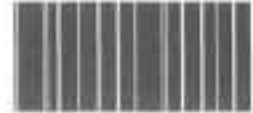




Filed: 9 April 2018 11:06 AM
Garling J..6/07/2018



D0000ZADJY

Defence to Amended Statement of Claim

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2015/00310264

TITLE OF PROCEEDINGS

First Plaintiff	Laurence Kevlin Eades
First Defendant	ENDEAVOUR ENERGY ABN 59253130878
Second Defendant	Asplundh Tree Expert (Australia) Pty Ltd
Number of Defendants	3

FILING DETAILS

Filed for	Asplundh Tree Expert (Australia) Pty Ltd, Defendant 2
Legal representative	Melissa Helen Fenton
Legal representative reference	
Telephone	02 8281 4555
Your reference	MHF.AXF.1604525

ATTACHMENT DETAILS

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

Defence to Amended Statement of Claim (Defence to Second Amended Statement of Claim.pdf)

[attach.]

Form 7 A (version 5)
UCPR 14.3

DEFENCE TO SECOND AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law Division
List	General List
Registry	Sydney
Case number	2015/00310264

TITLE OF PROCEEDINGS

Plaintiff	Laurence Kelvin Eades
First defendant	Endeavour Energy (ABN 59 253 130 878)
Second defendant	Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424)
Third defendant	Pinnacle Career Development Pty Limited (ABN 73 115 138 326)
Number of defendants	3

FILING DETAILS

Filed for	Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424) , the Second defendant
Legal representative	Melissa Helen Fenton Colin Biggers & Paisley Pty Ltd
Legal representative reference	MHF:AXF:1604525
Contact name and telephone	Melissa Fenton (02) 8281 4555
Contact email	melissa.fenton@cbp.com.au

PLEADINGS AND PARTICULARS

In relation to the Second Amended Statement of Claim (SASOC) filed on 20 December 2017, and adopting the defined terms referred to in the SASOC, the second defendant (hereafter referred to as Asplundh):

1. Admits paragraph 1.
2. Admits paragraph 2,
3. As to paragraph 3, Asplundh;
 - (a) admits that there was a fire in or around Mount York Road, Mt Victoria in New South Wales on 17 October 2013; and
 - (b) otherwise does not admit the paragraph.

4. As to paragraph 4, Asplundh:
 - (a) refers to and repeats paragraph 3 above;
 - (b) admits that the proceedings are brought by group members in the classes described in subparagraphs 4.1 to 4.4 of the SASOC; and
 - (c) does not know and cannot admit the existence of the losses or the identity of anyone who may have suffered losses who fall within the classes described in subparagraphs 4.1 to 4.4 of the SASOC.
5. As to paragraph 5, Asplundh:
 - (a) admits that seven or more persons claim to have sustained loss or damage as pleaded in subparagraphs 4.1 to 4.4 of the SASOC;
 - (b) refers to and repeats paragraph 4 above; and
 - (c) otherwise does not know and cannot admit paragraph 5.
6. Admits paragraph 6.
7. Does not know and cannot admit paragraph 7.
- 7A. Admits paragraphs 7A.
- 7B. Admits paragraphs 7B.
8. Admits paragraph 8.
9. Admits paragraph 9
10. Admits paragraph 10.
11. As to paragraph 11, Asplundh:
 - (a) admits that the ES Act and other applicable legislation empowered the first defendant to perform certain functions, and
 - (b) otherwise does not admit the paragraph.
12. Does not admit paragraph 12.
13. As to paragraph 13, Asplundh:

- (a) admits that the first defendant used the power line to transmit electricity; and
 - (b) otherwise does not admit the paragraph.
14. Does not admit paragraph 14.
15. As to paragraph 15, Asplundh:
- (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 some or all of the persons in the class identified in paragraph 4 of the SASOC to protect themselves by:

- (i) obtaining insurance in respect of the loss and damage referred to in paragraph 106 of the SASOC; 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

- (i) 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) otherwise does not admit the paragraph.

