

PROCESSED

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

S CI 2014 05162

BETWEEN

IRWIN JAMES RAMSAY

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651118)  
and GIPPSLAND CONTRACTING PTY LTD (ACN 104 187 911)

Defendants

IRWIN JAMES RAMSAY and GIPPSLAND CONTRACTING PTY LTD  
(ACN 104 187 911)

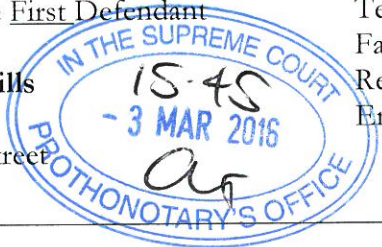
Defendants to Counterclaim

**AMENDED DEFENCE AND COUNTERCLAIM**

Filed pursuant to the order of the Honourable  
Justice J Forrest made 4 February 2016

Date of document: 3 March 2016 ~~8 December 2014~~  
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**Note:** for the avoidance of doubt, any admission of an allegation in the amended statement of claim is an admission of the allegation only, and not of any of the particulars supporting the allegation.

To the third further amended statement of claim dated 3 February 2016 ~~24 October 2014~~

(statement of claim) the first defendant (**Ausnet Services**) says —

1. To paragraph 1 —
  - (a) it admits that a fire occurred on 9 February 2014 between Jack River and Madalya, west of Yarram in Victoria;

- (b) otherwise, it does not admit the allegations therein.
- 2. It does not admit the allegations in paragraph 2.
- 3. It admits the allegations in paragraph 3.
- 4. To paragraph 4 —
  - (a) it does not admit the allegations therein;
  - (b) it says further that it relies on the provisions of Parts VB and VBA of the *Wrongs Act 1958* (Vic) (*Wrongs Act*) in respect of each group member who is alleged to have suffered personal injury.
- 5. It does not admit the allegations in paragraph 5.
- 6. To paragraph 6 -
  - (a) it admits the allegations in sub-paragraph (a);
  - (b) to sub-paragraph (b) -
    - (i) it says that it carried on business as a distributor of electricity in the geographical area of northern and eastern Victoria pursuant to a distribution licence granted under the *Electricity Industry Act 2000* (Vic), as varied from time to time (the **Distribution Business**);
    - (ii) otherwise, it denies the allegations therein;
  - (c) to sub-paragraph (c) -
    - (i) it admits that in carrying on the Distribution Business it was a major electricity company, and an operator of a supply network, within the meaning of s 3 of the *Electricity Safety Act 1998* (Vic);
    - (ii) otherwise, it denies the allegations therein.
- 7. To paragraph 7 —
  - (a) it admits that -

- (i) in the course of and for the purposes of the Distribution Business it owned and operated the network infrastructure which carries electricity from a transmission network to the point at which supply is passed to end users of electricity in the licensed area (the **Distribution Network**);
    - (ii) the Distribution Network included a single wire earth return electricity supply line running in a north-westerly direction north-west of the intersection of Egan's Road and Yarram-Morwell Road in Jack River, through which electricity was transmitted (the **SWER line**);
  - (b) it says that as at 9 February 2014 the Distribution Network —
    - (i) supplied electricity to no fewer than 661,000 customers in an area of not less than 80,000 square kilometres;
    - (ii) comprised approximately 61 zone and switching stations, 59,500 distribution substations, 370,000 poles and 560,000 kilometres of overhead lines and underground cables; and
    - (iii) included approximately 220,000 spans (being the distance between two poles) in locations which were, as at 9 February 2014, designated by the Country Fire Authority (**CFA**) to be hazardous bushfire risk areas.
  - (c) otherwise, it denies the allegations therein.
8. Subject to full reference to the relevant statutory provisions, it admits the allegations in paragraph 8.
9. To paragraph 9 -
- (a) it denies the allegations therein;
  - (b) further, it denies that s 98 of the *Electricity Safety Act*, or s 90 of the *Electricity Safety Act* and clause 2(1) of the Code of Practice for Electric Line Clearance (**Code**),

created any private right or cause of action for the benefit of the plaintiff, or any group member, or any particular class of persons;

- (c) it says further that if (which is denied) the statutory provisions on which the plaintiff relies imposed on Ausnet Services an obligation for the protection of any particular class of persons, the scope of that obligation was limited by reference to the matters alleged in paragraphs 16 and 27 of this defence.

