

Form 3A (version 5)

UCPR 6.2

**AMENDED STATEMENT OF CLAIM**

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2014/313883

**TITLE OF PROCEEDINGS**

First plaintiff	<b>Peter St Barbe More</b>
Second plaintiff	<b>Yvonne Grace More</b>
Defendant	<b>Endeavour Energy (ABN 59 253 130 878)</b>

**FILING DETAILS**

Filed for	First and <u>second</u> plaintiffs
Legal representative	Bill Petrovski, William Roberts Lawyers
Contact name and telephone	Bill Petrovski, +61 2 9552 2111
Contact email	Bill.Petrovski@williamroberts.com.au

**TYPE OF CLAIM**

Torts - Negligence - Personal Injury - Nuisance ~~–~~Property Damage

**RELIEF CLAIMED**

The plaintiffs claim on their own behalf and on behalf of each of the Group Members identified in paragraph 1.c. of this statement of claim:

- 1 Damages.
- 2 Costs.
- 3 Interest on damages and costs pursuant to sections 100 and 101 of the *Civil Procedure Act 2005* (NSW).
- 4 Such further order as the Court deems fit.

## TABLE OF CONTENTS

A. The plaintiffs.....	2
B. Endeavour.....	4
C. Relevant statutory powers and obligations of Endeavour.....	5
D. Endeavour's network management plan.....	7
E. The Springwood Bushfire.....	8
F. <u>Endeavour's inspections prior to the fire</u> .....	9
G. <u>Duty of care</u> .....	12
H. Breaches by Endeavour.....	17
I. Nuisance.....	20
J. Loss and damage of plaintiffs.....	22
K. Loss and damage of Group Members.....	23

## PLEADINGS AND PARTICULARS

### A. The plaintiffs

#### 1. The plaintiffs:

- a. had or had acquired an interest in or owned personal and/or real property **(Property)** in New South Wales;

#### **Particulars**

*Particulars of the plaintiffs' property are identified in Schedule 2 to this Statement of Claim.*

- b. suffered loss and damage by reason of the breaches of duty and nuisance of the defendant **(Endeavour)** pleaded in this Statement of Claim; and
- c. pursuant to section 157 of the *Civil Procedure Act 2005* (NSW) **(Civil Procedure Act)** represent persons **(Group Members)** being natural and artificial persons who:

- i. are listed in Schedule 1 to this Statement of Claim: and
- ii. are not group members of the proceedings in *Johnston v Endeavour Energy* (2014/148790) (as defined in those proceedings).

**2.** For the purposes of section 161 of the Civil Procedure Act:

- a. the nature of the claims brought on behalf of the Group Members are claims against Endeavour relating to loss and damage:
  - i. to property; or
  - ii. to property and person:

suffered by reason of the breaches of the Duty of Care and/or Nuisance (as defined below): and
- b. the relief claimed on behalf of the Group Members is that set out in this statement of claim.

**3.** The plaintiffs and Group Members have the same interest in this proceeding, by reason of the fact that the plaintiffs and each Group Member claim the same type of relief against Endeavour for the same breaches of duty and nuisance, and require a resolution of at least the following common issues of law or fact:

- a. whether Endeavour owed a duty of care to the plaintiffs and Group Members;
- b. the nature, scope and content of the duty (or duties) owed to the plaintiffs and Group Members;
- c. whether and to what extent Endeavour breached the duty (or duties) owed to the plaintiffs and Group Members;
- d. whether and to what extent Endeavour failed to take reasonable steps to prevent a nuisance which affected the property of the plaintiffs and Group Members;
- e. the cause or causes of the bushfire defined below as the Springwood Bushfire;
- f. whether, as a matter of fact, an employee or agent of Endeavour acted or omitted to act in the way alleged in Section paragraphs 19, 20 and 21 of this statement of claim;

g. whether as a matter of fact, on or about 9 July 2013 an employee or agent of Endeavour determined that Endeavour had reasonable cause to believe that the Tree;

- i. could destroy, damage or interfere with its electricity works, or
- ii. could make its electricity works become a potential cause of bush fire or a potential risk to public safety.

as alleged in paragraph 21 .c of the statement of claim:

- h. whether the Springwood Bushfire was caused by the action of the Tree (as defined below) coming into contact with the Electricity Works (as defined below); and
- i. whether the type of loss suffered by the plaintiffs and Group Members was caused by:
  - i. Endeavour breaching the Duty of Care (as defined below); or
  - ii. the Nuisance (as defined below).

