

DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2014/00313883

FILED

16 APR 2015



TITLE OF PROCEEDINGS

First plaintiff	Peter St Barbe More
Second plaintiff	Yvonne Grace More
<u>First Defendant</u>	Endeavour Energy (ABN 59 253 130 878)
<u>Second Defendant</u>	<u>Osborne Aviation Services Australia Pty Ltd ABN 24 072 380 226</u>

FILING DETAILS

Filed for	Endeavour Energy (ABN 59 253 130 878), the defendant
Legal representative	Jonathan Gregson Melville Hunt, Lander & Rogers Lawyers
Legal representative reference	COP:2041035:JHU
Contact name and telephone	Jonathan Hunt, +61 2 8020 7614 Colleen Palmkvist, +61 2 8020 7644
Contact email	jhunt@landers.com.au cpalmkvist@landers.com.au

HEARING DETAILS

PLEADINGS AND PARTICULARS

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

- 1 In response to paragraph 1, the First Defendant
 - a. does not know and cannot admit sub-paragraph (a);
 - b. denies sub-paragraph (b);
 - c. admits that the proceedings are brought on behalf of persons listed in Schedule 1 to the Further Amended Statement of Claim and who are not group members in Supreme Court of New South Wales Proceedings 2014/148790; and

d. otherwise does not admit the paragraph.

2 In response to paragraph 2, the First Defendant:

- a. admits that the claims against it in the Further Amended Statement of Claim relate to alleged loss and damage to property and/or person;
- b. admits that the relief claimed from it is set out in the Further Amended Statement of Claim;
- c. denies it breached any Duty of Care and/or created a Nuisance; and
- d. otherwise does not admit the paragraph.

3 In response to paragraph 3, the First Defendant:

- a. says that the questions as to whether it owed and breached the alleged duties are not necessarily common to the Plaintiffs and all group members because the circumstances in which a duty may be recognised and the content of any duty which is recognised may vary in part according to the nature of the loss claimed;
- b. admits that sub-paragraphs (d) to (h) raise common issues of fact and law; and
- c. otherwise does not admit the paragraph.

4 In response to paragraph 4, the First Defendant:

- a. admits sub-paragraphs (a) to (e);
- b. in response to sub-paragraph (f)(i):
 - i. admits that it was the owner of the Electricity Works (as defined), save that certain infrastructure on the poles was owned by telecommunications providers;
 - ii. admits that it had practical control over the Electricity Works (as defined) except to the extent that the Electricity Works (as defined) included service cables, transformers and fuses or other like installations on private land; and
 - iii. in the premises of sub-paragraph (b)(ii) above, admits that the Electricity Works (as defined) were under its care and management insofar as it had the powers conferred on it by the *Electricity Supply Act 1995* (NSW) and other legislation, including the powers under section 45 in relation to erection, installation, extension, alteration,

maintenance and removal of electricity works and admits it exercised those powers in relation to the Electricity Works;

- c. in response to sub-paragraph f(ii), admits that it had an entitlement to keep the Electricity Works (as defined) on the land on which they were situated; and
- d. otherwise does not admit the paragraph.

4C The First Defendant admits paragraph 4C.

5 In response to paragraph 5, the First Defendant admits the paragraph and says further:

- a. that its principal objectives as an energy distributor are as follows:
 - i. to be a successful business and, to this end:
 - 1. to operate at least as efficiently as any comparable businesses,
 - 2. to maximise the net worth of the State's investment in it,
 - 3. to exhibit 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 contained in section 6(2) of the *Protection of the Environment Administration Act 1991 (NSW)*;
 - iii. to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates;
 - iv. to operate efficient, safe and reliable facilities for the distribution of electricity and other forms of energy;
 - v. to be an efficient and responsible supplier of electricity and other forms of energy and of services relating to the use and conservation of electricity and other forms of energy; and
 - vi. to be a successful participant in the wholesale and retail markets for electricity and other forms of energy and for services relating to the use and conservation of electricity and other forms of energy.
- b. that each of its principal objectives is of equal importance; and
- c. otherwise does not admit the paragraph.

Particulars

Section 8 of the Energy Services Corporations Act 1995 (NSW)

- 6 In response to paragraph 6, the First Defendant:
- a. says that its principal functions were and are:
 - i. to establish, maintain and operate facilities for the distribution of electricity and other forms of energy; and
 - ii. to supply electricity and other forms of energy, and services relating to the use and conservation of electricity and other forms of energy, to other persons and bodies;
 - b. otherwise does not admit the paragraph.