16. As to paragraph 16, Asplundh:
- (a) refers to and repeats paragraph 4 above; and
 - (b) does not know and cannot admit the paragraph.
17. Does not admit paragraph 17.
18. As to paragraph 18, Asplundh:
- (a) admits that Mount Victoria is in a bushfire-prone area;
 - (b) admits that parts of Mount York Road, Mount Victoria, including the drive way of 80-92 Mount York Road was in an area containing a number of large trees; and
 - (c) otherwise denies the paragraph.
19. Does not admit paragraph 19.
- 19A. Does not know and cannot admit paragraph 19A.
- 19B. Does not admit paragraph 19B.
20. As to paragraph 20, Asplundh:
- (a) admits subparagraph 20.1; and
 - (b) does not know and cannot admit the paragraph.
21. Does not know and cannot admit paragraph 21.
- 21 A. Does not know and cannot admit paragraph 21 A.
- 21B. Does not know and cannot admit paragraph 21B.
- 21C. Does not know and cannot admit paragraph 21C,
22. Does not know and cannot admit paragraph 22.
23. Does not admit paragraph 23
24. Does not admit paragraph 24.
25. Admits paragraph 25.
26. As to paragraph 26, Asplundh:

- (a) relies on the Primary Documentation and Network Management Plan for their full force and effect; and
 - (b) otherwise does not admit the paragraph.
- 27. As to paragraph 27, Asplundh:
 - (a) relies on the Primary Documentation and Network Management Plan for their full force and effect; and
 - (b) otherwise does not admit the paragraph.
- 28. Admits paragraph 28.
- 29. Does not admit paragraph 29.
- 30. As to paragraph 30, Asplundh:
 - (a) relies on the Primary Documentation and Network Management Plan for their full force and effect, including MMI0013; and
 - (b) otherwise does not admit the paragraph.
- 31. Does not admit paragraph 31.
- 32. Does not admit paragraph 32.
- 33. Does not know and cannot admit paragraph 33.
- 34. Does not admit paragraph 34.
- 35. As to paragraph 35, Asplundh:
 - (a) admits that in or around August 2012 it entered into a contract with Endeavour Energy to provide vegetation management services limited to vegetation control delivery (cutting) in the Northern Region from 1 October 2012 (**Asplundh Contract**);
 - (b) says the Asplundh Contract comprised:
 - (i) a document titled "Endeavour Energy Request for Expression of Interest, RFEI number 1523/12E" dated 25 January 2012;
 - (ii) Supply Schedule No 1523/12C signed by Gregory Fitzgerald on behalf of Asplundh on 13 July 2012;

- (iii) Documents appended to the Supply Schedule;
 - (iv) Master Supply Agreement for the Supply of Goods and Services effective on 1 October 2012; and
 - (v) refers to and relies on the terms of the Asplundh Contract including all annexures, attachments and appendices (however displayed) as if fully set out herein;
- (c) admits that it was a term of the Asplundh Contract that Asplundh provide vegetation management services limited to vegetation control delivery (cutting) to Endeavour Energy in the Katoomba region and relies on Part C2 Specification - Vegetation Control Delivery as if fully set out herein;
 - (d) says that Asplundh was not retained to scope and audit the annual cut in the year commencing 1 October 2012 in the Katoomba region; and
 - (e) says that Pinnacle was retained by Endeavour Energy to perform the scope and audit contract during the 2012/2013 period in the Katoomba region.
36. As to paragraph 36, Asplundh:
- (a) relies on clause 7.5.1 of the Supply Schedule No. 1523/12C as if fully set herein and otherwise does not admit subparagraph 36.1;
 - (b) as to subparagraph 36.2:
 - (i) admits that clause 7.5.1 of the Supply Schedule No. 1523/12C required Asplundh to achieve minimum clearance for vegetation in proximity to Endeavour Energy's network assets as set out in MMI0013 and the vegetation control delivery specification (Clause 2.1 Objective) in the Katoomba region;
 - (ii) relies on the definition of Vegetation Defects as set out on page 5 of Part C2 Specification;
 - (iii) relies on clause 7.2 of the Supply Schedule No. 1523/12C and says that all monthly invoices issued by Asplundh to Endeavour Energy were paid.
 - (c) as to subparagraph 36.3,
 - (i) admits that clause 7.3 of the Asplundh Contract required Asplundh to carry out PSBI in accordance with the provisions of the Asplundh Contract; and

