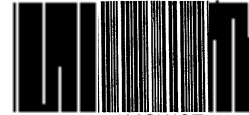




Filed: 10 September 2015 3:01 PM



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Form 3A/B
Rule 6.2

AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2014/00148790

FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	Brendan Pendergast
Legal representative reference	
Telephone	(03) 5560 2000
Your reference	KAE:131769

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Amended Statement of Claim (third further amended statement of claim.pdf)

[attach.]

UCPR 6.2

Form 3A (version 5)

SECOND ~~THIRD~~ FURTHER AMENDED STATEMENT OF CLAIM

Court Supreme Court of New South Wales
Division Common Law
List General
Registry Sydney
Case number 2014/148790

Plaintiff Sean Johnston
First Defendant Endeavour Energy (ABN 59 253 130 878)
Second Defendant Osborne Aviation Services Pty Ltd
(ABN 24 072 380 226)

Filed for Sean Johnston, the plaintiff
Legal representative Brendan Pendergast, Maddens Lawyers
219 Koroit street,
Warrnambool, Victoria, 3080
DX:28001
Tel: (03)55602000
Legal representative reference 131769
Contact name and telephone Brendan Pendergast, (03)55602000
Contact email bfp@maddenslawyers.com.au

Torts - Negligence - Personal Injury - Nuisance - Property Damage

- 1 Damages.
- 2 Interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW).
- 3 Costs including interests on costs.



THE PLAINTIFF & GROUP MEMBERS

1. The plaintiff was at all material times the sole proprietor of real property situated at 109 Buena Vista Road, Winmalee in the State of New South Wales ("**plaintiffs land**").
2. The Plaintiff brings this proceeding on his own behalf and on behalf of the group members.
3. The Springwood/Winmalee fire ("**Springwood/Winmalee fire**") is the fire that started in Linksview Road, Springwood in the State of New South Wales on 17 October 2013.
4. The group members ("**group members**") to whom this proceeding relates are:
 - 4.1. all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of:
 - 4.1.1. the Springwood/Winmalee; and/or
 - 4.1.2. the death of or injury to another person as a result of the Springwood/Winmalee fire.where "psychiatric injury" in this group definition means nervous **shock** or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 31 December **2014**; and
 - 4.2. all those persons who suffered loss of or damage to property as a result of the Springwood/Winmalee; and
 - 4.3. all those persons who at the time of the Springwood/Winmalee fire resided in, or had real or personal property in, the Springwood/Winmalee fire area

and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property; and

4.4. the legal personal representatives of the estates of any deceased persons in 4.2 and/or 4.3 who were group members as at the date of commencement of this proceeding.

5. As at the date of commencement of this proceeding, there are seven or more persons who have claims against the defendants.

ENDEAVOUR ENERGY

6. The First Defendant ("**Endeavour Energy**") at all material times:

6.1. is and was a company incorporated under the *Energy Services Corporations Act 1995* and capable of being sued;

6.2. carried on business as a distributor of electricity to residential and business consumers in New South Wales ("**the business**");

6.3. in carrying on the business was:

6.3.1. an electricity energy distributor; within the meaning of the *Energy Services Corporation Act 1995* (NSW) ("**ESC Act**") and

6.3.2. a network operator within the meaning of the *Electricity Supply Act 1995* (NSW) ("**ES Act**");

7. In the course of and for the purposes of the business, at all material times, Endeavour Energy:

7.1. owned, further or alternatively had the use and management of, the poles, the pole fittings, conductors, fuses, transformers, and sub stations and like installations servicing Linksvie Road, Springwood (together and severally "**installations**") comprising:

7.1.1. (to pole 487086) low voltage aerial bundled conductors ("LV **ABC**");

7.1.2. thereafter four bare or uninsulated phase and neutral low voltage conductors,

suspended from poles together with service cables to premises in Linksvie Road, Springwood ("**power line**");

Particulars

Further particulars of the history of the construction, installation and maintenance of the power line will be provided following discovery and interrogation.

7.2. caused or allowed the transmission of electricity on the power line for the purposes of *inter alia* supply to residential consumers.

OSBORNE

7A. The second defendant (**Osborne**) is and was at all material times incorporated under the *Corporations Act 2001* (Cth) and capable of being sued.

STATUTORY CONTEXT

8. At all material times, Endeavour Energy had the principal statutory objectives set out in section 8 of the ESC Act, which included the objective to operate efficient, safe and reliable facilities for the distribution of electricity.

9. At all material times, Endeavour Energy had the principal statutory functions set out in section 9 of the ESC Act, being:

9.1. to establish, maintain and operate facilities for the distribution of electricity and other forms of energy, and

9.2. 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.

10. At all material times, the objects of the ES Act were:

- 10.1. to promote the efficient and environmentally responsible production and use of electricity and to deliver a safe and reliable supply of electricity, and
 - 10.2. to confer on network operators such powers as are necessary to enable them to construct, operate, repair and maintain their electricity works, and
 - 10.3. to promote and encourage the safety of persons and property in relation to the generation, transmission, distribution and use of electricity.
11. At all material times, Endeavour Energy had power under the ES Act for the purpose of exercising its functions:
- 11.1. to carry out work connected with the erection, installation, extension, alteration, maintenance and removal of electricity works (s. 45);
 - 11.2. to enter any premises by an authorised officer (s. 54-56);
 - 11.3. to trim or remove any tree situated on any premises which it had reasonable cause to believe:
 - 11.3.1. could destroy, damage or interfere with its electricity works, or
 - 11.3.2. could make its electricity works become a potential cause of bush fire or a potential risk to public safety (s.48).

ENDEAVOUR ENERGY'S DUTY OF CARE

- 12 At all material times Endeavour Energy:
- 12.1 had the ultimate responsibility for all activities associated with the planning, design, construction, inspection, modification and maintenance of the power line;
 - 12.2 had the right, to the exclusion of other private persons to:
 - 12.2.1 construct, repair, modify, inspect and operate the power line; or
 - 12.2.2 give directions as construction, repair, modification, inspection or operation of the power line;

- 12.3 exercised the right referred to in 12.2 above; and
- 12.4 in the premises, had practical control over the power line.

Particulars

So far as the plaintiff is able to say prior to discovery, Endeavour Energy constructed, repaired, modified and inspected and operated the power line, and further gave directions to its contractors regarding the construction, repair, modification, inspection or operation of the power line and in particular in relation to inspection for hazardous vegetation and tree clearances so as to ensure anything which could make the power line become a potential cause of fire or potential risk to public safety was clear from the power line. Further particulars may be provided prior to trial.