Particulars

Section 9 of the Energy Services Corporations Act 1995 (NSW).

7 The First Defendant admits paragraph 7.

- 8 In response to paragraph 8, the First Defendant:
- a. says that section 45 of the *Electricity Supply Act 1995* (NSW) empowers 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 section 48 of the *Electricity Supply Act 1995* (NSW) empowers network operators including the First Defendant to trim or remove trees but, pursuant to subsections 48(2)(b) and 48(5), can only do so in emergencies or after first serving a notice which is not complied with;
 - c. says that section 54 of the *Electricity Supply Act 1995* (NSW) empowers 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; and
 - d. otherwise does not admit the paragraph.

- 9 In relation to paragraph 9, the First Defendant:
- a. says that the Statutory Powers (as defined in paragraph 8 of the Further Amended Statement of Claim), if exercised, were to be exercised consistently with the functions and objects conferred on the First Defendant by the *Energy Services Corporations Act 1995* (NSW) and the *Electricity Supply Act 1995* (NSW); and
 - b. otherwise does not admit the paragraph.

- 10 The First Defendant admits paragraph 10.
- 11 In relation to paragraph 11, the First Defendant:
- a. admits that its Network Management Plan was required to provide for bushfire risk management with the objects set out in sub-paragraphs (a) - (d) of the Further Amended Statement of Claim; and
 - b. says further that bushfire risk management was one of four 'chapters' its Network Management Plan was required by the Regulation (as defined) to contain, namely:
 - i. chapter 1 dealing with network safety and reliability;
 - ii. chapter 2 dealing with customer installation safety;
 - iii. chapter 3 dealing with public electrical safety awareness;
 - c. relies on the terms of its Network Management Plan for their full force and effect.
- 12 In relation to paragraph 12, the First Defendant:
- a. admits that it was obliged to implement the Network Management Plan; and
 - b. otherwise does not admit the paragraph.
- 13 In response to paragraph 13, the First Defendant:
- a. says that the Network Management Plan refers to specific workplace instruments and standards developed by the First Defendant to achieve the objectives of the policies stated in the Network Management Plan at an operational level;

Particulars

In relation to bushfire management, the First Defendant refers to the Network Management Plan, Chapter 4- sections 3, 4 and 9.

- b. says that it implemented the said standards and workplace instruments; and
 - c. otherwise does not admit the paragraph.
- 14 The First Defendant admits paragraph 14, save that it says that the NSW Rural Fire Service issued the Extreme Fire Danger Warning on 9 October 2014 for 10 October 2014.

15 In relation to paragraph 15, the First Defendant admits that the Tree fell on to the Electricity Works on 108 Linksvie Road, Springwood, New South Wales, however says that this occurred at between approximately 1:00pm and 1:30pm and not on the evening of 17 October 2013.

16 In relation to paragraph 16, the First Defendant:

- a. admits there was a fire in the Springwood and Winmalee areas, including in bushland adjacent to Linksvie Road, on and from 17 October 2013;
- b. does not know and cannot admit when or where the fire ignited; and
- c. otherwise does not admit the paragraph.

17 In relation to paragraph 17, the First Defendant:

- a. repeats paragraph 16 above;
- b. admits that the fire in the Springwood and Winmalee areas caused extensive damage; and
- c. does not admit the balance of the paragraph.

18 In relation to paragraph 18, the First Defendant:

- a. at the time of pleading does not know and cannot admit paragraph 18 in circumstances where it does not have available to it at the time of pleading any of the following: the street lines in the vicinity of where the Tree fell onto them; the fuses from the sub-station associated with Linksvie Road; the Tree; and any physical evidence from the area under or around the points at which the Tree impacted the street lines;
- b. says further that to the best of the First Defendant's knowledge:
 - i. there was no evidence of fire on the street lines at or about the point where the Tree fell onto them or among the vegetation beneath those street lines; and
 - ii. there was no evidence of fire or burning on the Tree.

18A In relation to paragraph 18A, the First Defendant:

- a. admits that, in discharge of its principal objectives and functions:
 - i. since 2008, it engaged contractors to undertake a continuous inspection and defect rectification regime in relation to vegetation in proximity to the Electricity Works and Consumer Mains (as defined) (Continuous Vegetation Management Regime):

- ii. since 2012, it engaged contractors to undertake a yearly pre-summer bushfire inspection Program (PSBI Program)
- b. says that between 2008 and 2011 the PSBI Program was undertaken by employees of the First Defendant; and
- c. otherwise does not admit the paragraph.

