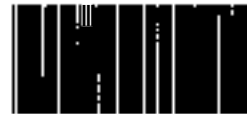




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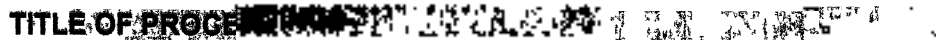
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Form 9
UCPR 9 1

**FIRST CROSS-CLAIM
STATEMENT OF CROSS-CLAIM**



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



TITLE OF PROCEEDINGS
First Plaintiff Sean Johnston

First Defendant Endeavour Energy (ABN 59 253 130 878)



First Cross-claimant Endeavour Energy (ABN 59 253 130 878)

First Cross-defendant Osborne Aviation Services Pty Limited

FILING DETAILS

Filed for Endeavour Energy (ABN 59 253 130 878), Cross Claimant 1

Filed in relation to Plaintiff's claim

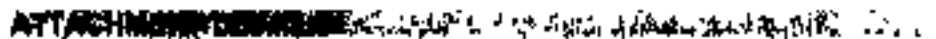
Legal representative Jonathan Gregson Melville Hunt

Legal representative reference 8020 7614

Telephone JHU:2037920

Your reference

NOTICE OF LISTING
A Notice of Listing will be attached and served with this statement of cross claim.



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

Statement of Cross Claim (UCPR 9) (Johnston.pdf)

Form 1 - Service and Execution of Process Act 1992 (Cth) (SEPA Notice.pdf)

Form 9 (version 4)
UCPR 9.1

FIRST CROSS-CLAIM STATEMENT OF CROSS-CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

| | |
|------------------|--|
| Plaintiff | Sean Johnston |
| First Defendant | Endeavour Energy |
| Second Defendant | Osborne Aviation Services Pty Limited |

TITLE OF THIS CROSS-CLAIM

| | |
|-----------------|--|
| Cross-claimant | Endeavour Energy |
| Cross-defendant | Osborne Aviation Services Pty Limited |

FILING DETAILS

| | |
|--------------------------------|---|
| Filed for | Endeavour Energy , the cross-claimant |
| Legal representative | Jonathan Gregson Melville Hunt, Lander & Rogers |
| Legal representative reference | COP 2037920 JHU |
| Contact name and telephone | Colleen Palmkvist, +612 8020 7644 |
| Contact email | cpalmkvist@landers.com.au |

RELIEF CLAIMED

- 1 Damages.
- 2 Indemnity pursuant to clause 11.3 of the Osborne Contract
- 3 **Costs.**
- 4 Such further or other order as the Court thinks fit.

PLEADINGS AND PARTICULARS

- 1 If (which is denied) the cross-claimant (**First Defendant**) is liable to the claimants as alleged in the Second Further Amended Statement of Claim, for the purposes of this cross-claim only, the First Defendant makes the allegations in paragraphs 2 to 25 below.
- 2 The First Defendant is a company incorporated under the *Energy Services Corporations Act 1995* and able to sue and be sued in its own corporate name and style.
- 3 The cross-defendant (**Osborne**) is a corporation entitled to sue and be sued in its own corporate name and style.

Damages

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

Particulars

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

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

Particulars

Osborne Contract, Schedule 2, Sections 3.0 and 4.0

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

Particulars

Osborne Contract, Schedule 2, Section 4.0

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

Particulars

Osborne Contract, Schedule 2, Section 3.0

- 8 Pursuant to the Osborne Contract, Osborne was required, inter alia, to conduct ground line patrols in areas where helicopter patrols could not be performed (such as no-fly zones, urban areas, stock sensitive areas and general aviation no fly zones, and areas where the vegetation canopy prevents image capture of assets) so as to, inter alia:

- (a) identify, classify, prioritise, photograph, record and report defects on both the First Defendant's and private poles and lines which could lead to the ignition of a bushfire;
- (b) issue PSBI Defect Report of Inspections notices to private customers detailing private line defects identified;
- (c) notify the First Defendant of defects on the First Defendant's network and any privately owned network (a "defect" being defined as a condition that requires rectification work); and
- (d) liaise with the First Defendant and private customers to arrange ground line inspections of private poles and lines where access is not available of the initial time of inspection.