## **B. Endeavour**

4. Endeavour:

- a. is a state-owned corporation and is capable of being sued in its own right;
- b. is an energy distributor within the meaning of the *Energy Services Corporations Act 1995* (NSW) (**ESCA**);
- c. is a network operator within the meaning of the *Electricity Supply Act 1995* (NSW) (**ESA**);
- d. holds a distribution network service provider licence under the ESA;
- e. at the material times was responsible for the distribution of electricity in the Blue Mountains local government area; and
- f. at the material times:
  - i. was the owner of and had under its care, control and management the electricity power lines and associated equipment or electricity

structures that formed the distribution system used to convey and control the conveyance of electricity to the premises of customers within the Blue Mountains local government area (Electricity Works):  
and

- ii. had an implied licence to keep in place and maintain the Electricity Works on the land on which they were situated.

**Particulars**

*Section 51 and definitions of "distribution network service provider", "distribution system", "electricity works" and "network operator" in the Dictionary of the ESA.*

*The implied licence pleaded is analogous to that found to exist in Rosebanner Pty Ltd v EnergyAustralia [2011] NSWCA 28.*

**C. Relevant statutory powers and obligations of Endeavour**

- 5. The principal objectives of Endeavour include the objective of operating efficient, safe and reliable facilities for the distribution of electricity.

**Particulars**

*Section 8 of the ESCA.*

- 6. The principal functions of Endeavour are:
  - a. to establish, maintain and operate facilities for the distribution of electricity;  
and
  - b. to supply electricity to other persons and bodies.

**Particulars**

*Section 9 of the ESCA.*

7. The objects of the ESA are:
- a. to promote the efficient and environmentally responsible production and use of electricity and to deliver a safe and reliable supply of electricity;
  - b. to confer on network operators such powers as are necessary to enable them to construct, operate, repair and maintain their Electricity Works; and
  - c. to promote and encourage the safety of person and property in relation to the generation, transmissions, distribution and use of electricity.

***Particulars***

*Section 3 of the ESA.*

8. At the material times Endeavour was:
- a. empowered under the ESA to carry out work connected with the erection, installation, extension, alteration, maintenance and removal of Electricity Works;
  - b. empowered to trim or remove trees situated on any premises that it had reasonable cause to believe:
    - i. could destroy, damage or interfere with its Electricity Works; or
    - ii. could make its Electricity Works become a potential cause of bushfire or a potential risk to public safety; and
  - c. empowered to enter any premises through an authorised officer for the purpose of exercising powers conferred upon it;
- (collectively, **Statutory Powers**).

***Particulars***

*Sections 45, 48, 51, 54 and 55 of the ESA.*

9. The Statutory Powers were to be exercised having regard to the functions and objects conferred on Endeavour by the ESCA and ESA.

**D. Endeavour's network management plan**

10. At the material times Endeavour was obliged to and did lodge a network management plan.

**Particulars**

*Clause 8 of the Electricity Supply (Safety and Network Management) Regulation 2008 (NSW) (Regulation).*

11. The network management plan was required to provide for bushfire risk management with the objects of:
- a. ensuring public safety;
  - b. establishing standards that must be observed when electricity lines operate near vegetation;
  - c. reducing interruptions to electricity supply that are related to vegetation; and
  - d. minimising the possibility of fire ignition by electricity lines.

**Particulars**

*Clauses 8 and 12 of the Regulation.*

12. At the material times Endeavour was obliged to implement the network management plan, including by exercising the Statutory Powers.

**Particulars**

*Clause 8(4) of the Regulation.*

13. Endeavour implemented its network management plan at an operational level through instruction and standards documents created by Endeavour.