18B In relation to paragraph 18B, the First Defendant:

- a. says that the general purpose of the PSBI Program was to identify any factors associated with the overhead mains that could lead to the initiation of a bushfire;

Particulars

The First Defendant relies on Mains Maintenance Instruction MMI0001: Routine above and below ground pole and line inspection and treatment procedures".

- b. says that as from 17 February 2011, the First Defendant's Mains Maintenance Instruction MMI0001 has provided that an example of a defect that may cause bushfires is insufficient clearance between mains and trees including hazardous trees outside the clearance zone;

Particulars

Mains Maintenance Instruction MM I0001: Routine above and below around pole and line inspection and treatment procedures", Amendment No 13.

- c. says that as from 10 March 2011, hazard trees have been defined as trees outside the minimum trimming clearances, including the allowance for bushfire prone areas, 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 MM I0013: "Clearances to be maintained between network assets and vegetation", Amendment No 8.

- d. otherwise does not admit the paragraph.

18C In relation to paragraph 18C, the First Defendant:

- a. says that the general purpose of vegetation management is 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.

Particulars

RFT (as defined), DO 'Scope'

- b. does not admit the balance of the paragraph.

18D The First Defendant admits paragraph 18D save that it says that under the Asplundh Contract (as defined) the services to be provided by Asplundh were not confined to implementation of the First Defendant's Continuous Vegetation Management Regime but extended to the provision of other services stipulated in the contract-

Particulars

The Asplundh Contract, Contract No 957/07C (C), is comprised of: correspondence dated 28 May 2008, 4 June 2008 and 12 June 2008; a Technical Specification; a Services Agreement; and Asplundh's submission in response to the First Defendant's Request For Tender numbered 957/07T for the Establishment of a Panel of Vegetation Control in Proximity to the Overhead Electricity Network Assets. A copy of these documents can be provided on request.

The services to be provided under the Asplundh Contract are itemised in clause D0. 4 of the Services Agreement.

18E The First Defendant admits paragraph 18E.

18F In relation to paragraph 18F, the First Defendant:

- a. says that pursuant to the Asplundh Contract, Asplundh was required to (among other things):
 - i. undertake a maintenance program to maintain vegetation in its contract areas to a distance outside the Minimum Safety Clearances set out in MMI 0013 at all times, pursuant to clauses D2.3(a) and D2.12;
 - ii. provide a continuous cyclic program of inspection in its contract areas on a three month basis to identify vegetation that had grown within the Minimum Safety Clearance and rectify this defect by trimming the vegetation to at least the Minimum Trimming Clearance set out in MMI 0013 pursuant clause D2.3(c);
 - iii. identify and trim/remove dead, dying, dangerous and visually damaged trees or limbs pursuant to clause D6.2;
 - iv. inspect Bushfire Prone Areas pursuant to clause D2.12 to identify any vegetation that was within, or that could grow into, the Minimum Safety Clearance within the designated bushfire period and trim that vegetation to the Minimum Trimming Clearance for bushfire prone areas;
 - v. carry out discretionary works allocated to it pursuant to clause D12;
- b. says further that Asplundh, pursuant to the Asplundh Contract (as defined) was not required to manage vegetation in proximity to Consumer Mains (as defined) pursuant to clause D.02(e); and
- c. does not admit the balance of the paragraph and relies on the terms of the Asplundh Contract for their full force and effect.

18G The First Defendant admits paragraph 18G save that it says that under the ATS Contract (as defined) the services to be provided by ATS were not confined to implementation of the First Defendant's Continuous Vegetation Management Regime but extended to the provision of other services stipulated in the contract.

18H The First Defendant admits paragraph 18H.

18I In relation to paragraph 18I, the First Defendant:

- a. says that pursuant to the ATS Contract, ATS was required to (among other things):
 - i. undertake a maintenance program to maintain vegetation in its contract areas to a distance outside the Minimum Safety Clearances set out in MMI 0013 at all times, pursuant to clauses D2.3(a) and D2.12;
 - ii. provide a continuous cyclic program of inspection in its contract areas on a three month basis to identify vegetation that had grown within the Minimum Safety Clearance and rectify this defect by trimming the vegetation to at least the Minimum Trimming Clearance set out in MMI 0013 pursuant clause D2.3(c);
 - iii. identify and trim/remove dead, dying, dangerous and visually damaged trees or limbs pursuant to clause D6.2;
 - iv. inspect Bushfire Prone Areas pursuant to clause D2.12 to identify any vegetation that was within, or that could grow into, the Minimum Safety Clearance within the designated bushfire period and trim that vegetation to the Minimum Trimming Clearance for bushfire prone areas;
 - v. carry out discretionary works allocated to it pursuant to clause D12;
- b. denies that the ATS Contract had any operation in relation to the Electricity Works (as defined) because the contract areas to which the ATS Contract applied are not within the Blue Mountains local government area;
- c. does not admit the balance of the paragraph and relies on the terms of the ATS Contract for their full force and effect.