- (ii) says that Endeavour Energy was required under the terms of its Network Management Plan and the Primary Documentation to conduct an annual PSBI in all designated bushfire prone areas;
- (iii) says that;
 - (A) it was a term of the Asplundh Contract that Asplundh would carry out *an* inspection and defect rectification of designated bushfire prone areas each 12 months prior to the commencement of the declared bushfire season (clause 7.3);
 - (B) it was a term of the contract that any identified defects would be cut to MMI0013 minimum trimming clearances; and
 - (C) Endeavour Energy completed its own PSBI audit and aerial patrol/LiDAR program for the relevant year;
- (d) as to subparagraph 36.4,
 - (i) admits that Asplundh was permitted under Part C2 Specification to perform discretionary works that had been approved by Endeavour Energy's Vegetation Control Manager and says that such discretionary work at all times depended on Endeavour Energy approving the works including but not limited to:
 - (A) Endeavour Energy assessing the *tree* and determining whether or not it required removal;
 - (B) Endeavour Energy issuing a private tender to certain approved providers to remove the identified tree; and
 - (C) Endeavour Energy assessing the quotations submitted by interested parties to carry out the discretionary work.
 - (e) in relation to subparagraph 36.5 admits that it was a term of the Part C2 Specification that Asplundh's relevant staff and subcontractors would comply with the training requirements set out in clause 4.7; and
 - (f) otherwise does not admit the paragraph.

37. As to paragraph 37, Asplundh

- (a) relies on the Asplundh Contract as set out in paragraph 35 above for its full force and effect; and

- (b) otherwise does not admit the paragraph.
38. Admits paragraph 38.
39. As to paragraph 39, Asplundh:
- (a) admits that Endeavour Energy entered into a contract with Pinnacle for the provision by Pinnacle of Vegetation Management Maintenance and Audit for the Northern and Central Region effective from 1 August 2012 **(Pinnacle Contract)**;
 - (b)** refers to the Pinnacle Contract as if fully set out herein; and
 - (c) otherwise does not admit the paragraph.
40. As to paragraph 40, Asplundh:
- (a) admits that Endeavour Energy entered into a contract with Pinnacle for the provision by Pinnacle of Vegetation Management Maintenance and Audit for the Northern and Central Region effective from 1 August 2012;
 - (b) refers to the Pinnacle Contract as if fully set out herein; and
 - (c) otherwise does not admit the paragraph.
41. As to paragraph 41, Asplundh:
- (a) repeats paragraph 26 of this defence;
 - (b) will, at any hearing of these proceedings, refer to and rely on the terms of the Asplundh Contract as set out in paragraph 35 above;
 - (c) will, at any hearing of these proceedings, refer to and rely on the terms of the Primary Documentation including MMI 0001 and MMI 0013; and
 - (d) otherwise does not admit the paragraph.
42. As to paragraph 42, Asplundh:
- (a) admits that Endeavour Energy provided a copy of MM I0013 (Amendment no.8) at or around the time Asplundh entered into the Asplundh Contract;
 - (b) does not know and cannot admit subparagraph 42.2; and
 - (c) otherwise does not admit the paragraph.
43. As to paragraph 43, Asplundh:

- (a) admits that Endeavour Energy entered into a contact with Heli-Aust Pty Ltd; and
 - (b) as necessary, relies on the terms of that contract (as defined in the SASOC) for its full force and effect.
- 44. As to paragraph 44, Asplundh:
 - (a) admits that Endeavour Energy entered into a contact with Osborne; and,
 - (b) as necessary, relies on the terms of that contract (as defined in the SASOC) for its full force and effect.
- 45. As to paragraph 45, Asplundh:
 - (a) repeats the matters pleaded in paragraph 44 above; and
 - (b) otherwise does not admit the paragraph.
- 46. As to paragraph 46, Asplundh:
 - (a) admits that Endeavour Energy entered into a contact with Active Tree Services; and,
 - (b) as necessary, relies on the terms of that contract (as defined in the SASOC) for its full force and effect
- 47. As to paragraph 47, Asplundh:
 - (a) repeats the matters pleaded in paragraph 46 above; and
 - (b) otherwise does not admit the paragraph.
- 48. Does not know and cannot admit paragraph 48.
- 49. As to paragraph 49, Asplundh:
 - (a) does not know and cannot admit the allegations contained in subparagraph 49.1;
 - (b) does not know and cannot admit the allegations contained in subparagraph 49.2;
 - (c) as to subparagraph 49.3, Asplundh says that:
 - (i) it does not know and cannot admit the allegations contained in subparagraphs (a) through to (c) insofar as it concerns contractual arrangements between Endeavour Energy and other parties that existed in the period 1 July 2008 to about August 2012;