**Particulars**

*The plaintiffs ~~rely~~ rely upon the full terms of the 2011-2013 Network Management Plan and associated primary documents, including:*

- a. *Mains Maintenance Instruction **MMI** 0001 - Routine Above and Below Ground Pole and Line Inspection & Treatment Procedures;*

- b. *Mains Maintenance Instruction MMI 0013 - Clearances to be Maintained Between Power Lines and Trees;*
- c. *Work Place Instruction WNV 1012 - Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and*
- d. *Environmental Management Standard EMS 0004 - Vegetation Management*

#### **E. The Springwood Bushfire**

- 14. On 10 October 2013, the New South Wales Rural Fire Service issued an Extreme Fire Danger Warning for the Greater Sydney (including the Blue Mountains), Greater Hunter, Shoalhaven and Illawarra regions because of the prevailing weather conditions.
- 15. On or about the evening of 17 October 2013, a tree (**Tree**) fell onto the Electricity Works on Linksvie Road, Springwood, New South Wales.

#### **Particulars**

*The Tree and/or its limbs or branches fell onto and rested upon the street lines suspended between the poles designated JU267 and JU268 adjacent to the properties at 108 and 110 Linksvie Road.*

- 16. A fire ignited shortly afterwards in bushland adjacent to Linksvie Road (**Springwood Bushfire**).
- 17. The Springwood Bushfire spread from Springwood to surrounding areas and caused extensive damage before being brought under control.

#### **Particulars**

*The particulars of the spread of the Springwood Bushfire are identified in Schedule 3 to this Statement of Claim.*

- 18. The Springwood Bushfire was caused by the action of the Tree coming into contact with the Electricity Works.

#### **Particulars**

*The interaction between the Tree and the Electricity Works:*

- a. *created a circuit; or*



b. configured the Electricity Works in such a way as to cause arcing.

The circuit or arcing ignited material or foliage on the Tree. The burning material drifted with the prevailing wind into the bushland opposite the properties at 108 and 110 Linksvie Road where it ignited the Springwood Bushfire.

F. **Endeavour's inspections prior to the fire**

19. At all material times from no later than February 2012, Endeavour conducted regular pre-bushfire season patrols to:

a. inspect the Electricity Works and immediately surrounding vegetation including the Tree; and

b. identify for rectification or removal any: ~~vegetation defects, including Hazardous Trees.~~

i. dead, dying, dangerous and visually damaged vegetation:

1. within the minimum safety clearances of the Electricity Works;

2. above the Electricity Works; and

ii. trees that could come into contact with the Electricity Works having regard to foreseeable local conditions;

(collectively, Hazardous Trees).

**Particulars**

*Mains Maintenance Instruction MMI 0001 - Routine Above and Below Ground Pole and Line Inspection & Treatment Procedures and Work Place Instruction WNV 1012 - Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting.*

20. in or around January 2012 and February 2012 (together, the 2012 Inspections), an agent or agents of Endeavour:

a. inspected the Electricity Works and immediately surrounding vegetation on Linksvie Road including:

i. the trees and vegetation adjacent to the power pole numbered JU 267 on Linksvie Road (which included the Tree);

- ii. the trees and vegetation adjacent to the service lines running from JU 267 to 108 and 110 Linksview Road (which included the Tree):
- b. did not identify the Tree as a Hazardous Tree: and
- c. took no other action with respect to the Tree.

**Particulars**

The inspections were carried out by Asplundh Tree Experts (Australia) Pty Ltd (Asplundh) and/or Active Tree Services Pty Ltd (ATS) who were contractors engaged on Endeavour's behalf who carried out the inspections as agent of Endeavour.

21. In or around July 2013, an-employee-or an agent or agents of Endeavour:
- a. inspected the Electricity Works and immediately surrounding vegetation on Linksview Road (July 2013 Inspection) including:
    - i. the trees and vegetation adjacent to the power pole numbered JU 267 on Linksview Road (which included the Tree):
    - ii. the trees and vegetation adjacent to the service lines running from JU 267 to 108 and 110 Linksview Road (which included the Tree): and
  - b. required issued notices pursuant to section 48(2) of the ESA to the occupiers of the properties at 108 and 110 Linksview Street Road requiring them, to trim foliage of vegetation on their premises with respect to near the service lines between their premises and the street-lines power pole JU 267 which, in the case of one or both of those premises, included the Tree;
  - c. determined that it had reasonable cause to believe that the Tree:
    - i. could destroy, damage or interfere with its electricity works, or
    - ii. could make its electricity works become a potential cause of bush fire or a potential risk to public safety; and

**Particulars**

- 1 Section 48(2) of the ESA allowed Endeavour to serve a notice in the form of a customer vegetation report if it had "reasonable cause to believe that a tree situated on any premises could

destroy, damage or interfere with its electricity works, or could make its electricity works become a potential cause of bush fire or a potential risk to public safety".