- 13 At all material times:
- 13.1 Endeavour Energy used the power line to transmit electricity;
- 13.2 the transmission of electricity along the power line created a risk of unintended discharges of electricity from the power line;
- 13.3 unintended discharges of electricity from the power line were highly dangerous in that they were capable of causing death or serious injury to persons, and destruction or loss of property by:
- 13.3.1 electrocution;
- 13.3.2 burning by electric current; further or alternatively;
- 13.3.3 burning by fire ignited by the discharge of electricity;
- 13.4 in the premises set out in "13.1" to "13.3" inclusive, the transmission of electricity along the power line was a dangerous activity;
- 13.5 Endeavour Energy knew or ought reasonably to have known of the risks referred to in "13.1" to "13.4" above.
- 14 At all material times, it was reasonably foreseeable to Endeavour Energy that there were risks **(the Risks)** that:

- 14.1 interference with conductors and service cables by trees might cause a discharge of electricity from the power line;
- 14.2 the discharge of electricity from the power line could cause ignition of flammable material in the vicinity of the point of discharge;

Particulars

Flammable material is any material capable of ignition, including without limitation ignition by the application of electric current or by contact with molten or burning metal.

- 14.3 further and in the alternative to 14.2, a discharge of electricity from the power line could cause the emission of electricity, heat or molten metal particles ("**sparks**") from the point of discharge;
- 14.4 electricity, heat or sparks emitted from a point of discharge could cause electric shock or burns to persons or property in the vicinity of the point of discharge;
- 14.5 electricity, heat or sparks emitted from a point of discharge could cause the ignition of fire in flammable material exposed to / in the vicinity of the point of discharge of the electricity, heat or sparks;
- 14.6 such ignition could produce a fire which might spread over a wide geographic area, depending on *inter alia* wind direction and velocity;

Particulars

The fire spread also depended on the amount of combustible fuel, the terrain, the environmental conditions including humidity and precipitation, the effectiveness of human fire fighting responses. Further particulars may be provided prior to trial.

- 14.7 such fire could cause death or injury to persons and loss of or damage to property within the area over which the fire spread ("**fire area**"), and consequential losses including economic losses;
- 14.8 such fire could cause damage to property and consequential losses including economic losses within areas:

14.8.1 affected by the physical consequence of fire, such as smoke or debris; or

14.8.2 the subject of emergency activity to prevent the spread of fire, including without limitation the clearing of firebreaks;

("affected areas")

14.9 such fire or its consequences could:

14.9.1 disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;

14.9.2 impede the use or amenity of property located in the fire area or affected areas; or

14.9.3 reduce the value of property or businesses located in the fire area or affected areas; and thereby cause economic loss to those persons, **or** the owners of those properties or businesses;

14.10 the risks referred to in 14.7, further or alternatively 14.8, further or alternatively 14.9 above were likely to be higher when the environment around the power line was dry and hot and windy than when the environment was damp or cool or windless.

15 At all material times members of the public who:

15.1 were from time to time; or

15.2 owned or had an interest in real or personal property; or

15.3 carried on business;

in the fire area or affected areas ("**the Springwood/Winmalee Class**");

15.3.1 had no ability, or no practical and effective ability, to prevent or minimize the risk of such discharge occurring; and

15.3.2 were vulnerable to the impact of such fire; and consequently

15.3.3 were to a material degree dependent, for the protection of their persons and property, upon Endeavour Energy ensuring that the power line was safe and operated safely in the operating conditions applying to it from time to time.

Particulars

Particulars of the area affected by the Springwood/Winmalee fire will be provided prior to trial.

The operating conditions referred to included the level of electrical current being transmitted along the power lines, the physical environment around the power lines including without limitation wind direction and speed, ambient temperature, the presence of objects capable of coming into contact with the power lines (including without limitation trees) and the amount of combustible fuel around or below the power lines.

- 16 At all material times the claimants were:
 - 16.1 persons within the Springwood/Winmalee class; or
 - 16.2 dependents of persons within the Springwood/Winmalee class; or
 - 16.3 persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the Springwood/Winmalee class.

- 17 In the premises set out in paragraphs 8 to 16 inclusive, alternatively paragraphs 8 and 12 to 16 inclusive, at all material times Endeavour Energy owed to the claimants a **non-delegable** duty:
 - 17.1 to take reasonable care, by its officers, servants and agents; and
 - 17.2 a duty to ensure that reasonable care was taken, by its agents or contractors;

to avoid the materialisation of the Risks **(the Endeavour Duty)**.

- 18 [not used]

- 19 [not used]

STANDARD OF CARE

General Circumstances

20 At all material times, Springwood in the vicinity of the power line:

20.1 was a high bushfire risk area for the purposes of tree management.

Particulars

Springwood in the vicinity of the power line is an urban area adjacent to the Blue Mountains National Park.

A copy of the document "Tree Management Plan" June 2007 prepared by Endeavour Energy pursuant to clause 137 of the *Electricity Supply (General) Regulation 2001* ("**Tree Management Plan**") may be inspected by appointment at the office of the **Plaintiff's** solicitors.

20.2 featured large numbers of trees, including a large *acacia binerva* (coast myall) adjacent to pole JU 267 ("**the Tree**") and bordering 108 Linksvie Road, Springwood, which was:

20.2.1 overhanging the power line; or

20.2.2 of such height and sufficiently close to the power line that if it fell or shed branches there was a material risk that it would fall onto or across the power line;

20.2.3 of such height and weight and supported branches of such size and weight, that there was a material risk that the Tree or branch falling across the power line would cause:

20.2.3.1 the power line conductors or service cables to break; and/or

20.2.3.2 the power line conductors to come in contact with each other; and

20.2.3.3 electrical arcing to occur between the tree or branch and a conductor on the power line or between conductors on the power line or between a broken

service cable and vegetable matter under the power line.

21 At all material times:

- 21.1 the conductors on the power line adjacent to pole JU 267 at 108 Linksvie Road, Springwood ("**the Conductors**") were bare or uninsulated low voltage aerial conductors;
- 21.2 the Conductors were in close proximity to each other;
- 21.3 there was a material risk that in the event of the Conductors being displaced in any way by a tree or branch they could clash and/or arc between themselves or with the tree or branch;
- 21.4 there was a material risk that clashing and/or an arc occurring might cause the discharge of molten particles of super heated metal ("**sparks**") from the section of conductor where clashing and/or arcing occurred;
- 21.5 the protection systems regulating the power line included low voltage fuses and such other protection which is known by Endeavour Energy but is not known to the plaintiff;

Particulars

Further particulars may be provided following the completion of discovery and receipt of expert evidence.

- 21.6 the protection systems regulating the power line were such that there was a material risk that, in the event of clashing and/or arcing, or a component of the power line breaking and falling to the ground, the protection systems would or could allow current to continue to be transmitted through the power line to cause ignition of a fire, especially in dry and windy conditions.