18J The First Defendant admits paragraph 18J.

19 The First Defendant admits paragraph 19,

~~In relation to paragraph 19, the Defendant:~~

- ~~a. says that at all material times from no later than February 2012, it conducted an annual pre-summer bushfire season inspection to identify any factors associated with the overhead mains that could lead to the initiation of a bushfire; and~~

Particulars

~~·Mains-Maintenance-Instruction-MMI0001, "Routine above and below ground pole and line inspection and treatment procedures", page 63.~~

~~b. Otherwise does not admit the paragraph.~~

19A In relation to paragraph 19A, the First Defendant **says** that between in or about July 2008 and in or about July 2013, pursuant to the Asplundh Contract, Asplundh:

- a. carried out quarterly inspections of the vegetation in proximity to the Electricity Works in its contract areas which included Linksview Road;
- b. in addition to the quarterly inspections referred to in subparagraph (a) above, undertook annual inspections in designated bushfire prone areas, including Linksview Road, in the pre-summer bushfire season, and
- c. otherwise does not admit the paragraph.

20 In relation to paragraph 20, the First Defendant:

- a. admits that says that Asplundh Tree Experts (Australia) Pty Ltd (Asplundh), contractors engaged by it, undertook inspections of the vegetation surrounding the Electricity Works on Linksview Road in or around January 2012 and February 2012;
- b. admits Asplundh did not identify the Tree as a Hazardous Tree (as defined in the Further Amended Statement of Claim at paragraph 49b18B); and
- c. otherwise does not admit the paragraph.

21 In relation to paragraph 21, the First Defendant:

- a. admits that ATS (as defined) says that Active Tree Services Pty Ltd (ATS), contractors engaged by it, inspected vegetation surrounding the Electricity Works on Linksview Road in or around July 2013;
- b. denies that ATS undertook the inspection pursuant to the ATS Contract (as defined in the Further Amended Statement of Claim);
- c. says that ATS undertook the inspection pursuant to a Master Supply Agreement for the Supply of Goods and Services and the Supply Schedule No. 6383/12C under that Master Supply Agreement effective 16 May 2013 (together, the 2013 ATS Contract);
- d. says that ATS issued Customer Vegetation Reports to the occupants of properties at 108 and 110 Linksview Road requiring them to trim foliage near the service lines between the premises and power pole JU 267 but denies that the said reports were notices under section 48 and/or section 53C of the

Electricity Supply Act 1995 (NSW) and says further that section 53C of the Electricity Supply Act 1995 (NSW) did not come into force until 11 November 2014;

- e. admits that ATS did not identify the Tree as a Hazardous Tree (as defined in the Further Amended Statement of Claim at paragraph 49b18B); and
- f. otherwise does not admit the paragraph.

21A In relation to paragraph 21A, the First Defendant:

- a. admits subparagraphs (a) and (b)
- b. does not know and cannot admit subparagraph (c).

22 The First Defendant denies paragraph 22.

23 The First Defendant admits paragraph 23.

24 In relation to paragraph 24, the First Defendant:

- a. admits sub-paragraph (a);
- b. says further that it manages the known risks associated with the transmission of electricity in a number of ways, including:
 - i. 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;
 - ii. by the installation and use of protection devices to cut off the supply of electricity in certain events;
 - iii. by inspection of its network assets and of the relationship between network assets and other things;
 - iv. by maintaining separation of street lines;
 - v. by the spacing of supporting insulators; and
 - vi. by the placement of line spreaders mid-span on low voltage lines;
- c. admits sub-paragraph (b);
- d. says further that the amount of electricity potentially capable of being conducted from the street lines or the service lines was limited by:
 - i. the voltage of the street lines (230 volt single phase / 400 volt three phase), which was the lowest distribution voltage of any conductors on the First Defendant's network;