2. Customer vegetation reports 48177 and 48178 were issued to the occupiers of the properties at 108 and 110 Linksview Road respectively on 9 July 2013 and required the trimming of vegetation on their premises to achieve a minimum clearance of 500 millimetres from those service lines.
  3. The foliage which was the subject of customer vegetation report 48177 (to 108 Linksview Road) and/or customer vegetation report 48177 48178 (to 110 Linksview Road) (being foliage within the 500mm clearance zone to the service lines) was or included foliage which was part of the Tree.
- d. in the alternative to subparagraphs 21b. and 21c. (if one or both of the notices referred therein did not relate to foliage on the Tree), did not identify the Tree as a Hazardous Tree; and
- e. took no other action with respect to the Tree.

#### **Particulars**

- i. The inspection was carried out by Asplundh and/or ATS on Endeavour's behalf and as agent of Endeavour.
  - ii. Customer vegetation reports 48177 and 48178 were issued to the occupiers of the properties at 108 and 110 Linksview Road respectively on 9 July 2013 requiring trimming of vegetation on their premises to achieve a minimum clearance of 500 millimetres from the service lines.
22. Further and in the alternative to the matters pleaded in paragraph 21 above, as a result of the 2012 Inspections (or either of them) and/or the July 2013 Inspection, Endeavour had reasonable cause to believe that the Tree:
- a. could destroy, damage or interfere with its electricity works, or
  - b. could make its electricity works become a potential cause of bush fire or a potential risk to public safety.

**Particulars**

The following features of the Tree and the risks that it posed to the Electricity Works would have been readily discernable to an arborist appropriately Qualified to carry out the inspections pursuant to Endeavour's policy "Mains Maintenance Instruction MMI 0001 - Routine Above and Below Ground Pole and Line Inspection & Treatment Procedures":

a. it exhibited poor stem taper in relation to its height:

b. it had an uneven and asymmetrical canopy:

c. it was in an exposed location with respect to topography and elevation;

d. it was infected with a white rot fungus and/or a brown rot fungus that caused internal decay beyond a safe threshold and which was evident on a visible inspection of the tree:

a. the trunk and canopy of the Tree extended over and above the street lines comprising the relevant parts of the Electricity Works; and

f. having regard to particulars a, b, c, d and e above, there was a risk the Tree would come into contact with the Electricity Works having regard to foreseeable local conditions.

G. Duty of care

23. At the material times Endeavour caused or allowed electricity to be transmitted via the Electricity Works.

24. At the material times Endeavour knew or ought to have known and it was foreseeable to it that:

- a. the transmission of electricity through the Electricity Works involved a risk that the electricity would be conducted along a circuit created unintentionally by the interaction between the Electricity Works and other things;

- b. if electricity was conducted through an inanimate object, depending on the properties of the object and the amount of electricity involved, the object might be heated to some degree and there might be a risk of ignition;
- c. if an inanimate object came into contact with the Electricity Works it might configure the Electricity Works in such a way to create an electrical arc and create a risk of ignition;
- d. if ignition occurred by the mechanism in paragraphs 24.b. or 24.c. in a bushfire prone area the risk of a bushfire of the spread and severity of the Springwood Bushfire was not insignificant; and
- e. if a bushfire occurred there was a not insignificant risk that the plaintiffs and Group Members would suffer loss and damage to their property and person.

(The risks identified in subparagraphs 24.a to 24.e are referred to collectively in this amended statement of claim as the **Risks**).

- 25. By causing or allowing electricity to be transmitted via the Electricity Works, Endeavour created the Risks.
- 26. Further and in the alternative to the matters pleaded in paragraphs 24 and 25 above, at ~~At the~~ material times Endeavour had a significant and special measure of control over the Risks Electricity-Works.