Particulars

So far as the plaintiff is able to say prior to discovery, interrogation, and receipt of expert evidence, the protection systems on the power line were such that after clashing and/or arcing between Conductors and/or a cable failure, electricity would or could continue to be transmitted, during which ignition of dry vegetation could occur.

21.7 there was material risk that:

21.7.1 sparks produced by clashing and/or arcing between Conductors;
or

21.7.2 heat or electrical discharge from a fallen service cable;

could ignite dry vegetation in the vicinity of the sparks, heat or discharge;

21.8 the risk referred to in "21.7" was higher when conditions around the power lines were dry and hot and windy than when conditions were moist, cool and calm;

21.9 the dry, hot and windy conditions which increased the risk referred to in "21.8" above were also likely to increase the risks of a tree falling, or shedding branches, across the power line.

22 At all material times Endeavour Energy:

22.1 knew; or

22.2 being the network operator ought reasonably to have known;

the matters set out in the two preceding paragraphs.

Endeavour Energy's Network Management Plan

23 As a network operator, Endeavour Energy was required to and did lodge a Network Management Plan with the Director General of the Department of Trade and Investment.

Particulars

Pursuant to clause 8 of the *Electricity Supply (Safety and Network Maintenance) Regulation 2008 (ES Regulations)* Endeavour Energy lodged the Endeavour Energy Network Management Plan 2011-2013

24. Endeavour Energy's Network Management Plan was required to include and did include, among other things:

- 24.1 a systematic identification of hazardous events that might be expected to occur;
- 24.2 a specification of the operational, maintenance and organisational safeguards intended to prevent those events from occurring; and
- 24.3 provision for bushfire risk management with the objects:
 - 24.3.1 to ensure public safety;
 - 24.3.2 to establish standards that must be observed when electricity lines operate near vegetation;
 - 24.3.3 to reduce interruptions to electricity supply that are related to vegetation;
 - 24.3.4 to minimise the possibility of fire ignition by electricity lines.

Particulars

Clauses 8 and 9 of the ES Regulations

- 24A. In its Network Management Plan, Endeavour Energy:
 - 24A.1 identified trees as a potential cause of hazardous events, being fallen conductors and/or arcing mains (Chapter 1 para [5.3.4]);
 - 24A.2 specified its Mains Designs and Maintenance Standards as the safeguards intended to prevent those hazardous events from occurring (Chapter 1 para [5.3.4]); and
 - 24A.3 identified its primary documentation applicable to the minimisation of bushfire risk, including (Chapter 4 para [3.2]):
 - 24A.3.1 Mains Maintenance Instruction **MMI 0001- Routine Above and Below Pole and Line Inspection & Treatment Procedures (MMI 0001)**;
 - 24A.3.2 Mains Maintenance Instruction **MMI 0013- Clearances to be Maintained Between Power Lines and Trees (MMI 0013)**;

24A.3.3 Workplace Instruction WNV 1012 –Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and

24A.3.4 Workplace Instruction WNV 0811 –Vegetation Management Pre-Summer Bushfire Requirements

(the Primary Documentation).

24B. Endeavour Energy was obliged to implement its Network Management Plan.

Particulars

Clause 8(4) of the ES Regulations

24C. At all material times, Endeavour Energy was required by the Network Management Plan and the Primary Documentation to:

24C.1 maintain the minimum clearances between vegetation and its network assets in accordance with MMI 0013 **(Clearance Space)**;

Particulars

- (a) MMI 0001 (Am 15)-[5.2] [5.12.4.5], [5.23], [5.21.7], Annexure 7;
- (b) MMI 0013 (Am 9) -[5.0].

24C.2 identify and remove:

24C.2.1 all dead, dying, dangerous or visually damaged vegetation, including limbs or trees; and

24C.2.2 any tree that could come into contact with an electric power line having regard to foreseeable local conditions;

(Hazardous Trees)

Particulars

MMI 0013 (Am 9)- [5.1.6] and [5.1.7];

Dead, dying, dangerous or visually damaged vegetation, including limbs or trees, is any vegetation that has the potential to adversely impact on the reliability of the network under normal or adverse weather conditions, including vegetation that is dead, dying, dangerous or visually damaged or is potentially unsafe for any reason (MMI 0013-[4.0])

- 24C.3 for all uncovered network assets, inspect the space outside the Clearance Space to identify any Hazardous Trees situated above a line projected at 45° from the vertical from the lowest conductor at a design height of 5.5 metres above ground (**the Hazard Space**);
- 24C.4 trim to at least the lowest conductor height or, at the request of the land owner or manager, remove, any Hazardous Tree located in the Hazard Space.

Particulars

Mains Maintenance Instruction MMI 0013- Clearances to be Maintained Between Power Lines and Trees (Am 9) [5.1.8].

- 24D. At all material times, Endeavour Energy was required by the Network Management Plan and the Primary Documentation to conduct:
 - 24D.1 annual Pre-Summer Bushfire Inspections (**PSBI**) in all designated bushfire prone areas;

Particulars

- (a) Network Management Plan [3.4];
- (b) MMI 0001 (Am 15V [5.2] [5.12.4.5], [5.23], [5.21.7], Annexure 7;
- (c) Workplace Instruction WNV 1012 - Pre Summer Bushfire Map Patrols, Inspections and Defect Reporting; and
- (d) Workplace Instruction WNV 0811 - Vegetation Management Pre-Summer Bushfire Requirements

- 24D.2 Vegetation Management Inspections of its network assets to be undertaken as frequently as provided for in the contract with any contractor engaged to undertake the inspections and, in any event, at least annually;

Particulars

- (a) Network Management Plan [3.4];
- (b) MMI 0013 (Am 9) - [4.0], [5.5].

- 24E. The purpose of the PSBI Program was to identify any factors associated with Endeavour Energy's overhead mains within designated bushfire prone areas that could lead to the initiation of a bushfire.
- 24F. A purpose of the Vegetation Management Inspections was to minimise the risk of bushfires caused by contact between vegetation and overhead powerlines.

⋮
⋮
⋮
⋮

24G. As part of its Vegetation Management Inspections and PSBI Program, Endeavour Energy was required to inspect for, identify and trim or remove any Hazardous Trees located within the Clearance Space or the Hazard Space in accordance with MMI-0013.

Training to Identify Hazardous Trees

24H In order to comply with the requirements of the Network Management Plan and the Primary Documentation to inspect for and identify Hazardous Trees, Endeavour Energy was required to ensure that the persons whom it employed or engaged to conduct its Vegetation Management Inspections and PSBI Program were competent to inspect for and identify potentially Hazardous Trees.

24I To be competent to inspect for and identify potentially Hazardous Trees, a vegetation inspector requires appropriate training in the inspection and identification of Hazardous Trees (Appropriate Training).