- ii. the sum of all of the impedances on the First Defendant's network between the power source and the street lines or the service cable; and
 - iii. by the protection devices (being devices which cut off the supply of electricity in certain events) in the First Defendant's network.
- e. admits sub-paragraph (c);
- f. says further that:
- i. arcing would only be a possibility in the event that the street lines clashed with each other;
 - ii. the street lines were equipped with spreaders designed for the purpose of preventing clashing; and
 - iii. clashing would only occur if the street lines were subjected to substantial and unexpected external forces (over and above foreseeable local climatic conditions);
- g. says that in the premises the risk of ignition and bushfire by the mechanism in sub-paragraphs 24.b. to c. was a low risk, but otherwise, admits that if ignition occurs in a bushfire prone area there is a risk of a bushfire occurring depending on the climatic conditions;
- h. admits that if a bushfire occurs there is a risk that persons will suffer loss of and damage to their property and person; and
- i. otherwise does not admit the paragraph.

25 In relation to paragraph 25, the First Defendant says that the transmission of electricity was an activity which carried a risk of harm and repeats paragraph 24 above, but does not otherwise admit the paragraph.

26 In relation to paragraph 26, the First Defendant:

- a. repeats paragraphs 4, 24 and 25 above; and
- b. otherwise does not admit the paragraph.

27 In relation to paragraph 27, the First Defendant:

- a. repeats paragraph 21, 24, 25 and 26 above;
- b. for the avoidance of doubt, does not admit the particulars to paragraphs 21, 24, 25 and 26; and
- c. otherwise denies the paragraph.

- 28 In relation to paragraph 28, the First Defendant:
- a. repeats paragraphs 24, 25, 26 and 27 above;
 - b. for the avoidance of doubt, does not admit the particulars to paragraphs 24, 25, 26 and 27; and
 - c. otherwise does not know and cannot admit the paragraph in the absence of a specification of the precise nature of the improper, inadequate or negligent exercise of the Statutory Powers referred to.
- 29 In relation to paragraph 29, the First Defendant:
- a. repeats paragraphs 19, 20, 21, 21A, 22, 24, 25, 26, 27 and 28 above;
 - b. for the avoidance of doubt, does not admit the particulars to paragraphs 19, 20, 21, 22, 24, 25, 26, 27 and 28;
 - c. 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;
 - d. says in that regard that the First Defendant supplied electricity to approximately 2.2 million people and established, maintained and operated facilities for the distribution of electricity, across a region spanning more than 25,000 ~~24,500~~ square kilometres and comprising the local government areas of Blacktown, Blue Mountains, Hawkesbury, Lithgow, Parramatta, Penrith, The Hills, parts of Hornsby, Mid-Western, Bathurst, parts of Oberon, Camden, Campbelltown, Fairfield, Holroyd, Liverpool, Wingecarribee and Wollondilly, parts of Upper Lachlan Shire, parts of Goulburn Mulwaree, Kiama, Shellharbour, Shoalhaven and Wollongong;
 - e. 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 23,400 28,000 kilometres of overhead electricity lines;
 - f. 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 5a of this Defence;

Particulars

Since 2009 the First Defendant is subject to regulation by the

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

- g. says that the class of persons to whom the First Defendant allegedly owed the duty was indeterminate, having regard to the definition of the Plaintiffs and Group Members in the Further Amended Statement of Claim and, in the premises, denies that it owed a duty of care to an indeterminate class of persons; and
- h. otherwise denies the paragraph.

30 In relation to paragraph 30, the First Defendant:

- a. repeats paragraph 29 above;
- b. says further that a duty to remove Hazardous Trees (as defined in the Further Amended Statement of Claim at paragraph ~~18B19b~~) 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 the Electricity Works (as defined), 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;
- c. says further that any such duty must extend to the identification, removal and making safe of Hazardous Trees (as defined) across any of the 23,400 km of overhead electricity lines across the First Defendant's 24,500 km² network area; and
- d. otherwise denies the paragraph.

30A Paragraph 30A of the Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

30B Paragraph 30B of the Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

30C Paragraph 30C of the Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it

31 The First Defendant admits paragraph 31.

32 In relation to paragraph 32, the First Defendant:

- a. admits that at or around 1.30pm on 17 October 2013, the local conditions for Linksvie Road and its surrounds exhibited the features in sub-paragraphs (a) to (d); and
- b. otherwise does not admit the paragraph.

33 The First Defendant denies paragraph 33.

34 In relation to paragraph 34 the First Defendant:

- a. repeats paragraphs 24, 31, 32 and 33 above;
- b. otherwise denies the paragraph.