### **Particulars**

*The control exercised by Endeavour was a "significant and special measure of control" analogous to that which has been held to found a common law duty on a public authority to exercise discretionary statutory powers and, is derived from the facts that Endeavour:*

- a. *owned the Electricity Works;*
- b. *was authorised by the ESCA and ESA to transmit electricity via the Electricity Works and did so;*
- c. *knew or ought to have known the ~~special~~ particular risks connected with the use of the Electricity Works for the transmission of electricity; ~~and~~*
- d. *knew or ought to have known what ~~special~~ particular precautions against those risks were **necessary**, including:*

**i. the proper exercise of the Statutory Powers; and**

**ii. the precautions contained in the 2011-2013 Network Management Plan and associated primary documents, including:**

**1. Mains Maintenance Instruction MM I 0001 - Routine Above and Below Ground Pole and Line Inspection & Treatment Procedures;**

**2. Mains Maintenance Instruction MM I 0013 – Clearances to be Maintained Between Power Lines and Trees;**

**3. Work Place Instruction WNV 1012 - Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and**

**£ Environmental Management Standard EMS 0004 – Vegetation Management;**

e. had the Statutory Powers and was required to exercise them having regard to its principle statutory objects and functions and the objects of the ESA as pleaded and particularised in paragraphs 5, 6 and 7 above, including:

i. the operation of safe facilities for the distribution of electricity (f5);

ii to promote and encourage the safety of person and property in relation to the generation, transmission, distribution and use of electricity (f7.c);  
**and**

**f. fact reasonable cause to believe that the Tree was a Hazardous Tree for the reasons set out in the particulars subjoined to paragraph 22 above such that its Statutory Powers pursuant to section 48 of the ESA were enlivened and enabled it:**

i. to issue a notice to the owners or occupiers of 108 and/or 110 Linksvie Road to trim the Tree so as to achieve a minimum clearance from the conductor lines, to remove the Tree or otherwise to make safe the Tree within a reasonable time specified in the notice;

ii. in the event that the owner and/or occupiers of such premises did not comply with such a notice in the time specified, to carry out the works specified in the notice itself;

iii. In an emergency to trim or remove the Tree at its own expense pursuant to subsection 48(2) of the ESA and to enter private premises pursuant to section 54(1) of the ESA in order to carry out such works.

27. Further and in the alternative to the matters pleaded and particularised in paragraphs 24, 25 and 26 above, as a result of the matters pleaded and particularised in paragraphs 21.b and 21.c above, on or around 9 July 2013 Endeavour commenced the exercise of Statutory Powers to make safe the Tree.

### **Particulars**

The plaintiffs repeat the matters pleaded and particularised in 21.b and 21.c above and says that by inspecting the vegetation immediately surrounding the service lines to 108 and 110 Linksvie Road (which included the Tree) and issuing the customer vegetation reports in relation to that vegetation, Endeavour had commenced to exercise its Statutory Powers pursuant to section 48 of the ESA to make safe the Tree.

~~25. At the material times Endeavour conducted an activity via the Electricity Works creating a risk of bushfire.~~

28. such that the Further and in the alternative to the matters pleaded and particularised in paragraphs 24, 25, 26 and 27 above, the plaintiffs and Group Members were reliant upon Endeavour and vulnerable to any damage ensuing from the improper, inadequate or negligent exercise of the Statutory Powers.

### **Particulars**

*The reliance and vulnerability of the plaintiffs and Group Members arose from:*

- a. *the nature of the control exercised by Endeavour as set out in the particulars to paragraph 26.3 of this Statement of Claim;*
- b. *the inherent risk of harm Risks described in paragraph 24 above arising from the transmission of electricity via the Electricity Works and the fact that the Risks were known or foreseeable to Endeavour;*
- c. *the lack of particular knowledge held by the plaintiffs and Group Members about Risks described in paragraph 24 above;*

**d. the exposure of the property of the plaintiffs and Group Members to the Risks**  
**a risk of that harm arising from the operation by Endeavour of Electricity**  
**Works outside of their:**

- i. control;*
- ii. knowledge; or*
- iii. vicinity;*

**e. the lack of special particular knowledge about what special particular**  
**precautions against those risks were necessary;** and

**fe the reliance by the plaintiffs and Group Members on Endeavour exercising the**  
**Statutory Powers with reasonable care.**

~~21. At the material times Endeavour had the requisite powers (consisting of the Statutory Powers) to take action that it considered necessary to avert or prevent the danger to the property of the plaintiffs and Group Members arising from the risk of bushfire created by the Electricity Works,~~

29. As a result of the matters pleaded and particularised in paragraphs 18, ~~19, 20, 21~~ and 22 19, 20, 21 22, 24, 25, 26, 27 and 28 above (separately or in combination), Endeavour, at the material times, owed a duty of care to the plaintiffs and Group Members to exercise reasonable care to exercise, and/or in exercising the Statutory Powers to avert or prevent the materialisation of the Risks with reasonable care with respect to the Electricity Works (**Duty of Care**).