Particulars

Appropriate Training is that necessary to enable a person without any previous arboricultural or horticultural Qualifications or experience to be able to identify signs that a tree was potentially a Hazardous Tree. Appropriate training would include:

- a. a visual tree assessment training course, such as that offered by QTRA;
- b. an appropriately designed in-house training course conducted by a Qualified arborist;

Additional training in tree risk assessment would enable an inspector to both identify and assess potentially Hazardous Trees. Such training would include:

- c. a tree risk assessment training course, such as that offered by QTRA;
- d. an appropriately designed in-house tree risk assessment course conducted by a Qualified arborist.

Endeavour Energy's Vegetation Inspection Contracts

25. On about 12 June 2008, Endeavour Energy entered into a contract with Asplundh Tree Expert (Australia) Pty Ltd (**Asplundh**) by which it appointed Asplundh to its panel of preferred suppliers of vegetation management services in specified areas (**the Asplundh Contract**).

Particulars

The Asplundh Contract is in writing and comprises Contract Number **957/07C(C)– Panel for Vegetation Control in Proximity to Overhead Electricity Network Assets** between Endeavour Energy and Asplundh, the material terms of which are set out in::

- (a) a letter from Endeavour Energy to Asplundh dated 12 June 2008;
- (b) Contract Number 957/07C(C) *Vegetation Control in Proximity to Overhead Electricity Network Assets*

The specified areas were Hills, Penrith, Bowenfels/Kandos and **Katoomba** Transmission.

- 25A. Pursuant to the Asplundh Contract, Asplundh was required within the specified areas (which included Linksvie Road) to, among other things:
- 25A.1 perform (on a rolling basis) quarterly inspections of vegetation in proximity to overhead electricity network assets (cl. D3.4);
 - 25A.2 achieve and maintain clearances between vegetation and Endeavour Energy's overhead network assets in accordance with **MMI-0013**, including the identification and rectification of Hazardous Trees (cl. D2, D2.3);
 - 25A.3 carry out PSBI and defect rectification of all designated bushfire prone areas (cl. D2.12).

Particulars

The clauses referred to above are those contained in Contract Number 957/07C(C) *Vegetation Control in Proximity to Overhead Electricity Network Assets*.

- 25B On or about 20 September 2012, Endeavour Energy entered into a contract with Heli Aust Pty Ltd (**Heli Aust**) for Heli Aust to undertake a PSBI program (**Heli Aust Contract**).

Particulars

The Heli Aust Contract is in writing and comprises the "**Services Agreement 1515/11C Provision of PSBI Video Review and Ground**

"Line Inspection Services" executed on behalf of Heli Aust on 15 August 2012 and on behalf of Endeavour Energy on 20 September 2012.

~~On about 12 June 2008, Endeavour Energy entered into a contract with Active Tree Services Pty Ltd (ATS) by which it appointed ATS to its panel of preferred suppliers of vegetation management services in specified areas, (the ATS Contract 2008):~~

Particulars

~~The ATS Contract 2008 is in writing and comprises Contract Number 957/07C(B) Panel for Vegetation Control in Proximity to Overhead Electricity Network Assets between Endeavour Energy and ATS, the material terms of which are set out in:~~

~~(a) a letter from Endeavour Energy to ATS dated 12 June 2008;~~

~~(b) Contract Number 957/07C(B) Vegetation Control in Proximity to Overhead Electricity Network Assets Technical Specification~~

~~The specified areas were Hills, Ponrith, Bowenfels/Kandos and Katoomba Transmission.~~

25C. Under the Heli Aust Contract Heli Aust was required to:

25C.1 review overhead video captured by helicopter video cameras to identify and record all defects that could cause the initiation of a bushfire;

25C.2 conduct a ground line visual inspection of network assets and vegetation in areas that are classified as non-flight areas (which included Linksview Road) to identify defects that could cause the initiation of a bushfire;

25C.3 comply with policies issued by Endeavour Energy and provided to Osborne, including MMI-0001 and MMI-0031;

25C.4 identify any Hazardous Trees for rectification or removal in accordance with MMI-0013;

25C.5 act in a professional, efficient and safe manner and without negligence in carrying out its contractual duties.

Particulars

Heli Aust Contract cl 3.1, 4.1, 5.1; Schedule 2, Sections 8.1, 8.3, 8.5, 8.7.3.

Pursuant to the ATS Contract 2008, ATS was required within the specified areas (which included Linksview Road) to, among other things:

~~25C.1~~ perform (on a rolling basis) quarterly inspections of vegetation in proximity to overhead electricity network assets (cl. ~~D3.4~~);

~~25C.2~~ achieve and maintain clearances between vegetation and Endeavour Energy's overhead network assets in accordance with MMI-0013, including the identification and ~~rectification~~ of Hazardous Trees (cl. ~~D2, D2.3~~);

~~25C.3~~ carry out PSBI and ~~defect~~ rectification in designated bushfire prone areas (cl. ~~D2-12~~);

Particulars

~~The clauses referred to above are those contained in Contract Number 957/07C(B) - Vegetation Control in Proximity to Overhead Electricity Network Assets.~~

25D On or about 1 July 2013, Endeavour Energy entered into a further contract with ATS by which it engaged ATS to provide vegetation management services within specified Endeavour Energy franchise areas (**ATS Contract 2013**).

Particulars

The ATS Contract 2013 is in writing and comprises:

- (a) Master Supply Agreement for the Supply of Goods and Services between Endeavour Energy and ATS with an effective date of on or about 16 May 2013; and
- (b) Supply Schedule No.6383/12A under the Master Supply Agreement referred to in (a) with an effective date of 1 July 2013.

The specified Endeavour Energy franchise areas are Moss Vale, Shellharbour, Springhill (transmission) and Windsor.

25E. Pursuant to the ATS Contract 2013, ATS was required within the specified Endeavour Energy franchise areas (which included Linksview Road) to, among other things:

25E.1 perform (on a rolling basis) quarterly inspections of vegetation in proximity to overhead electricity network assets (cl 7.5.1.1);

- 25E.2 achieve and maintain clearances between vegetation and Endeavour Energy's overhead network assets in accordance with **MMI-0013** (cl. 2.1 and 7.5.1(d));
- 25E.3 carry out PSBI and defect rectification of 100% of all designated bushfire prone areas (cl. 7.3).

Particulars

The clauses referred to above are those contained in Annexure B to Supply Schedule No.6383/12A, Technical Specification- Vegetation Control in Proximity to Overhead Electricity Network Assets'.

- 25F. On or about 28 April 2013, Endeavour Energy entered into a contract with **Osborne** for Osborne to undertake a PSBI program (**Osborne Contract**).

Particulars

The Osborne Contract is in writing and comprises the "**Services Agreement - ~~633226332/12~~ Endeavour Energy Pre-Summer Bushfire Inspection Program**" executed on behalf of Osborne on 28 April 2013 and on behalf of Endeavour Energy on 29 April 2013.