10. It denies the allegations in paragraph 10.

11. It denies the allegations in paragraph 11.

12. To paragraph 12 -

- (a) it admits the allegations in sub-paragraph (a);
- (b) it admits that it had the right to construct, repair, modify, inspect, maintain and operate the SWFR line and to give directions as to its construction, repair, modification, inspection, maintenance or operation;
- (c) it admits that except to the extent that it conferred such rights on another party by contracting with another party, it held those rights to the exclusion of other private persons;
- (d) it refers to the allegations in paragraph 27 of this defence; and
- (e) otherwise, it does not admit the allegations therein.

13. To paragraph 13 -

- (a) as to sub-paragraph (a) -
  - (i) it admits that at all material times it used the SWER line to distribute electricity;
  - (ii) it says further that at all material times the nominal voltage on the line was 1,2.7 kV;
  - (iii) otherwise, it denies the allegations therein;

- (b) as to sub-paragraph (b) -
  - (i) it admits that the transmission of electricity along a SWER line could create a risk of unintended discharges of electricity;
  - (ii) it refers to and repeats sub-paragraphs (c)(ii) and (iii) below;
  - (iii) otherwise, it denies the allegations therein;
- (c) as to sub-paragraph (c) -
  - (i) it says that an unintended discharge of electricity from a SWER line might be capable of causing death or serious injury to persons and damage to property by the means alleged;
  - (ii) it says further that the prospect of the risk of injury to persons or damage to property from burning by fire ignited by the discharge of electricity materialising, and the magnitude of the risk if it did materialise, were dependent upon circumstances outside of Ausnet Services' control;
  - (iii) the circumstances outside the control of Ausnet Services referred to above included, without limitation, weather conditions at the time of the discharge of electricity, the nature and quantity of flammable material available in the vicinity of any point of discharge, the direction in which and speed at which the fire (if ignited) travelled, the extent and expedition of actions taken by fire agencies and other persons to suppress the fire and steps taken by persons to remove or protect themselves or their property from the path or impact of the fire;
  - (iv) it specifically denies that the risk of injury to persons or damage to property from burning by fire ignited by the discharge of electricity from the SWER line was material;
  - (v) otherwise, it denies the allegations in sub-paragraph (c);

- (d) it denies the allegations in sub-paragraph (d);
  - (e) it denies the allegations in sub-paragraph (e).
14. To paragraph 14 —
- (a) it admits that it was reasonably foreseeable that a discharge of electricity from a SWER line could possibly cause ignition of flammable material in the vicinity of the point of discharge;
  - (b) it admits that it was reasonably foreseeable that ignition of flammable material might produce a fire which might spread over a wide geographic area depending, among other things, on wind direction and velocity;
  - (c) it admits that it was reasonably foreseeable that fires could cause death or injury to persons or loss of or damage to property within the area over which they spread;
  - (d) it admits that it was reasonably foreseeable to it that fires could cause damage to property within areas affected by their physical consequences;
  - (e) it denies the allegations in sub-paragraph (e);
  - (f) it admits that it was reasonably foreseeable that the risks of bushfires occurring were greater during periods of high or extreme bushfire danger than otherwise;
  - (g) it refers to and repeats the matters alleged in sub-paragraph 13(c)(ii) and (iii) above;
  - (h) it specifically denies that it was reasonably foreseeable to it that there was a material risk -
    - (i) of a discharge of electricity from the SWER line;
    - (ii) that, if such discharge caused a fire, it could cause loss or death, injury or loss of the kind alleged in sub-paragraphs 14(c), (d) and (e);
  - (i) otherwise, it denies the allegations in paragraph 14.

15. To paragraph 15 —
- (a) it denies the allegations therein;
  - (b) it says that the plaintiff and some or all of the group members were capable of protecting themselves including by effecting insurance cover in respect of the losses alleged;
  - (c) it says further that the class of persons alleged in paragraph 15 is indeterminate, and was not at any relevant time capable of being reasonably determined.
16. To paragraph 16-
- (a) it denies the allegations therein;
  - (b) it says that if (which is denied) it owed a duty of care to a class of persons including the plaintiff and group members or any of them, the scope of that duty and the reasonableness of the steps taken in discharge of the duty are to be assessed by reference, among other things, to the statutory framework and to the facts and considerations alleged in sub-paragraphs (c) to (i) below;
  - (c) the scale of the Distribution Network for which Ausnet Services was responsible was as alleged at sub-paragraph 6(e) above;
  - (d) Ausnet Services was not free to set its own prices for the services it supplied by operating its Distribution Business;
  - (e) at all material times the maximum prices which Ausnet Services could charge were set by the Australian Energy Regulator pursuant to the Electricity Distribution Price Review 2011-15 Final Decision (the **Price Determination**) which operated during a period which included 9 February 2014;
  - (f) the Australian Energy Regulator was required by the National Electricity Law (the Schedule to the *National Electricity (South Australia) Act 1996 (SA)*) to take into account in making the Price Determination the principle that a regulated network

service provider should be provided with a reasonable opportunity to recover at least the efficient costs the operator incurs in—