30. As an incident of the Duty of Care, Endeavour owed a duty to take reasonable care to identify and make safe or remove or cause to be removed Hazardous Trees.

### **Particulars**

**The precautions required in order for Endeavour to exercise reasonable care to prevent the materialisation of the Risks were prescribed in Endeavour's 2011-2013 Network Management Plan and associated primary documents, including:**

- i. Mains Maintenance Instruction MMI 0001 - Routine Above and Below Ground Pole and Line Inspection & Treatment Procedures;**



ii. Mains Maintenance Instruction MM I 0013 - Clearances to be Maintained Between Power Lines and Trees;

iii. Work Place Instruction WNV 1012 – Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and

iv. Environmental Management Standard EMS 0004 – Vegetation Management

#### **H. Breaches by Endeavour**

31 At the material times Linksvie Road and its surrounds were a bushfire prone area and in particular:

- a. the bushland opposite the properties at 108 and 110 Linksvie Road was designated Vegetation Category 1 with respect to bushfire risk; and
- b. the properties at 108 and 110 Linksvie Road and the Tree were located within a Vegetation Buffer 100m.

#### **Particulars**

*At the material times:*

- i. Endeavour's Tree Management Plan defined "bushfire prone areas" as areas of land defined as bushfire prone by local councils in accordance with the Rural Fires Act 1997 (NSW);*
- ii the Blue Mountains City Council designated Linksvie Road and its surrounds as bushfire prone in its Bush Fire Prone Land Map applying to the Blue Mountains and certified by the Rural Fire Service in accordance with Section 146 of the Environmental Planning and Assessment Act 1979 (NSW); and*
- Hi the Blue Mountains City Council made the specific designations pleaded in paragraphs 31.a. and 31.b. in its Bush Fire Prone Land Map referred to in paragraph ~~b-ii~~ of these particulars.*

32. At the material times the foreseeable local conditions for Linksvie Road and its surrounds included:
- a. dry environmental conditions;
  - b. low atmospheric humidity;
  - c. high ambient temperature; and
  - d. strong winds.
33. At the material times the Tree was a Hazardous Tree.

**Particulars**

*The Tree was a Hazardous Tree because of any one or any combination of the following:*

- a. it exhibited poor stem taper in relation to its height;*
- b. it had an uneven and asymmetrical canopy;*
- c. it was in an exposed location with respect to topography and elevation;*
- d. it was infected with a white rot fungus and/or a brown rot fungus that caused internal decay beyond a safe threshold and which was evident on a visible inspection of the tree;*
- e. the trunk and canopy of the Tree extended over and above the street lines comprising the relevant parts of the Electricity Works; and*
- f. having regard to particulars a, b, c, d and e above, there was a risk the Tree would come into contact with the Electricity Works having regard to foreseeable local conditions.*

34. As a result of the matters referred to in paragraphs 31 to 33 above:
- a. the probability of the Risks occurring was not insignificant;
  - b. there was a significant risk of harm if precautions were not taken to avoid the Risks occurring;
  - c. the likely seriousness of the harm occurring in the event that the Risks eventuated was potentially catastrophic;
  - d. the burden of taking precautions to avoid the Risks by removing or trimming the Tree was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risks would eventuate in relation to the Tree and potential seriousness of the harm if that occurred;
  - e. there was minimal social utility in preserving the Tree or in refraining from appropriately trimming it or alternatively, the social utility of Endeavour of operating the Electricity Works would not be impacted or hindered significantly by the taking of the required precautions and any such impact or hindrance would not obviate the need to take such precautions due to the probability that the Risks would eventuate in relation to the Tree and potential seriousness of the harm if that occurred.
35. As a result of the matters pleaded in paragraph 34 above, a reasonable person in the position of Endeavour would have taken precautions to prevent the materialisation of the Risks by:
- a. identifying the defects and hazards associated with the Tree as identified in the particulars subjoined to paragraph 33;
  - b. pruning or removing the Tree; or
  - c. causing the owners and/or occupiers of 108 and 110 Linksvie Road to make safe the Tree by pruning or removing it

36. In the premises of the matters pleaded in paragraph 35 above, Endeavour breached the Duty of Care:

- a. by failing to exercise its Statutory Powers in order to take the precautions against the Risks:

**Particulars**

.The plaintiffs refer to and repeat the matters pleaded and particularised in paragraphs 20, 21.d, 21.e and 22 above.