- 25G Under the Osborne Contract, Osborne was required to:
- 25G.1 inspect Endeavour Energy's electricity works within the PSBI Bushfire Map area (which included Linksvie Road) and the vegetation in proximity to the electricity works by helicopter patrols or, where helicopter patrols could not be performed, by ground line inspections;
- 25G.2 comply with policies issued by Endeavour Energy and provided to Osborne, including **MMI-0001** and **MMI-00134**;
- 25G.3 identify any Hazardous Trees for rectification or removal in accordance with **MMI-00134**;
- 25G.4 act in a professional, efficient and safe manner and without negligence in carrying out its contractual duties.

Particulars

Osborne Contract, cl 5.1, 5.2; Schedule 2, Sections 5.4, 7.0, 14.0 and 17.0.

The plaintiff refers to and repeat paragraphs 48, 50, 51, 52, 53, 55 and 56 of Endeavour Energy's Amended Defence to the Further Amended Statement of Claim

Inspections of the Tree prior to the Springwood/Winmalee Bushfire

26. In about March 2011, ~~ATS pursuant to the ATS Contract 2008 and as agent for Endeavour Energy, alternatively,~~ Asplundh pursuant to the Asplundh Contract and as agent for Endeavour Energy (**the March 2011 Inspection**):
- 26.1 inspected the Conductors, service cables and trees and vegetation, including the Tree, in proximity to pole JU 267 in Linksview Road;
 - 26.2 identified that the Tree encroached within the minimum clearance space set out in **MMI-0013** between it and the service cables to 108 and/or 110 Linksview Road;
 - 26.3 determined that it had reasonable cause to believe that the Tree:
 - 28.3.1 could destroy, damage or interfere with its electricity works; or
 - 28.3.1 could make its electricity works become a potential cause of bush fire or a potential risk to public safety;
 - 26.4 on the basis of that determination, served, pursuant to s 48 of the ESA, Customer Vegetation Report 83088 on the occupier of 110 Linksview Road, requiring the occupier to trim the foliage of the Tree to achieve a minimum clearance of 500 mm between it and a service cable;
 - 26.5 did not otherwise identify the Tree as a Hazardous Tree;
 - 26.6 took no other action in relation to the Tree.
27. In or about January and February 2012 (**the early 2012 Inspections**), Asplundh pursuant to the Asplundh Contract and as agent for Endeavour Energy:
- 27.1 inspected the Conductors, service cables and trees and vegetation, including the Tree, in proximity to pole JU 267 in Linksview Road;
 - 27.2 did not identify the Tree as encroaching within the minimum clearances or within the space above the minimum clearances set out in **MMI-0013**;

27.3 did not identify the Tree as a Hazardous Tree;

27.4 took no action in relation to the Tree.

27A. On or about 31 August 2012, Heli Aust, pursuant to the Heli Aust Contract and as agent of Endeavour Energy (the Heli Aust Inspection):

27A.1 conducted a ground line inspection in Linksview Road:

27A.2 did not identify the Tree as encroaching within the minimum clearances or within the space above the minimum clearances set out in MMI-0013:

27A.3 did not identify the Tree as a Hazardous Tree:

27A.4 took no action in relation to the Tree,

28 On about 9 July 2013, ATS, pursuant to the ATS Contract 2013 and as agent of Endeavour Energy (the July 2013 Inspection):

28.1 inspected the Conductors, service cables and trees and vegetation, including the Tree, in proximity to pole JU 267 in Linksview Road;

28.2 identified that the Tree encroached within the minimum clearance space set out in MMI-0013 between it and the service cables to 108 and/or 110 Linksview Road;

28.3 determined that it had reasonable cause to believe that the Tree:

28.3.1 could destroy, damage or interfere with its electricity works; or

28.3.1 could make its electricity works become a potential cause of bush fire or a potential risk to public safety;

28.4 on the basis of that determination, served, pursuant to s 48 of the ESA:

28.4.1 Customer Vegetation Report 48177 on the occupier of 108 Linksview Road, requiring the occupier to trim the foliage of the Tree to achieve a minimum clearance of 500 mm between it and the service cable to the premises;

- 28.4.2 Customer Vegetation Report 48178 on the occupier of 110 Linksview Road, requiring the occupier to trim vegetation, including the foliage of the Tree, to achieve a minimum clearance of 500 mm between it and the service cable to the premises;
- 28.5 did not otherwise identify the Tree as a Hazardous Tree;
- 28.6 took no other action in relation to the Tree.
29. On about 30 July 2013, Osborne, pursuant to the Osborne Contract and as agent for Endeavour Energy **(the Osborne Inspection)**:
- 29.1 conducted a ground line inspection of the Conductors, service cables and trees and vegetation, including the Tree, in proximity to pole JU 267 in Linksview Road;
- 29.2 did not identify the Tree as encroaching within the minimum clearances or within the space above the minimum clearances set out in **MMI-0013**;
- 29.3 did not identify the Tree as a Hazardous Tree;
- 29.4 took no action in relation to the Tree.
30. In the course of one or each of the March 2011 Inspection, the early 2012 Inspections, the Heli Aust Inspection, the July 2013 Inspection and/or the Osborne Inspection, the Tree should have been identified by the inspectors as a Hazardous Tree, in that:
- 30.1a its condition was such that it could come into contact with the Conductors in foreseeable local conditions;
- 30.1b its condition was such that it had the potential to adversely impact on the reliability of the network under normal or adverse weather conditions;
- 30.2 its location was such that if it fell it represented a serious risk to network assets;

- 30.3 its health was such that it was a potential serious hazard under the range of weather conditions that could reasonably be expected to prevail in the locality; and
- 30.4 if it fell onto the power line it had the propensity to cause a bush fire.

Particulars of the tree

The tree overhung the power line and was within the space above the minimum trimming clearance of 2.5 metres. Further particulars will be provided as to the spatial relationship between the tree and the Conductors.

The tree was approximately 30 years old.

The tree suffered from a brown rot fungus affecting the trunk of the tree from below ground level and affecting the integrity of the tree. This brown rot fungus further meant that boring insects including witchety grubs became more active and further reduced the integrity of the tree.

Signs that the tree was at risk of failing upon an appropriate inspection included:

- (a) fissures at the base of the tree;
- (b) visible rot at the base of the tree near the fissures;
- (c) frass (castings) of borers and/or grubs at the base of the tree;
- (d) sap leakage at the base of the tree;
- (e) wood tissue growth being seen as swelling and knobs of wood where the tree was putting down healthy wood so as to reinforce the integrity of the tree;
- (f) the lean of the tree from perpendicular;
- (g) crown dieback.