35 The First Defendants denies paragraph 35 and further refers to paragraph 36 below.

36 In relation to paragraph 36, the First Defendant:

- a. denies the paragraph;
- b. says that if (which is denied) it owed the duties as alleged in the Further Amended Statement of Claim, it discharged those duties by:
 - i. engaging Asplundh pursuant to the Asplundh Contract to undertake the steps in paragraph 18F above;
 - ii. engaging Asplundh to undertake the steps in paragraph 18F above pursuant to a Master Supply Agreement for the Supply of Goods and Services and Supply Schedule 6383/12B for the period 1 July 2013 to 31 May 2016 (2013 Asplundh Contract);
 - iii. auditing the vegetation maintenance work undertaken by Asplundh in accordance with Division Workplace Instruction WNV1046;

Particulars

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

- iv. engaging ATS pursuant to the 2013 ATS Contract to inspect vegetation in Linksvie Road, Springwood, to identify any vegetation within the clearances prescribed by Mains Maintenance Instruction MMI 0013 "Clearances to be maintained between network assets and vegetation"; and
- v. undertaking annual pre-summer bushfire inspections of bushfire prone areas (including Linksvie Road, Springwood) in advance of the 2008, 2009, 2010 and 2011 bushfire seasons;

Particulars

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

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

- vi. engaging Heli-Aust Pty Ltd to undertake a pre-summer bushfire inspection in Linksvie Road, Springwood in advance of the 2012 Bushfire Season pursuant to Services Agreement 1515/11C for the Provision of PSBI Video Review and Ground Line Inspection Services between Endeavour Energy (which inspection occurred on or about 31 August 2012);
- vii. engaging Osborne Aviation Services Pty Ltd to undertake a pre-summer bushfire inspection in Linksvie Road, Springwood to identify any defect that could lead to a bushfire in advance of the 2013 Bushfire Season pursuant to the Osborne Contract (as pleaded further from paragraph 46 below) (which inspection occurred on or about 30 July 2013); and
- viii. undertaking a program of overhead line inspection and below ground line inspection every 4.5 years (OLI/GLI Program) in all parts of its franchise area (including Linksvie Road, Springwood) to ensure compliance with the provisions of Mains Maintenance Instruction MM I0001: Routine above and below ground pole and line inspection and treatment procedures".

Particulars

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

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

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

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

Particulars

The First Defendant relies on Mains Maintenance Instruction MM I0013: "Clearances to be maintained between network assets and vegetation" and ISSC 3.

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

Particulars

The First Defendant relies on Mains Maintenance Instruction MM I0021: "Guide to rights and obligations for electricity mains located on private property."

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

Particulars

The First Defendant relies on Mains Maintenance Instruction

MMI0013: "Clearances to be maintained between network assets and vegetation" and ISSC 3.

- ii. at all material times there was a 1.5 metre clearance between the Tree and the street lines;
- e. says further that it complied with its own general procedures and applicable standards with regard to the removal of hazard trees at pole JU 267 and in that regard relies on the following:
 - i. its general procedures required it to remove all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances;

Particulars

The First Defendant relies on Mains Maintenance Instruction MM I0013: "Clearances to be maintained between network assets and vegetation".

- ii. the Tree was neither dead, dying, dangerous nor visually damaged at all or in any material respect;
- iii. as from 10 March 2011, its general procedures required it to remove hazard trees, being trees outside the minimum trimming clearances, that could come into contact with an electric power line having regard to foreseeable local conditions;

Particulars

The First Defendant relies on Mains Maintenance Instruction MM I0013: "Clearances to be maintained between network assets and vegetation", Amendment No 8.

- iv. the Tree was not one that could come into contact with an electric power line having regard to foreseeable local conditions.
- f. says that it is a public or other authority within the meaning of section 41 of the *Civil Liability Act 2002* (NSW) and:
 - i. relies on section 43 of the *Civil Liability Act 2002* (NSW) and says that the conduct of the First Defendant in not taking steps (other than those referred to at paragraphs 36(b) and (c) above) to trim or remove the Tree, does not constitute a breach of the alleged duty (as defined in

the Further Amended Statement of Claim at paragraphs 29 and 30, and which is in any event denied) on the ground that that conduct was not, in the circumstances so unreasonable that no authority having the functions of the First Defendant could properly consider the conduct to be a reasonable exercise of its functions; and

ii. relies on section 43A of the *Civil Liability Act 2002 (NSW)* and says that it is not liable for any breach of the alleged 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 Statutory Powers (as defined in the Further Amended Statement of Claim at paragraph 8), was not so unreasonable that no authority having that statutory power could properly consider the conduct a reasonable exercise of the power.