- (ii) in answer to subparagraph 49.3(ca), Asplundh:
 - (A) admits that it attended at 80 - 92 Mt York Road in Mt Victoria on 28 October 2012;
 - (B) does not admit that Asplundh attended as agent for Endeavour Energy or Pinnacle;
 - (C) admits subparagraph (i) that Asplundh inspected the conductors, trees and vegetation along the driveway to the premises at 80-92 Mount York Road;
 - (D) admits subparagraph (ii) that it identified 5+ eucalyptus trees required ground line clearing between poles 5 and 4;
 - (E) admits subparagraph (iii) insofar as Asplundh identified two eucalyptus trees that required the use of an Elevated Work Platform (EWP) but otherwise does not admit the subparagraph;
 - (F) admits subparagraph (iv) that Asplundh identified three eucalyptus trees that required ground line clearing between poles 4 and 3;
 - (G) does not admit that it notified Endeavour Energy of any of the matters referred to in subparagraphs (ii), (iii) and (iv);
 - (H) does not admit that Asplundh's attendance at Mt Victoria on 28 October 2012 was in performance of any of its obligations under the Asplundh Contract; and
 - (I) otherwise does not admit the paragraph.
- (iii) Admits subparagraph 49.3(cb).
- (iv) Admits subparagraph 49.3(cc).
- (v) Does not admit subparagraph 49.3(cd) and says that it received the scoping data from Pinnacle on 15 November 2012.
- (vi) in relation to subparagraph 49.3(d), Asplundh:

- (A) admits that a representative of Asplundh attended Mt Victoria, including a location at Mount York Road referred to and contained within grid map U28827;
 - (B) does not admit that Asplundh attended as agent for Endeavour Energy or Pinnacle;
 - (C) does not admit that its attendance at Mt Victoria on 22 November 2012 was in performance of any of its obligations under the Asplundh Contract;
 - (D) denies subparagraph (ai) and says that no Asplundh cutting crews attended at Mount York Road on or about 22 November 2012;
 - (E) admits subparagraph (i) that Asplundh inspected the conductors, trees and vegetation along the driveway to the premises at 80-92 Mount York Road;
 - (F) admits subparagraph (ii) that it identified two eucalyptus trees that may require the use of an Elevated Work Platform (EWP) and that also required traffic control and network outage before any cutting works could be undertaken but otherwise does not admit the subparagraph;
 - (G) denies subparagraph (iii) that it notified Endeavour Energy of any of the matters referred to in subparagraphs (i) and (ii); and
 - (H) otherwise does not admit the paragraph.
- (vii) as to subparagraph (da), Asplundh:
- (A) admits that it performed cutting at Mt York Road in accordance with its obligations under the Asplundh Contract on 12 December 2012 and 14 December 2012; and
 - (B) otherwise does not admit the subparagraph.
- (viii) as to subparagraph (db), Asplundh:
- (A) admits that it submitted the completed grid map U28827 including the list of FAE's for the month of December 2012, to Endeavour Energy on 20 December 2012;

- (B) submitted the maps for compliance checking by Endeavour Energy; and
 - (C) otherwise does not admit the subparagraph.
- (ix) admits subparagraph (do);
 - (x) admits subparagraph (dd);
 - (xi) as to paragraph (de), Asplundh:
 - (A) does not admit that Pinnacle verified to Endeavour Energy on 17 January 2013 that the work was compliant;
 - (B) says that Pinnacle informed Endeavour Energy by email on 17 January 2013 that a defect was identified on Grid Map U28827 between poles 14 and 15;
 - (C) says that on 18 January 2013, Endeavour Energy notified Asplundh of a defect on Grid May U28827 requiring reworks;
 - (D) says that on a date between 21 January 2013 and 24 January 2013, Asplundh attended Mt York Road and undertook the reworks;
 - (E) says that on 24 January 2013 Asplundh submitted the completed reworks to Endeavour Energy;
 - (F) says that on 7 February 2013, Endeavour Energy forwarded the completed reworks to Pinnacle to be inspected for compliance;
 - (G) says that between 7 February 2013 and 14 February 2013 Pinnacle attended Mt York Road to inspect the reworks;
 - (H) says that on 14 February 2013, Pinnacle emailed Endeavour Energy confirming that Grid Map U28827 was compliant; and
 - (I) otherwise does not admit the paragraph.
- (d) as to subparagraph 49.4, Asplundh:
 - (i) says that the Tree was not encroaching minimum clearances set out in MMI0013, and
 - (ii) otherwise does not admit the paragraph.