Upon one or more of the above signs being observed which indicated dry rot or other health issues with the tree, further investigation would have confirmed the existence of the dry rot by:

- (i) tapping the tree trunk with an inspection mallet which would have resulted in an obvious hollow sound indicating the extent of the dry rot; and

- (ii) if further proof of the dry rot and its extent was needed, pushing a screw driver into the tree at the site of the fissures which would clearly demonstrate the dry rot and its extent;

30A Further, by reason of the matters set out in paragraph 30, in the course of one or each of the March 2011 Inspection, the early 2012 Inspections, the Heli Aust Inspection, the July 2013 Inspection and/or the Osborne Inspection, the Tree should have been identified by Endeavour Energy by itself or its agents as a tree that could:

30A.1 damage or interfere with its electricity works, or

30A.2 make its electricity works become a potential cause of bush fire or a potential risk to public safety;

31. In the premises set out in paragraphs 30 and 30A 18 to 25G above, at all material times, the Endeavour Duty required Endeavour Energy, acting reasonably to exercise reasonable care to identify Hazardous Trees located within the Clearance Space and the Hazard Space and to trim or remove them or to cause them to be trimmed or removed.

~~31.1 to identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 30; and~~

~~31.2 to trim or remove the Tree; or~~

~~31.3 to cause the owner or occupier of 108 Linksview Road to trim or remove the Tree.~~

31A1. If (which is denied) the Endeavour Duty was delegable and could be discharged by the appointment of competent contractors, the Endeavour Duty included a duty to exercise reasonable care in the appointment and supervision of the contractors.

OSBORNE'S DUTY OF CARE

31 A. At all material times, Osborne knew or ought reasonably to have known of the risks referred to in paragraphs 13.1 to 13.4 above.

31B. At all material times:

31B.1 the Risks defined in paragraph 14 above were reasonably foreseeable to Osborne;

31 B.2 Osborne knew or ought reasonably to have known of the Risks.

31C. As a result of the matters set out in paragraphs 15, 16, 24A, 24C to 24F, 25F, 25G, 29, 30 and 31A and 31B above (in combination or separately), at all material times, Osborne owed a duty of care to the plaintiff and Group Members to exercise reasonable care in carrying out the PSBI Program under the Osborne Contract to avoid the materialisation of the Risks (the **Osborne Duty**).

31D. In the premises set out in paragraphs 24A, 24C to 24F, 25F, 25G, 29, 30 and 30A above, at all material times the Osborne Duty required Osborne Endeavour-Energy, acting reasonably, to:

31D.1 identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 30; and

~~31D.2 trim or remove the Tree; or~~

31 D.3 notify Endeavour Energy of the fact that the Tree was a Hazardous Tree.

BREACHES OF DUTY OF CARE BY ENDEAVOUR ENERGY

32. In the circumstances:

32.1 the probability that the harm referred to in sub-paragraphs 14.6 to 14.9 would occur if Endeavour Energy failed to take care was not insignificant:

Particulars

- a. The plaintiff refers to and repeats the matters set out in paragraphs 14, 20 and 21;
- b. The risk that bushfires could be ignited by clashing between uninsulated low voltage conductors was identified in the *Report of the Board of Inquiry Into the Occurrence of Bush and Grass Fires in Victoria 1977* and confirmed by the 2009 Victorian Bushfires Royal Commission [VBRC Report. Ch 4. [4.6.4]];

- c. The VBRC found that contact between vegetation and power lines poses a considerable risk for causing fires and that trees outside regulated clearance spaces pose a risk of causing fires by contacting power lines when they break or fall (VBRC Report, Ch 4. [4.6.2]):
- d. Endeavour Energy was aware of the findings of the VBRC and of the significant bushfire risk posed by Hazardous Trees, for example:
 - i. Endeavour Energy. Recommendations from the 2009 Victorian Bushfire Royal Commission Report [END.003.001.0262]:
 - ii. Network Management Plan, 2011-2013, Ch 4. [1.11-1.3]

32.2 in the event that the Risks materialised, the harm was potentially catastrophic:

32.3 any burden on Endeavour Energy in taking precautions to avoid the Risks was slight and not unreasonable having regard to its available resources, the seriousness of the harm and the risk of the occurrence of the harm;

Particulars

- a. There was no relevant financial constraint on Endeavour Energy taking the precautions set out in paragraph 32A below by reason that:
 - i. from about 1 January 2008, Endeavour Energy was subject to economic regulation by the Australian Energy Regulator (AER):
 - ii. the AER was required to make a Distribution Determination for distribution network service providers, including Endeavour Energy, for the period from 1 July

2009 to 30 June 2014 (2009 Regulatory Control Period):

- iii. Endeavour Energy submitted to the AER that its forecast direct operating and maintenance expenditure for the 2009 Regulatory Control Period was \$881 million, including \$198.1 million for vegetation management fEndeavour Energy Regulatory Proposal dated 2 June 2008 at p 140-11:
 - iv. the AER Distribution Determination for Endeavour Energy for the 2009 Regulatory Control Period approved Endeavour Energy's forecast direct operating and maintenance expenditure;
 - v. Endeavour Energy's actual expenditure on vegetation management during the 2009 Regulatory Control Period was \$136.5m less than its approved forecast vegetation management inspection expenditure fEndeavour Energy Regulatory Proposal 1 July 2015 to 30 June 2019 at 741:
 - vi. the cost of taking the precautions was significantly less than the budget available to Endeavour Energy for vegetation management during the 2009 Regulatory Control Period:
- b. further particulars of the cost of the precautions may be provided prior to trial.

32.4 Hazardous Trees are of no, or alternatively, very limited social utility and the Tree was of no social utility.

~~In the premises set out in paragraphs 20 to 31 inclusive above, as at 17 October 2013 Endeavour Energy had failed to:~~

~~32.1 identify the Troo as a Hazardous Tree by virtue of the defects and hazards associated with the Troo identified in paragraph 30;~~

~~31.2~~ —trim or ~~remove~~ the Tree; or

~~31.3~~ —cause the owner or occupier of ~~108~~ Linksview Road to trim or remove the **Tree**.

32A. A reasonable person in the position of Endeavour Energy would have taken the following precautions to avoid the materialisation of the Risks:

32A.1 ensured that the persons who conducted the Vegetation Management Inspections and the PSBI Program on its behalf had Appropriate Training;

32A.2 taken reasonable care to ensure that the contractors it engaged to conduct the Vegetation Management Inspections and the PSBI Program on its behalf discharged the obligation to inspect for and identify Hazardous Trees;

32A.3 identified the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 30;

32A.4 upon identifying the Tree as a Hazardous Tree;

32A.4.1. . . . trimmed or removed the Tree as soon as practicable pursuant to s 48(2)(b) of the ES Act; or

32A.4.2 served a notice under s 48(2)(a) of the ES Act on the owner or occupier of 108 Linksview Road requiring that the Tree be trimmed or removed within a reasonable time and, in the event that the owner or occupier did not carry out the work to the Tree within a reasonable time, trimmed or removed the Tree itself pursuant to s.48(5) of the ES Act.