36A Paragraph 36A of the Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

36B Paragraph 36B of the Further Amended Statement of Claim is not pleaded against the First Defendant who does not, therefore, plead in response to it.

37 In relation to paragraph 37, the First Defendant repeats paragraphs 31, 32 and 33 above.

38 In relation to paragraph 38, the First Defendant:

- a. admits sub-paragraph (a), save that it says that the real property also included that owned by residents of Linksview Road; and
- b. in relation to sub-paragraph (b):
 - i. admits that it was the owner of the Electricity Works (as defined in the Further Amended Statement of Claim at paragraph 4) on Linksview Road, save that certain infrastructure on the poles was owned by telecommunications providers;
 - ii. admits it had an entitlement to keep the Electricity Works on the land on which they were situated; and
 - iii. otherwise does not admit the sub-paragraph.

39 In relation to paragraph 39, the First Defendant:

- a. says that at all material times it transmitted electricity using the Electricity Works and that the authorised transmission of electricity is an activity which

carries a risk of harm;

- b. repeats paragraph 24 and 28 above; and
- c. otherwise does not admit the paragraph.

40 The First Defendant denies paragraph 40.

41 The First Defendant denies paragraph 41.

42 In relation to paragraph 42, the First Defendant:

- a. admits that the fire had adverse consequences for a large number of owners or occupiers of property in the fire affected area; and
- b. otherwise denies the paragraph.

42A In further answer to paragraphs 37-42, the First Defendant:

- a. says that it is not responsible for any nuisance as alleged by reason of the fact that its conduct in transmitting electric current using the Electricity Works (as defined) was carried out:
 - i. in the exercise of functions conferred on it by section 9 of the *Energy Services Corporations Act 1995* (NSW); and
 - ii. pursuant to the authority conferred on it by a distribution network service provider's licence granted under section 14 of the *Electricity Supply Act 1995* (NSW); and
- b. relies on sections 43 and 43A of the *Civil Liability Act 2002* (NSW) and in that regard repeats paragraphs 36.f.(i) and (ii) above.

42B The First Defendant does not admit paragraph 42A.

43 The First Defendant denies paragraph 43.

44 The First Defendant denies paragraph 44.

45 If, contrary to the foregoing denials, the First Defendant is liable to the Plaintiffs or Group Members as alleged in the Further Amended Statement of Claim, then for the purpose of pleading a proportionate liability defence only, the First Defendant makes the following allegations.

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

Particulars

The terms and conditions of the Osborne Contract are wholly in writing and contained in the "Services Agreement- 6332/12 Endeavour Energy Pre-Summer Bushfire Inspection Program" executed on behalf of Osborne on 28 April 2013 and on behalf of the First Defendant on 29 April 2013.

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

Particulars

Osborne Contract, Schedule 2, Sections 3.0 and 4.0

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

Particulars

Osborne Contract, Schedule 2, Section 4.0

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

Particulars

Osborne Contract, Schedule 2, Section 3.0

- 50 Pursuant to the Osborne Contract, Osborne was required, inter alia, to conduct ground line patrols in areas where helicopter patrols cannot be performed (such as no-fly zones, urban areas, stock sensitive areas and general aviation no fly zones, and areas where the vegetation canopy prevents image capture of assets) so as to, inter alia:
- a. identify, classify, prioritise, photograph, record and report defects on both the First Defendant's and private poles and lines which could lead to the ignition of a bushfire;
 - b. issue PSBI Defect Report of Inspections notices to private customers detailing private line defects identified;
 - c. notify the First Defendant of defects on the First Defendant's network and any privately owned network (a "defect" being defined as a condition that requires rectification work); and

- d. liaise with the First Defendant and private customers to arrange ground line inspections of private poles and lines where access is not available of the initial time of inspection.

Particulars

Osborne Contract, Schedule 2, Section 5.4

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

Particulars

Osborne Contract, Schedule 2, Section 7.0

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

Particulars

Osborne Contract, Schedule 2, Section 17.0

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

Particulars

Osborne Contract, Schedule 2, Section 14.0.

54. At all material times, Osborne owed to the Plaintiffs and Group Members a duty to take reasonable care in carrying out the PSBI Program pursuant to the Osborne Contract.