- (e) admits sub-paragraph 49.5
 - (f) does not admit subparagraph 49.6; and
 - (g) otherwise does not know and cannot admit paragraph 49.
50. Paragraph 50 is deleted in the SASOC.
51. Does not admit paragraph 51.
52. Does not admit paragraph 52.
53. Does not admit paragraph 53.
54. As to paragraph 54, Asplundh:
- (a) in response to subparagraph 13.1 of the SASOC, Asplundh admits that Endeavour Energy used power lines, including power lines at Mount Victoria to conduct electricity;
 - (b) otherwise does not admit paragraph 54.
55. As to paragraph 55, Asplundh:
- (a) repeats the matters pleaded in answer to paragraph 14 of the SASOC; and
 - (b) otherwise does not admit the paragraph.
56. As to paragraph 56, Asplundh:
- (a) admits that it provided services in the Katoomba region, including Mount York Road, under the terms of the Asplundh Contract; and
 - (b) otherwise does not admit the paragraph.
57. As to paragraph 57, Asplundh:
- (a) repeats the matters pleaded in answer to paragraphs 35-37 and 56 of the SASOC;
 - (b) says that, consistent with its contractual arrangements, Asplundh had a limited degree of control over the implementation and observance of the requirements of the Asplundh Contract and Endeavour Energy's policies and procedures;
 - (c) says that it had a degree of control over the knowledge, training and experience of its employees engaged to perform services under the Asplundh Contract and

further that all Asplundh employees and subcontractors working on the Asplundh Contract had the training and qualifications required by Endeavour Energy and imposed under the terms of the Asplundh Contract; and

(d) otherwise does not admit the paragraph.

58. As to paragraph 58, Asplundh:

(a) repeats the matters pleaded in answer to paragraphs 14 and 55 of the SASOC; and

(b) otherwise does not admit the paragraph.

59. As to paragraph 59, Asplundh:

(a) repeats the matters pleaded in answer to paragraphs 14 and 55 of the SASOC

(b) denies the matters pleaded in subparagraph 59.2 of the Amended Statement of Claim; and

(c) otherwise does not admit the paragraph,

60. As to paragraph 60, Asplundh:

(a) relies on the Asplundh Contract for its full force and effect;

(b) says that it was a term of the Asplundh Contract that Asplundh provide vegetation management services limited to vegetation control delivery (cutting) to Endeavour Energy in the Katoomba region;

(c) says it was not retained to scope and audit the annual cut in the year commencing 1 October 2012 in the Katoomba region;

(d) says that Pinnacle was retained by Endeavour Energy to perform the scope and audit contract during the 2012/2013 period in the Katoomba region;

(e) denies that it and its relevant employees owed the plaintiff and group members a duty of the nature and scope as pleaded therein or at all; and

(f) otherwise does not admit paragraph 60.

61. As to paragraph 61, Asplundh:

(a) admits that it or its employees conducted one or more inspections of Mt York Road in the vicinity of the Tree;

- (b) says that Pinnacle identified the span between poles 4 and 3 as requiring trimming, and identified the works required in its cutting scope as provided to Asplundh on or around 15 November 2012;
- (c) admits that it performed cutting works between poles 4 and 3 on Mount York Road during the period 12 December 2012 and 14 December 2012;
- (d) says that Asplundh submitted the map for audit to Endeavour Energy on 20 December 2012;
- (e) admits that it undertook work in accordance with the terms of its contract with Endeavour Energy as set out in paragraph 18 above, including performing cutting works on a number of trees between various poles located along Mount York Road; and
- (f) otherwise does not admit the paragraph.