32B. Endeavour Energy failed:

32B.1 to ensure that the persons who conducted the Vegetation Management Inspections and the PSBI Program on its behalf had Appropriate Training;

Particulars

- a. Endeavour Energy did not provide any training in the inspection and identification of Hazardous Trees to the persons whom it engaged or whom its contractors engaged to inspect vegetation in the course of the Vegetation Management Inspections and/or PSBI Program:
- b. Endeavour Energy did not require Asplundh, ATS or Osborne to:
 - i. engage qualified arborists; or
 - ii. provide Appropriate Training to the persons whom they did engageto inspect vegetation in the course of the Vegetation Management Inspections, and/or the PSBI Program:

32B.2 to take reasonable care to ensure that the contractors it engaged to conduct the Vegetation Management Inspections and the PSBI Program on its behalf discharged the obligation to inspect for and identify Hazardous Trees:

Particulars

- c. Endeavour Energy engaged Tree Management Officers (TMO) to supervise and audit the work performed by its contractors none of whom had the Appropriate Training;
- d. Endeavour Energy knew that none of the individuals conducting the Vegetation Management Inspections and the PSBI Program on its behalf and none of its TMOs responsible for supervising and auditing that work had the Appropriate Training or were otherwise competent to inspect for and identify Hazardous Trees:

- e. Endeavour Energy did not adequately direct its contractors to inspect for and identify Hazardous Trees, particularly Hazardous Trees outside the Clearance Space, because:
 - i. Endeavour Energy's pre-work induction training under the Asplundh Contract, the Heli Aust Contract, the ATS Contract 2013 and the Osborne Contract did not include any instruction or direction in relation to the inspection for and identification of Hazardous Trees;
 - ii. Endeavour Energy's Vegetation Control Manual SRMM12 and Branch Procedure PVM0203 did not require training in the inspection and identification of Hazardous Trees;
 - iii. Osborne did not consider that it was required inspect for and identify Hazardous Trees outside the Clearance Space and did not do so;
 - iv. the accreditation process for the individuals responsible for providing vegetation inspection services under the Osborne Contract was a Network Familiarisation Training Session and Assessment held on 13 May 2013;
 - v. the Network Familiarisation Training Session and Assessment contained no instruction, training or assessment in the inspection for and identification of Hazardous Trees;
 - vi. prior to entering into the Osborne Contract, Osborne offered to supply additional services to Endeavour Energy, including a "fall-in tree analysis" and "health analysis" and Endeavour Energy refused that offer;
- f. further particulars may be provided prior to trial.

32B.3 to identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 30.

33. In the premises, as at 17 October 2013, by the failures identified in paragraph 32B, Endeavour Energy had breached, and continued to be in breach of the Endeavour Duty.:

Particulars

~~But for the breaches of duty:~~

- ~~(a) — the Tree would have been identified as a Hazardous Tree; and~~
- ~~(b) — the Tree would have been removed or trimmed in accordance with MMI-0013, such that the appropriate clearance distances were maintained between the Conductors and at the tree near pole JU-267 on 17 October 2013.~~

33A1. The failure of Endeavour Energy:

33A1.1 to take the precautions in paragraph 32A.1;

33A1.2 to take the precautions in paragraph 32A.2

were not acts or omissions involving the exercise of, or failure to exercise, a special statutory power within the meaning of s 43A of the *Civil Liability Act 2002 (NSW)*.

33A2. Further, or alternatively, the failure of Endeavour Energy to:

33A3.1 to take the precautions in paragraph 32A.1;

33A3.2 to take the precautions in paragraph 32A.2

were acts or omissions that were so unreasonable that no authority having the special statutory power could consider them to have been reasonable having regard to the matters set out in paragraphs 32.

33A3. To the extent that the failure of Endeavour Energy to identify the Tree as a Hazardous Tree during the March 2011 Inspection, the early 2012 Inspections, the July 2013 Inspection, the Heli-Aust Inspection and/or the Osborne Inspection were

acts or omissions which involved the exercise of, or failure to exercise, a special statutory power, the acts or omissions were so unreasonable that no authority having the special statutory power could consider them to have been reasonable having regard to the matters set out in paragraph 32.

BREACHES BY OSBORNE

33A4 In the circumstances:

33A4.1 by reason of the matters set out in paragraphs 13, 14, 20 and 21, the probability that the harm referred to in sub-paragraphs 14.6 to 14.9 would occur if Osborne failed to take care was not insignificant;

33A4.2 in the event that the Risks materialised, the harm was potentially catastrophic;

33A4.3 by reason of the matters set out in paragraphs 18 to 30 above, any burden to Osborne in taking precautions to avoid the Risks was slight and not unreasonable having regard to the seriousness of the harm and the risk of its occurrence;

33A4.4 Hazardous Trees are of no, or alternatively, very limited social utility and the Tree was of no social utility,

33A5. A reasonable person in the position of Osborne would have taken the following precautions to avoid the materialisation of the Risks:

33A5.1 ensuring that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Osborne Contract had the training, qualifications or experience necessary to enable them to competently inspect for and identify Hazardous Trees;

Particulars

The plaintiff relies upon clause 6.2a of the Osborne Contract and clause 13.0 of Schedule 2 of the Osborne Contract.

33A5.2 identifying the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in the particulars to paragraph 30;

Particulars

The plaintiff relies upon clauses 4.1a of the Osborne Contract; clauses 2.0, 5.1, 5.4, 5.4.1, 7.0, and 14.0 of Schedule 2 of the Osborne Contract; and Endeavour Energy policies WNV 1012, MMI-0001 and MMI-0013.

33A5.3 upon identifying the Tree as a Hazardous Tree notifying Endeavour Energy that the Tree was a Hazardous Tree.

Particulars

Clauses 5.4a and c. and 8.0 of Schedule 2 of the Osborne Contract,

33A In breach of the Osborne Duty, Osborne failed to:

33A.1a ensure that the persons who it employed or engaged to undertake inspections of vegetation in proximity to Endeavour Energy's network assets pursuant to the Osborne Contract had the training, qualifications or experience necessary to enable them to competently inspect for and identify Hazardous Trees;

33A.1 identify the Tree as a Hazardous Tree by virtue of the defects and hazards associated with the Tree identified in paragraph 30; and/or

~~33A.2 trim or remove the Tree; or~~

33A.3 notify Endeavour Energy of the fact that the Tree was a Hazardous Tree.

