragraph 70 is not pleaded against the First Defendant who does not plead in response to it.
71. Paragraph 71 is not pleaded against the First Defendant who does not plead in response to it.
72. Paragraph 72 is not pleaded against the First Defendant who does not plead in response to it.
73. As to paragraph 73, the First Defendant:
  - (a) repeats paragraphs 8 to 53 above; and
  - (b) otherwise denies the paragraph.
74. As to paragraph 74, the First Defendant:
  - (a) repeats paragraphs 8 to 53 and 73 above;
  - (b) otherwise denies the paragraph.

75. As to paragraph 75, the First Defendant:

- (a) says, in relation to sub-paragraph 75.1, that reasonable care was taken when replacing or joining sections of conductor during the construction, repair and/or maintenance of its overhead network;
- (b) in relation to sub-paragraphs 75.2 to 75.5, says:
  - (i) the First Defendant had in place, at all material times, a process by which dead, dying, dangerous and visually damaged vegetation outside minimum trimming clearances could be identified to it, including:
    - (A) by Asplundh, Pinnacle, Heli-Aust, Osborne and ATS;
    - (B) by its employees, including Tree Management Officers.

#### **Particulars**

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

- (ii) says that it had reasonable grounds to believe that Asplundh, Pinnacle, Heli-Aust, Osborne and/or ATS had the skills and expertise to provide the services the subject of the Asplundh Contract, Pinnacle Contract, Heli-Aust Contract, the Osborne Contract and the ATS Contract;
- (iii) says that Asplundh, Heli-Aust, Pinnacle, Osborne and/or ATS represented and warranted to the Defendant that they had the skills and expertise to provide the services the subject of the Asplundh Contract, Heli-Aust Contract, the Pinnacle Contract, the Osborne Contract and the ATS 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).

Pinnacle Capability Statement dated 2011.

Pinnacle Response to Request for Tender, including statement  
regarding key resources.

Pinnacle Contract (as defined), Clause 6.2(a).

- (c) says that the employees of the First Defendant that audited the services the subject of the Asplundh Contract, Pinnacle, Heli-Aust Contract, the ATS Contract and Osborne Contract had appropriate skills and expertise;
  - (d) 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;
  - (e) repeats paragraphs 8 to 53, 73 and 74 above; and
  - (f) denies the balance of the paragraph.
76. The First Defendant denies paragraph 76 and repeats paragraphs 20(d) and 75 above and paragraph 78 below.
77. The First Defendant denies paragraph 77.
78. As to paragraph 78, the First Defendant:
- (a) repeats paragraph 75 above;



- (b) says that if (which is denied) it owed the duties as alleged in the Amended Statement of Claim, it discharged those duties by:
- (i) engaging Asplundh to provide the services (amongst others) in paragraph 35 above;
  - (ii) engaging Pinnacle to provide the services (amongst others) in paragraph 38 above;
  - (iii) engaging Heli-Aust to provide the services (amongst others) in paragraph 43 above;
  - (iv) engaging Osborne to provide the services (amongst others) in paragraph 44 above;
  - (v) engaging ATS to provide the services (amongst others) in paragraph 46 above;
  - (vi) undertaking annual vegetation management inspections in the Katoomba Area (including Mount York Road, Mount Victoria) in the period prior to about August 2012;
  - (vii) undertaking annual pre-summer bushfire inspections of bushfire prone areas (including Mount York Road, Mount Victoria) in advance of the 2008, 2009, 2010 and 2011 bushfire seasons;
  - (viii) appointing Tree Management Officers, being persons with at least ten years' experience as a linesman and provided with training in visual tree assessment, who inspected for trees that were outside minimum clearance distances and presented a serious risk to overhead power lines;
  - (ix) undertaking the OLI/GLI program every 4.5 years in all parts of its franchise area (including Mount York Road, Mount Victoria) to ensure compliance with the provisions of Mains Maintenance Instruction MMI 0001: Routine above and below ground pole and line inspection and treatment procedures; and

**Particulars**

An OLI/GLI inspection of map U28827 was undertaken in or about September 2012.

- (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 between pole 3 and pole 4 and in that regard relies on the following:
- (i) its general procedures and applicable industry standards required the maintenance of a clearance distance of 2.5 metres between vegetation and street lines;

**Particulars**

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

- (ii) at all material times there was a 2.5 metre clearance between the Tree and the power lines;
- (d) says further that it complied with its own general procedures and applicable standards with regard to the identification and/or management of dead, dying, dangerous, visually damaged vegetation or trees between pole 3 and pole 4 and in that regard relies on the following:
- (i) its general procedures required it to trim or remove dead, dying, dangerous and 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 MMI 0013: "Clearances to be maintained between network assets and vegetation".

- (ii) its general procedures required it to remove dead, dying, dangerous and visually damaged 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".

- (iii) the Tree did not appear to be a dead, dying, dangerous or visually damaged tree or vegetation within the meaning of those terms as used in MMI 0013;
- (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.

79. As to paragraph 79, the First Defendant:

- (a) repeats paragraph 75 above; and
- (b) denies the balance of the paragraph.