62. As to paragraph 62, Asplundh:

- (a) repeats the matters pleaded in answer to paragraphs 54 to 61 of the SASOC; and
- (b) otherwise does not admit the paragraph.

63. As to paragraph 63, Asplundh:

- (a) says that all Asplundh employees and subcontractors working on the Asplundh Contract had Appropriate Training;
- (b) says that all Asplundh employees and subcontractors working on the Asplundh Contract had the training and qualifications required by Endeavour Energy and imposed under the terms of the Asplundh Contract; and
- (c) otherwise does not admit the paragraph.

64. Does not admit paragraph 64.

65. Does not admit paragraph 65.

66. Does not admit paragraph 66.

67. Does not admit paragraph 67.

68. Does not admit paragraph 68.

69. Does not admit paragraph 69.

70. Does not admit paragraph 70.
71. Does not admit paragraph 71.
72. Does not admit paragraph 72.
73. Does not admit paragraph 73.
74. Does not admit paragraph 74.
75. Does not admit paragraph 75.
76. Does not admit paragraph 76.
- 76A. Does not know and cannot admit paragraph 76A.
77. Does not admit paragraph 77.
78. Does not admit paragraph 78.
79. Does not admit paragraph 79.
80. Does not admit paragraph 80.
81. As to paragraph 81, Asplundh:
- (a) says that the services provided by Asplundh to Endeavour Energy pursuant to the Asplundh Contract were carried out with due, care and skill; and
 - (b) repeats the matters pleaded in answer to paragraphs 18, 19, 54, 55, 14.10 and 14.12 of the SASOC; and
 - (c) otherwise does not admit the paragraph.
82. As to paragraph 82, Asplundh:
- (a) says that the services provided by Asplundh to Endeavour Energy pursuant to the Asplundh Contract were carried out with due, care and skill;
 - (b) says that, at the relevant time, its employees and subcontractors who performed services on behalf of Asplundh pursuant to the Asplundh Contract had Appropriate Training;
 - (c) in answer to subparagraph 82.1, repeats the matters pleaded in answer to paragraph 63 of the SASOC;

- (d) *in answer to subparagraph 82.2, repeats the matters pleaded in answer to paragraph 51 of the SASOC and*
 - (e) *otherwise does not admit the paragraph.*
83. As to paragraph 83, Asplundh:
- (a) *repeats the matters pleaded in answer to paragraph 60 of the SASOC in relation to the existence of the alleged 'Asplundh Duty';*
 - (b) *in answer to subparagraph 83.1 repeats the matters pleaded in answer to paragraphs 62 and 63 of the SASOC and says that Asplundh employees and subcontractors who worked on the Asplundh Contract had Appropriate Training;*
 - (c) *in answer to subparagraph 83.2, repeats the matters pleaded in answer to paragraph 51 of the SASOC;*
 - (d) *does not admit subparagraph 83.3;*
 - (e) *in answer to subparagraph 83.4, admits that it did not notify Endeavour Energy specifically about the condition of the Tree;*
 - (f) *says that it performed its cutting in accordance with the scope provided to it by Pinnacle pursuant to the Asplundh Contract with due, care and skill;*
 - (g) *says that Asplundh's performance of the cutting at or near Mt York Road was audited and deemed complaint by Pinnacle and Endeavour Energy; and*
 - (h) *otherwise denies the paragraph.*
84. As to paragraph 84, Asplundh:
- (a) *repeats the matters pleaded in answer to paragraph 60 of the SASOC in relation to the existence of the alleged 'Asplundh Duty';*
 - (b) *denies breaching any duty of care (the existence of which as pleaded by the plaintiff is denied) to the plaintiff or group members; and*
 - (c) *denies the paragraph.*
85. Denies paragraph 85,
86. As to paragraph 86, Asplundh:
- (a) *denies that it was negligent as alleged or at all;*

- (b) does not admit that:
 - (i) the plaintiff;
 - (ii) each of the group members referred to in subparagraphs 4.1 to 4.3 of the Amended Statement of Claim; and
 - (iii) each of the deceased persons referred to in sub-paragraph 4.4 of the Amended Statement of Claim

as the case may be, suffered loss and damage as alleged, or at all.