BREACHES OF DUTY CAUSED SPRINGWOOD / WINMALEE FIRE

34. At approximately 1.30pm on 17 October 2013 at Linksvie Road, Springwood:

34.1. vegetation in and adjacent to Linksvie Road was dry;

34.2. there was low humidity in local atmospheric conditions;

:
:
:
:
:

34.3. there was a very high ambient temperature;

34.4. there were strong winds blowing.

35. Each of the:

35.1. dry vegetation;

35.2. low humidity;

35.3. ambient temperature;

35.4. wind speed and direction;

on 17 October 2013 were within the range of foreseeable operating conditions for the power line.

36. At approximately 1.30pm on 17 October 2013:

36.1. the hazardous tree fell onto and remained upon the Conductors on the power line;

36.2. as a result of the Tree falling onto the Conductors, the Conductors clashed and arced with each other and/or-tho-troo causing the discharge of molten aluminium sparks from the Conductors; and/or-~~ignited~~-vegetation-from-the ~~tree~~;

36.3. the sparks or-~~ignited~~-vogotation ignited vegetable matter on the ground opposite the Conductors on the other side of Linksvievw Road;

36.4. the sparks or-~~ignited~~-vegetation thereby started a fire which subsequently spread over a wide geographic area being the Springwood/Winmalee fire.

37. If the actions precautions referred to in paragraph 32A.1 and 32A.2 had been undertaken by Endeavour Energy, the Springwood/Winmalee fire would not have occurred because:

37.1. had Endeavour Energy taken the precaution in paragraph 32A.1, the Tree would have been identified as a Hazardous Tree either directly by

Endeavour Energy or by its agents Asplundh, ATS, Heli Aust and/or Osborne during the inspections by no later than about 30 July 2013;

37.2. had the Tree been identified as a Hazardous Tree, Endeavour Energy would have taken one of the precautions in paragraph 32A.3 with the result that, by no later than about August 2013, the Tree would have been removed or trimmed to the height of the lowest conductor with the result that the Springwood/Winmalee fire could not have occurred.

38. If the actions precautions, referred to in paragraph 33A5 had been undertaken by Osborne the Springwood/Winmalee fire would not have occurred because:

38.1. had Osborne taken the precaution in paragraph 33A5.1 or 33A5.2, the Tree would have been identified as a Hazardous Tree during the Osborne Inspection;

38.2. had the Tree been identified as a Hazardous Tree during the Osborne Inspection, Osborne would have notified Endeavour Energy of that fact with the result that, by no later than about August 2013, the Tree would have been removed or trimmed to the height of the lowest conductor with the result that the Springwood/Winmalee fire could not have occurred.

39. In the premises the Springwood/Winmalee fire was caused by:

39.1. Endeavour Energy's breaches of Endeavour Duty; further or alternatively

39.2. Osborne's breaches of the Osborne Duty.

40. The Springwood/Winmalee fire was a natural and foreseeable consequence of the breaches of duty alleged in this proceeding.

SUB GROUP CLAIM –PRIVATE NUISANCE

41. Further to paragraph 4 above, the Plaintiff brings this proceeding on behalf of those group members ("**sub group members**") who suffered loss of or damage to property, further or alternatively economic loss, in connection with the Springwood/Winmalee fire's interference in their use and enjoyment of interests in land.

42. At all material times each of:
- 42.1. the risks referred to in paragraph 13 above; and
 - 42.2. the risks that a fire ignited by a discharge of electricity from the power line would unreasonably interfere with the use or enjoyment of interests in land:
 - 42.2.1. over which the fire passed; further or alternatively
 - 42.2.2. that was affected by physical consequences of the fire or by emergency responses to the fire;
 - 42.2.3. by the persons entitled to the said use or enjoyment;
- were reasonably foreseeable to Endeavour Energy.
43. By transmitting electric current along the power line, alternatively doing so at a time, being the afternoon of 17 October 2013, when the power line was not safe or operating safely, Endeavour Energy created the risk referred to in the preceding paragraph.
44. Endeavour Energy by the conduct alleged in the preceding paragraph in fact caused a fire beside Linksvie Road being the Springwood/Winmalee fire, which fire spread to *inter alia* land in which the Plaintiff and sub group members had interests ("**sub group lands**").
45. The Springwood/Winmalee fire unreasonably interfered with the Plaintiffs and sub group members' use and enjoyment of their interests in sub group lands.
46. In the premises the Plaintiff and sub group members suffered a nuisance created by Endeavour Energy ("**nuisance**").

CAUSATION AND LOSS AND DAMAGE

47. By reason of:
- 47.1. the breaches by Endeavour Energy of the Endeavour Duty;
 - 47.2. the breaches by Osborne of the Osborne Duty; further or alternatively

47.3. the nuisance;

alleged herein, the Plaintiff and each of the group members or sub group members as the case may be suffered loss and damage of the kinds referred to in sub-paragraphs 14.7 to 14.9 (inclusive) above.

Particulars of loss and damage of Plaintiff

The Plaintiff has lost upon the property his house, its contents, a garden shed and the contents thereof fences and garden. The Plaintiff further has suffered inconvenience.

Further particulars of the Plaintiff's loss and damage will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions.

COMMON QUESTIONS OF LAW OR FACT

48. The questions of law or fact common to the claims of the Plaintiff and each of the group members or sub group members are:
- 48.1. how the Springwood/Winmalee fire started;
 - 48.2. whether the Endeavour Duty was owed by Endeavour Energy to the Plaintiff and group members and if so the content of the duty;
 - 48.3a whether the Endeavour Duty was **non-delegable**;
 - 48.3b if the Endeavour Duty was delegable, whether the duty was discharged by Endeavour Energy engaging ATS and Osborne to undertake vegetation inspections on its behalf;
 - 48.3c whether Osborne owed the Osborne Duty to the plaintiff and group members and if so the content of the duty;
 - 48.3d whether Endeavour Energy breached the Endeavour Duty;
 - 48.3e whether Osborne breached the Osborne Duty;
 - 48.3. whether the **Springwood/Winmalee** fire was caused by a breach by Endeavour Energy of the Endeavour Duty;

- 48.4a whether the Springwood/Winmalee fire was caused by a breach by Osborne of the Osborne Duty;
- 48.4. whether the Plaintiff and sub group members suffered actual nuisance created by Endeavour Energy;
- 48.5. what are the principles for identifying and measuring compensable losses suffered by the claimants resulting from the breaches of duty or negligence alleged herein.

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 plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature  per *Brandon Pendergust*
as solicitor on the record.

Capacity

Date of signature 10.09.15.

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.

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.
- 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 or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales Law Courts Building, Queens Square 184 Phillip Street, Sydney NSW 2000 Australia
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001 Australia DX: 829 Sydney
Telephone	(02)9230 8111