Particulars

Osborne Contract, Schedule 2, Section 5.4

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

Particulars

Osborne Contract, Schedule 2, Section 7.0

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

Particulars

Osborne Contract, Schedule 2, Section 17.0

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

Particulars

Osborne Contract, Schedule 2, Section 14.0.

- 12 At all material times, MMI0001 stipulated, inter alia, that:
- (a) minimum tree clearances of all mains, including aerial service mains, must be inspected in accordance with those specified in MMI0013;
 - (b) particular attention must be given to the likelihood of vegetation outside the clearance zone that may be dead or dying and at a height that, if failure occurred, impact to the overhead mains would result. Vegetation in this condition was required to be reported for removal;
 - (c) the general purpose of the pre-summer patrol is to identify any factors associated with the overhead mains that could lead to the initiation of a bushfire. These may include inadequate tree clearances, impact damage, lightning damage, or any other defect; and

- (d) examples of defects that may cause bushfires included insufficient clearance between mains and trees including hazardous trees outside the clearance zone.
- 13 At all material times, MMI0013 required that, inter alia:
- (a) all dead, dying, dangerous, visually damaged vegetation or trees that can be climbed, or that reside within or above the designated minimum safety or trimming clearances, shall be removed;
 - (b) hazard trees (being trees outside the minimum trimming clearances, including the allowance the bushfire prone areas, that could come into contact with power lines having regard to foreseeable local conditions) shall be removed.
- 14 Linksvie Road, Springwood is part of an urban area.
- 15 On or about 30 July 2013, Osborne carried out a ground line inspection of trees and vegetation adjacent to pole JU 267 in Linksvie Road, Springwood, as part of the PSBI Program.
- 16 In the course of the said inspection, the Tree (as defined in the Second Further Amended Statement of Claim) should have been identified by Osborne as a tree requiring removal or trimming in accordance with:
- (a) the contractual obligations identified in paragraphs 8 to 10 above; and
 - (b) the provisions of MMI0001 and MMI0013.

Particulars

The First Defendant repeats paragraphs 20, 30 and 30A of the Second Further Amended Statement of Claim and the particulars thereto and says that in the premises, the Tree was:

- (i) a defect that may cause bushfires within the meaning of Schedule 2, Section 7.0 of the Osborne Contract and MMI0001;

- (ii) dead or dying and at a height that, if failure occurred, impact to the overhead mains would result, within the meaning of MMI0001;
- (iii) dead, dying, dangerous or visually damaged vegetation, and/or a hazard tree, within the meaning of MMI0013

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

- 17 It was a term of the Osborne Contract that Osborne would exercise reasonable care, skill and diligence in providing services to the First Defendant pursuant to the contract.

Particulars

*Clause 5.1(a)(6) of the Osborne Contract
The term was otherwise implied in law.*

- 18 Further, at all material times Osborne owed the First Defendant a duty to take reasonable care in providing services to the First Defendant, including the scoping of asset maps, pursuant to the Osborne Contract.

Particulars

The duty was concurrent with the obligation alleged in paragraph 17 above.

- 19 In breach of the contractual obligations alleged in paragraphs 8 to 10 and 17 above, as well as Osborne's duty of care alleged in paragraph 18 above, Osborne failed to identify the Tree as a tree requiring removal or trimming.

Particulars of breach

The particulars to paragraph 16 are repeated.

- 20 The First Defendant repeats paragraphs 34 to 36 of the Second Further Amended Statement of Claim and says that if Osborne had identified the Tree as a tree requiring removal or trimming:

- (a) the Tree would have been removed or trimmed before 17 October 2013; and

- (b) the Springwood/Winmalee fire (as defined in the Second Further Amended Statement of Claim) would not have occurred.

21 In the premises, if the First Defendant is ordered to pay damages to the claimants in respect of the loss or damage claimed in paragraph 47 of the Second Further Amended Statement of Claim, the First Defendant will have suffered loss and damage in consequence of the breaches alleged in paragraph 19.

Particulars of loss and damage

Any sum the First Defendant is ordered to pay the claimants as damages.

Any award of costs the First Defendant is ordered to pay.

The First Defendant's legal fees.