- b. alternatively, by the negligent exercise of its Statutory Powers to make safe the Tree.

**Particulars**

.The plaintiffs refer to and repeat the matters pleaded and particularised in paragraphs 21.f, 21.g, 21.h and 22 above.

**I. Nuisance**

37. The plaintiffs rely on the facts pleaded in paragraphs 31, 32 and 33 above in relation to its claim in nuisance.

38. At the material times the Electricity Works on Linksvie Road:

- a. comprised fixtures on real property owned by Blue Mountains City Council or the Crown; and

- b. were in the exclusive possession of Endeavour by reason of:

i. express statutory provision; and

ii. an implied licence over the Electricity Works and the land on which they were situated.

(the land and fixtures referred to in 38.a above are referred to together as Endeavour Property).

**Particulars**

Section 51 and definitions of "distribution network service provider", "distribution system", "electricity works" and "network operator" in the Dictionary of the ESA; sections 3, 8 and 9 of the ESCA.

As to the implied licence the plaintiffs repeat the matters pleaded and particularised in paragraph 4.f above.

39. At the material times Endeavour conducted a dangerous activity upon the Endeavour Property.

**Particulars**

The dangerous activity was the authorised transmission of electricity which was dangerous by reason of the facts pleaded at paragraph 24 above of this Statement of Claim. The relevant premises of Endeavour were the Electricity Works.

40. At the material times a risk of ignition state of affairs arose with respect to the Endeavour Property which exposed the property of the plaintiffs and Group Members to a foreseeable risk of loss and harm.

**Particulars**

The state of affairs arose from risk was the particular risk of ignition loss or harm to property arising from:

- a. the Risks described in paragraph 24 above:
- b. the fact that Linksvie Road and its surrounds were bushfire prone (as pleaded and particularised in paragraph 31 above)
- c. foreseeable local conditions (as pleaded and particularised in paragraph 32 above):
- d. the relative positions of the Electricity Works and Tree; and
- e. the fact that the Tree was a Hazardous Tree (as pleaded and particularised in paragraph 33 above).

~~Endeavour was obliged to take reasonable steps to remedy the risk within a reasonable time after it became or should have become aware of it~~

Endeavour:

- a. ~~failed to take reasonable steps to identify the Tree as a Hazardous Tree; and~~
- b. ~~failed to take reasonable steps to make safe or remove or cause to be removed the Tree.~~

41 By reason of Endeavour failing to take the reasonable steps pleaded in paragraphs 33 and 34 of this statement of Claim to remedy the state of affairs described in paragraph 40 of this Statement of Claim:

- a. the Tree fell onto the Electricity Works on Linksvie Road (as pleaded and particularised in paragraph 15 above);
- b. the action of the Tree coming into contact with the Electricity Works caused an ignition (as pleaded and particularised in paragraph 18 above);
- c. the Springwood Bushfire ignited shortly afterwards in the adjacent bushland (as pleaded and particularised in paragraph 16 above); and
- d. the Springwood Bushfire spread from Springwood to surrounding areas and caused extensive damage before being brought under control (as pleaded and particularised in paragraph 17 above).

42. The Springwood Bushfire unreasonably and substantially interfered with the plaintiffs' enjoyment and use of their property (together with paragraph 40, Nuisance).

#### J. Loss and damage of plaintiffs

43. As a result of:

- a. Endeavour's breaches of the Duty of Care; and/or
- b. the Nuisance;

the Springwood Bushfire ignited and spread, causing the plaintiffs to suffer loss and damage.

**Particulars**

*The loss suffered by the plaintiffs is:*

- i. the cost of repair of property; and/or*
- ii. any diminution in the value of property; and/or*
- Hi. any consequential losses being the necessity to pay interest and other expenses resulting from the damage to property.*

*Further particulars of further loss and damage will be provided in due course and prior to the hearing.*

**K. Loss and damage of Group Members**

44. Group Members have suffered loss and damage resulting from:
- a. Endeavour's breaches of the Duty of Care; and/or
  - b. the Nuisance.