80. As to paragraph 80, the First Defendant:

- (a) repeats paragraph 75 above; and
- (b) denies the paragraph.

81. Paragraph 81 is not pleaded against the First Defendant who does not plead in response to it.

82. Paragraph 82 is not pleaded against the First Defendant who does not plead in response to it.
83. Paragraph 83 is not pleaded against the First Defendant who does not plead in response to it.
84. Paragraph 84 is not pleaded against the First Defendant who does not plead in response to it.
85. Paragraph 85 is not pleaded against the First Defendant who does not plead in response to it.
86. Paragraph 86 is not pleaded against the First Defendant who does not plead in response to it.
87. Paragraph 87 is not pleaded against the First Defendant who does not plead in response to it.
88. Paragraph 88 is not pleaded against the First Defendant who does not plead in response to it.
89. Paragraph 89 is not pleaded against the First Defendant who does not plead in response to it.
90. Paragraph 90 is not pleaded against the First Defendant who does not plead in response to it.
91. As to paragraph 91, 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 Mount York 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.
92. In response to paragraph 92, the First Defendant refers to and repeats paragraph 91 of this Defence and otherwise admits the paragraph.
93. As to paragraph 93, the First Defendant:

- (a) admits there was a fire in the Mount Victoria area from 17 October 2013; and
- (b) denies the balance of the paragraph.

94. The First Defendant denies paragraph 94.

95. The First Defendant denies paragraph 95.

96. Paragraph 96 is not pleaded against the First Defendant who does not plead in response to it.

97. Paragraph 97 is not pleaded against the First Defendant who does not plead in response to it.

98. Paragraph 98 is not pleaded against the First Defendant who does not plead in response to it.

99. Paragraph 99 is not pleaded against the First Defendant who does not plead in response to it.

100. The First Defendant denies paragraph 100.

101. The First Defendant repeats paragraph 4 above but otherwise admits paragraph 101.

102. As to paragraph 102, the First Defendant;

- (a) repeats paragraph 14 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.

103. The First Defendant denies paragraph 103.

104. The First Defendant denies paragraph 104.

105. As to paragraph 105, the First Defendant:

- (a) admits that the fire had adverse consequences for some owners or occupiers of property in the fire affected areas; and
- (b) otherwise does not admit the paragraph

106. As to paragraph 106, the First Defendant
- (a) says 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 ES Act (as defined);
  - (b) relies on sections 43 and 43A of the *Civil Liability Act 2002* (NSW) and in that regard repeats paragraph 78 above; and
  - (c) denies the paragraph.
107. The First Defendant denies paragraph 107 to the extent it contains allegations against the First Defendant.
108. As to paragraph 108, the First Defendant:
- (a) admits sub-paragraph 108.1;
  - (b) says that, in so far as sub-paragraphs 108.2 to 108.4, 108.7 and 108.10.1 are concerned, 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 108.12 and therefore does not admit that paragraph.

**Proportionate liability defence - Asplundh**

109. If, contrary to the forgoing denials, the First Defendant is liable to the Plaintiff or group members as alleged in the Amended Statement of Claim, then in the alternative, and for the purpose of pleading a proportionate liability defence only, the First Defendant makes the following allegations.

110. For the purposes of this proportionate liability defence only the First Defendant repeats and relies on paragraphs 33 to 37, 41, 42, 54 to 63 and 81 to 87 of the Amended Statement of Claim.
111. In the premises, if (which is denied) the First Defendant is liable to the Plaintiff and group members as alleged in the Amended Statement of Claim, then:
- a. the First Defendant and Asplundh will have caused the same loss or damage;
  - b. accordingly, the First Defendant and Asplundh 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.

**Proportionate liability defence – Pinnacle**

112. If, contrary to the forgoing denials, the First Defendant is liable to the Plaintiff or group members as alleged in the Amended Statement of Claim, then in the alternative, and for the purpose of pleading a proportionate liability defence only, the First Defendant makes the following allegations.
113. For the purposes of this proportionate liability defence only the First Defendant repeats and relies on paragraphs 38 to 42, 64 to 72 and 88 to 90 of the Amended Statement of Claim.
114. In the premises, if (which is denied) the First Defendant is liable to the Plaintiff and group members as alleged in the Amended Statement of Claim, then:
- a. the First Defendant and Pinnacle will have caused the same loss or damage;
  - b. accordingly, the First Defendant and Pinnacle 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

Date of signature



Solicitor for the First Defendant

23 August 2016

by his partner, Colleen Palmkvist

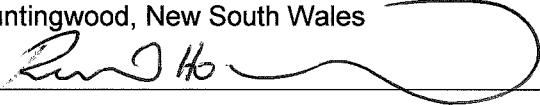


**AFFIDAVIT VERIFYING**

Name Rod Howard  
 Address 51 Huntingwood Drive  
 Huntingwood NSW 2148  
 Occupation Acting Chief Executive Officer, Endeavour Energy  
 Date 22 August 2016

I say on oath/~~affirm~~:

- 1 I am the Acting 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 Huntingwood, New South Wales  
 Signature of deponent   
 Name of witness Vito Tetto  
 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**

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