Indemnity

22 It was a term of the Osborne Contract that Osborne keep indemnified the First Defendant from and against:

- (a) all actions, suits, proceedings, claims, demands, costs (including legal costs and disbursements on a full indemnity basis), which may be brought against the First Defendant arising from the acts or omissions of Osborne, its agents, employees or subcontractors in the performance or non-performance of services, whether such performance or non-performance does or does not comprise a breach of the Osborne Agreement;
- (b) any losses, costs and expenses incurred by the First Defendant as a direct or indirect result of a breach of the Osborne Agreement by Osborne;
- (c) any losses, costs and expenses incurred by the First Defendant as a direct or indirect result of any negligent or other tortious act or omission by Osborne, its agents, employees or subcontractors; and
- (d) any breach of statute or illegal act or omission by Osborne, its agents, employees or subcontractors in connection with the performance or non-performance of services.

Particulars

Osborne Agreement, clause 11.3(c)

23 'Losses" was defined to include loss of all kinds whatsoever including legal costs and disbursements on a full indemnity basis

Particulars

Osborne Agreement, clause 11 3(c)

24 The loss or damage claimed in paragraph 47 of the Second Further Amended Statement of Claim is loss or damage which was caused by the conduct of Osborne, its agents, employees or subcontractors in the provision of services

Particulars

The First Defendant repeats paragraphs 15 to 20 above

25 In the premises, the First Defendant is entitled to indemnity from Osborne in respect of

- (a) the loss or damage claimed in paragraph 47 of the Second Further Amended Statement of Claim,
- (b) any award of costs the First Defendant is ordered to pay, and
- (c) the First Defendant's legal fees, pursuant to the Osborne Contract

SIGNATURE OF LEGAL REPRESENTATIVE


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

I have advised the cross-claimant that court fees may be payable during these proceedings These fees may include a hearing allocation fee

Signature

Capacity

Date of signature


Solicitor for the cross-claimant
21/4/15

NOTICE TO CROSS-DEFENDANT

If you do not file a defence you will be bound by any judgment or order in the proceedings so far as it is relevant to this cross-claim.

HOW TO RESPOND

Please read this statement of cross-claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the cross-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 cross-claim or part of the cross-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 cross-claimant all of the money and interest claimed.
 - 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 cross-claimant 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, 184 Phillip Street, Sydney |
| Postal address | Supreme Court of New South Wales, GPO Box 3, Sydney NSW 2001 |
| Telephone | 1300 679 272 |

AFFIDAVIT VERIFYING

Name Rod Howard
Address 51 Huntingwood Drive
Huntingwood NSW 2148
Occupation Chief Operating Officer, Endeavour Energy
Date 2 April 2015

~~I say on~~ oath/affirm:


- 1 I am the Chief Operating Officer of the First Defendant.
- 2 I believe that the allegations of fact contained in this cross-claim are true.

SWORN/AFFIRMED at Sydney, New South Wales
Signature of deponent 
Name of witness Colleen Palmkvist
Address of witness c/-Lander & Rogers, level 19, 123 Pitt Street, Sydney,
NSW 2000
Capacity of witness Solicitor

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

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

NSW Driver Licence NO: 6836SV
Identification document relied on (may be original or certified copy)

Signature of witness 

PARTY DETAILS

A list of parties must be filed and served with this statement of cross-claim.

PARTIES TO THIS CROSS-CLAIM

Cross-claimant

Endeavour Energy

Cross-defendant

Osborne Aviation Services Pty Limited

Service and Execution of Process Act 1992 Form 1

NOTICE TO DEFENDANT

PLEASE READ THIS NOTICE
AND THE ATTACHED DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING THEM YOU SHOULD GET LEGAL
ADVICE AS SOON AS POSSIBLE.

Attached to this notice is a Statement of Cross-Claim (the attached process) issued out of the Supreme Court of New South Wales.

Service of the attached process outside New South Wales is authorised by the Service and Execution of Process Act 1992.

YOUR RIGHTS

If a court of a State or Territory other than New South Wales is the appropriate court to determine the claim against you set out in the attached process, you may be able to have the proceeding stayed by applying to the Supreme Court of New South Wales.

If you think the proceeding should be stayed or transferred you should get legal advice as soon as possible.

CONTESTING THIS CLAIM

If you want to contest this claim, you must take any action set out in the attached process as being necessary to contest the claim.

If you want to contest this claim, you must also file an appearance in the Supreme Court of New South Wales. You have only 21 days after receiving the attached process to do so.

The appearance must contain an address in Australia where documents can be left for you or sent to you.