**Particulars**

*The loss suffered by Group Members will be particularised following the initial trial of the plaintiffs' claim and prior to the determination of Group Members<sup>1</sup> claims but with the plaintiffs<sup>3</sup> current state of knowledge will likely consist of:*

- i. the cost of repair of property plus any diminution in the value of property post any repairs; and/or*
- ii. the cost of replacement of property less any salvage value of the damaged property; and/or*
- Hi any consequential losses being the loss to income and profits resulting from the damage to property; and/or*
- iv. any consequential losses being the necessity to pay interest and other expenses resulting from the damage to property; and/or*
- v. personal injury (if relevant to a particular Group Member).*

**SIGNATURE OF LEGAL REPRESENTATIVE**

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

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

Signature

Capacity

Date of signature



Solicitor on the record

28 November 2014

**NOTICE TO DEFENDANT**

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

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

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

**HOW TO RESPOND**

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

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

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

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.**
- 2 If money is claimed, and you believe you owe the money claimed, by:**
  - # Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.



- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

**3 If money is claimed, and you believe you owe part of the money claimed, by:**

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

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

**REGISTRY ADDRESS**

Street address	Law Courts Building, Queens Square 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2000 DX 829 Sydney
Telephone	+61 2 9230 8111

**CASE CONFERENCE**

In accordance with the requirements of Supreme Court Practice Note SC Gen 17, these proceedings are to be listed for an initial case conference at 9:00am on Wednesday 10 December 2014.

**AFFIDAVIT VERIFYING**

Name Peter St Barbe More  
 Address 182 Rusden Road, Mt Riverview NSW 2774  
 Occupation Teacher  
 Date 28th November 2014

I say on oath:

- 1 I am the first plaintiff.
- 2 I believe that the allegations of fact in the amended statement of claim are true.

SWORN at BLAYSDALE NSW  
 Signature of deponent Peter More  
 Name of witness ~~Peter More~~ Robert Glenister Lees  
 Address of witness 9 East Crescent Blaydsale, NSW  
 Capacity of witness Justice of the peace / Solicitor # 19129

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. [OR, delete whichever option is inapplicable]  
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*~~
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]  
 #I have confirmed the deponent's identity using the following identification document:

Drivers licence # 6583 WL  
 Identification document relied on (may be original or certified copy) †

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35 .7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012) J  
 [† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

**AFFIDAVIT VERIFYING**

Name Yvonne Grace More  
 Address 182 Rusden Road, Mt Riverview NSW 2774  
 Occupation Teacher's Assistant  
 Date 28<sup>th</sup> November 2014

I say on oath:

- 3 I am the second plaintiff.
- 4 I believe that the allegations of fact in the amended statement of claim are true.

SWORN at BLAYLAND NSW  
 Signature of deponent [Signature]  
 Name of witness Robert Glenister Lees  
 Address of witness 9 Ross Crescent Blayland, NSW  
 Capacity of witness Justice of the peace / Solicitor ft 1912AL

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. [OR, delete whichever option is inapplicable]  
 #I did not see the face of the deponent because the deponent was wearing a face covering but I am satisfied that the deponent had a special justification for not removing the covering \*
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]  
 #I have confirmed the deponent's identity using the following identification document:

Drivers Licence A 9035X2  
 Identification document relied on (may be original or certified copy) <sup>†</sup>

Signature of witness [Signature]

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]  
 [† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

**FURTHER DETAILS ABOUT PLAINTIFFS****First plaintiff**

Name Peter St Barbe More  
Address 182 Rusden Road  
Mt Riverview NSW 2774

**Second plaintiff**

Name Yvonne Grace More  
Address 182 Rusden Road  
Mt Riverview NSW 2774

**Legal representative for plaintiffs**

Name Bill Petrovski  
Practising certificate number 41964  
Firm William Roberts Lawyers  
Address Level 22  
66 Goulburn Street  
Sydney NSW 2000  
DX address DX 11591 Sydney Downtown  
Telephone + 61 2 9552 2111  
Fax + 61 2 9552 1911  
Email Bill.Petrovski@williamroberts.com.au  
Electronic service address Not applicable.

**DETAILS ABOUT DEFENDANT****Defendant**

Name Endeavour Energy  
Address 51 Huntingwood Drive  
Huntingwood NSW 2148