87. Denies paragraphs 87.

88. Does not admit paragraph 88.

89. Does not admit paragraph 89.

90. Does not admit paragraph 90.

91. As to paragraph 91, Asplundh:

- (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 there was low humidity;
- (c) admits that there was a high ambient temperature;
- (d) admits there were strong winds blowing; and
- (e) otherwise does not admit the paragraph.

92. Does not know and cannot admit paragraph 92.

93. As to paragraph 93, Asplundh:

- (a) admits that a fire erupted in the Mount Victoria region on 17 October 2013; and
- (b) otherwise does not admit paragraph 93.

94. Does not admit paragraph 94.

95. Does not admit paragraph 95.

96. As to paragraph 96, Asplundh:

- (a) repeats the matters pleaded in answer to paragraph 82 of the SASOC; and
 - (b) otherwise does not admit the paragraph.
- 97. Denies paragraph 97.
- 98. Does not admit paragraph 98.
- 99. Does not admit paragraph 99.
- 100. Denies paragraph 100.
- 101. As to paragraph 101, Asplundh:
 - (a) repeats the matters pleaded in answer to paragraph 4 of the SASOC; and
 - (b) otherwise does not admit the paragraph.
- 102. As to paragraph 102, Asplundh:
 - (a) repeats the matters pleaded in answer to paragraph 14 of the SASOC;
 - (b) otherwise does not admit the paragraph.
- 103. Does not admit paragraph 103.
- 104. Does not admit paragraph 104.
- 105. As to paragraph 105, Asplundh:
 - (a) admits that the Mount Victoria fire had adverse consequences for some owners or occupiers of land in the fire affected areas; and
 - (b) otherwise does not admit the paragraph.
- 106. Does not admit paragraph 106.
- 107. As to paragraph 107 insofar as it contains allegations against it, Asplundh:
 - (a) denies breaching any duty as alleged or at all;
 - (b) repeats the matters pleaded in answer to paragraph 60 of the SASOC in relation to the existence of the alleged 'Asplundh Duty'; and
 - (c) does not admit the plaintiff and each group member suffered loss and damage as pleaded.

108. As to paragraph 108, Asplundh:
- (a) admits subparagraph 108.1;
 - (b) says that, insofar as sub-paragraphs 108.2 through to 108.10 relate to it, 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) does not know what is meant by the matters pleaded in 108.12 and cannot plead to that paragraph.
109. Asplundh denies that its conduct caused particular harm within the meaning of section 5D(1) of the *Civil Liability Act 2002* (NSW).

Proportionate Liability Defence - Endeavour Energy

110. Further and in addition and in the alternative to the whole of the SASOC, if Asplundh is found liable or partly liable to the plaintiff and/or any group member as alleged in the SASOC (which is denied by Asplundh), for the purpose of pleading a proportionate liability defence only, Asplundh pleads as follows.
111. For the purposes of this proportionate liability defence only, Asplundh repeats and relies on paragraphs 6 to 17, 18 to 31, 33, 34, 43 to 48, 49 (excluding 49.3(d) (i) - (iii)), 53, 73 - 80, 91 - 95, 102 - 106 of the SASOC.
112. If (which is denied) Asplundh is found to be liable or partly liable to the plaintiff and/or any group member as alleged in the SASOC, then:
- (a) Asplundh and Endeavour Energy will have caused the same loss or damage;
 - (b) accordingly, in respect of the claims made in these proceedings other than claims in respect of personal injury Asplundh and Endeavour Energy will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2002*, section 34(3); and
 - (c) pursuant to the *Civil Liability Act 2002*, section 35, the liability of Asplundh in respect of the claims made in these proceedings other than claims in respect of personal injury, 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 Asplundh's responsibility for the said damage or loss.

Proportionate Liability Defence - Pinnacle

113. Further and in addition and in the alternative to the whole of the SASOC, if Asplundh is found liable or partly liable to *the* plaintiff and/or any group member as alleged in the SASOC (which is denied by Asplundh), for the purpose of pleading a proportionate liability defence only, Asplundh pleads as follows,
114. For the purposes of this proportionate liability defence only, Asplundh repeats and relies on paragraphs 38 to 42, 64 to 72 and 88 to 90 of the SASOC.
115. If (which is denied) Asplundh is liable to the plaintiff and/or any group member as alleged in the SASOC, then:
- (a) Asplundh and Pinnacle will have caused the same loss or damage;
 - (b) accordingly, in respect of the claims made in these proceedings other than claims in respect of personal injury Asplundh and Pinnacle will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2002*, section 34(3); and
 - (c) pursuant to the *Civil Liability Act 2002*, section 35, the liability of Asplundh in respect of the claims made in these proceedings, other than claims in respect of personal injury, 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 Asplundh's responsibility for the said damage or loss.