Particulars

The First Defendant:

- (i) refers to and repeats paragraph 24 of the Further Amended Statement of Claim and says that the risks alleged in paragraph 24 were reasonably foreseeable to Osborne; and
- (ii) says that the Plaintiffs and Group Members were dependent, for the protection of their persons and property, upon Osborne because Osborne was the entity engaged by the First Defendant to undertake the PSBI Program so as to identify and rectify any defects that could lead to a bushfire occurring within the Penrith area.

- 55 At all material times, MMI0001 stipulated, inter alia, that:
- a. minimum tree clearances of all mains, including aerial service mains, must be inspected in accordance with those specified in MMI0013;
 - b. particular attention must be given to the likelihood of vegetation outside the clearance zone that may be dead or dying and at a height that, if failure occurred, impact to the overhead mains would result. Vegetation in this condition was required to be reported for removal;
 - c. the general purpose of the pre-summer patrol is to identify any factors associated with the overhead mains that could lead to the initiation of a bushfire. These may include inadequate tree clearances, impact damage, lightning damage, or any other defect; and
 - d. examples of defects that may cause bushfires included insufficient clearance between mains and trees including hazardous trees outside the clearance zone.
- 56 At all material times, MMIQ013 required that, inter alia:
- a. all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances, shall be removed;
 - b. hazard trees (being trees outside the minimum trimming clearances, including the allowance the bushfire prone areas, that could come into contact with power lines having regard to foreseeable local conditions) shall be removed.
- 57 The Electricity Works on Linksvie Road, Springwood are part of an urban area.
- 58 On or about 30 July 2013, Osborne carried out a ground line inspection of trees and vegetation adjacent to pole JU 267 in Linksvie Road, Springwood, as part of the PSBI Program.
- 59 In the course of the said inspection, the Tree should have been identified by Osborne as a tree requiring removal or trimming in accordance with:
- a. the contractual obligations identified in paragraphs 50 to 52 above; and
 - b. the provisions of MMIs0001 and MMI0013.

Particulars

The First Defendant repeats paragraphs 15 and 33 of the Further Amended Statement of Claim and the particulars thereto and says that in the premises, the Tree was:

- (i) a defect that may cause bushfires within the meaning of Schedule 2, Section 7.0 of the Osborne Contract and MMIQ001;
- (ii) dead or dying and at a height that, if failure occurred, impact to the overhead mains would result, within the meaning of MMIQ001;
- (iii) dead, dying, dangerous or visually damaged vegetation, and/or a hazard tree, within the meaning of MM 10013

and that a reasonably skilled contractor in the position of Osborne would have identified it as such and notified its existence to the First Defendant.

60 In breach of its duty of care alleged in paragraph 54 above, Osborne failed to identify the Tree as a tree requiring removal or trimming.

61 The First Defendant repeats paragraphs 14 to 18 of the Further Amended Statement of Claim and says that if Osborne had identified the tree as a tree requiring removal or trimming:

- a. the Tree would have been removed or trimmed before 17 October 2013; and
- b. the Springwood Bushfire would not have occurred.

62 In the premises, by reason of Osborne's breaches of duty as alleged above, the Plaintiffs and Group Members have suffered the loss and damage alleged in paragraphs 43 and 44 of the Further Amended Statement of Claim.

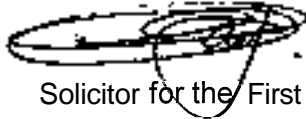
63 In the premises, if (which is denied) the First Defendant is liable to the Plaintiffs and Group Members as alleged in the Further Amended Statement of Claim, then:

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

SIGNATURE OF LEGAL REPRESENTATIVE

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

Signature

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

Capacity

Solicitor for the First Defendant by his employed solicitor

Date of signature

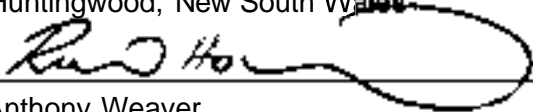
17 April 2015

AFFIDAVIT VERIFYING

Name Rod Howard
Address 51 Huntingwood Drive
Huntingwood NSW 2148
Occupation Chief Operating Officer, Endeavour Energy
Date 16 April 2015

I say on oath/~~affirm~~:

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

SWORN/AFFIRMED at Huntingwood, New South Wales
Signature of deponent 
Name of witness Anthony Weaver
Address of witness 51 Huntingwood Drive, Huntingwood, NSW 2148
Capacity of witness Solicitor

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

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

Signature of witness 

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

FURTHER DETAILS ABOUT FILING PARTY

Filing party

Name Endeavour Energy
Address 51 Huntingwood Drive
Huntingwood NSW 2148

Legal representative for filing party

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