Proportionate Liability Defence - Mr Michael Jones

116. Further and in addition and in the alternative to the whole of the SASOC, if Asplundh is found liable or partly liable to the plaintiff and/or any group member as alleged in the SASOC (which is denied by Asplundh), for the purpose of pleading a proportionate liability defence only, Asplundh pleads as follows.
117. For the purposes of this proportionate liability defence only, Asplundh repeats and relies on paragraphs 38 to 42, 64 to 72 and 88 to 90 of the SASOC.
118. If (which is denied) Asplundh is liable to the plaintiff and/or any group member as alleged in the SASOC, then:
- (d) Asplundh and Mr Jones will have caused the same loss or damage;
 - (e) accordingly, in respect of the claims made in these proceedings other than claims in respect of personal injury Asplundh and Mr Jones will be concurrent wrongdoers within the meaning of the *Civil Liability Act 2002*, section 34(3); and

- (f) pursuant to the *Civil Liability Act 2002*, section 35, the liability of Asplundh in respect of the claims made in these proceedings, other than claims in respect of personal injury, 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 Asplundh's responsibility for the said damage or loss.

Inherent Risk

119. Further and in the alternative and in answer to the whole of the SASOC, if the harm suffered by the plaintiff and/or any group member was caused by the failure of the Tree (which is denied):
- (a) the failure of the Tree was an inherent risk within the meaning of section 51 of the *Civil Liability Act 2002* (NSW);
 - (b) it was inherent risk that could not be avoided by the exercise of reasonable care and skill by Asplundh in the performance of its obligations under the Asplundh Contract;
 - (c) Asplundh is not liable in negligence as a result of the materialisation of an inherent risk.
120. Further and in addition, Asplundh says:
- (a) it has no liability to pay damages (if any) for pure mental harm.

PARTICULARS

Sections 30 & 31 of the *Civil Liability Act 2002* (NSW)

- (b) that it does not owe a duty of care (which is denied by Asplundh) for mental harm in circumstances where it ought not to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness.

PARTICULARS

ss32 of the *Civil Liability Act 2002* (NSW)

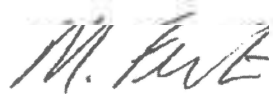
121. Further and in addition, entitlement to damages, if any (which entitlement is denied by Asplundh), are confined by reason of Part 2 *Civil Liability Act 2002* (NSW).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* 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

Solicitor

Date of signature

6 April 2018

Affidavit verifying not required for any Local Court proceedings, or proceedings in Supreme or District Court for defamation, malicious prosecution, false imprisonment, trespass to the person, death or personal injury]

AFFIDAVIT VERIFYING

Name Greg Fitzgerald
Address Unit 1, 197 Power Street, Glendenning NSW 2761
Occupation Managing Director, Asplundh Tree Expert
Date 9 April 2018

I affirm:

1. I am the Managing Director of the Second 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.


AFFIRMED at

Signature of deponent

Name of witness

Address of witness

Capacity of witness

Sydney

Rachel Johnstone
Level 42, 2 Park Street, Sydney NSW 2000
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 confirmed the deponent's identity using the following identification document:

Drivers' licence (No. 7099EC)

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).]

[† "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 or JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits, footnote 3.1

FURTHER DETAILS ABOUT FILING PARTY

Filing party

Name Asplundh Tree Expert (Australia) Pty Ltd (ABN 83 055 140 424)

Address Unit 1, 197 Power Street, Glendenning NSW 2761

Legal representative for filing party

Name Melissa Helen Fenton

Practising certificate number 36858

Firm Colin Biggers & Paisley Pty Ltd

Contact solicitor Melissa Fenton

Address Level 42, 2 Park Street
Sydney NSW 2000

DX address 280 Sydney

Telephone (02) 8281 4555

Fax (02) 8281 4567

Email melissaienton@cbp.com.au

Electronic service address melissa.fenton@cbp.com.au