- (i) providing direct control network services; and
  - (ii) complying with a regulatory obligation or requirement or making a regulator)' payment;
- (g) the revenue allowance approved by the Australian Energy Regulator in the Price Determination took into account the costs which Energy Safe Victoria anticipated would be reasonably incurred by Ausnet Services in complying with the requirements imposed by the technical regulatory framework alleged herein, relevantly concerning bushfire risk and vegetation clearance;
- (h) at all relevant times Ausnet Services was governed by a technical regulatory framework (the **Technical Regulatory Framework**) which as at 9 February 2014 relevantly comprised -
- (i) the terms of the distribution licence;
  - (ii) the *Electricity Safety Act*,
  - (iii) the *Electricity Safety (Bushfire Mitigation) Regulations 2013* (Vic);
  - (iv) the *Electricity Safety (Electric Line Clearance) Regulations 2010* (Vic) (the **Line Clearance Regulations**) including the Code;
  - (v) the *Electricity Safety (Management) Regulations 2009* (Vic); and
  - (vi) the *Energy Safe Victoria Act 2005* (Vic);
- (i) pursuant to the Technical Regulatory Framework -
- (i) Ausnet Services was required to submit to Energy Safe Victoria an electricity safety management scheme (**ESMS**) [*Electricity Safety Act*, s 99];
  - (ii) Energy Safe Victoria was required to accept the ESMS if it was satisfied that it was appropriate for the Distribution Network and complied with the

- Act and the regulations relating to electricity safety management schemes [*Electricity Safety Act*, s 102(2)];
- (iii) Ausnet Services was required, each year, to prepare and submit to Energy Safe Victoria for acceptance, a plan for its proposals for the mitigation of bushfire risk in relation to its supply network (**Bushfire Mitigation Plan**) [*Electricity Safety Act*, s 113 A];
  - (iv) Energy Safe Victoria was required to accept the Bushfire Mitigation Plan if it was satisfied that it was appropriate for the supply network [*Electricity Safety Act*, s 83BE(2), s 113C];
  - (v) an accepted Bushfire Mitigation Plan applying to a supply network was taken to form part of the ESMS [*Electricity Safety Act*, s 113D];
  - (vi) it was a defence to prosecution of a person for an offence relating to breach of a duty or obligation imposed under s 98 of the *Electricity Safety Act* that the person had complied with an accepted ESMS in relation to that duty or obligation [*Electricity Safety Act*, s 113];
  - (vii) the Line Clearance Regulations required that a responsible person who was a major electricity company must ensure that for each year a management plan (**Vegetation Management Plan**) relating to compliance with the Code was prepared in accordance with the Code, and to submit it to Energy Safe Victoria for approval [reg 9].
  - (viii) the Code required that a ‘responsible person’ must create and maintain the clearance spaces around a powerline in accordance with Parts 2 and 3 and the Schedule to the Code [clause 2(1)];
- (j) at all relevant times Ausnet Services had in place —
    - (i) an ESMS that was approved by Energy' Safe Victoria;

- (ii) Bushfire Mitigation Plans that were approved by Energy Safe Victoria;
  - (iii) Vegetation Management Plans that were prepared in accordance with the Code and approved by Energy Safe Victoria, which plans contemplated that vegetation might be cleared by contractors engaged by Ausnet Services;
  - (iv) procedures for the assessment of line clearances in accordance with the Code and pursuant to its Vegetation Management Plan (**Clearance Procedure VEM 20-03**);
  - (v) procedures and policies in respect of the training of persons who were engaged to carry out inspections pursuant to its Vegetation Management Plans (**Training Policies**); and
  - (vi) procedures for the auditing of the work of persons who were engaged to carry out inspections pursuant to in its Vegetation Management Plans (**Compliance Audit Policy and Bushfire Mitigation Audit Policy**) -  
(the **Ausnet Services System**);
- (k) it says that —
- (i) reasonable care required that it do no more than put into effect a reasonable system for the mitigation of risks caused by its operation of the Distribution Network;
  - (ii) by reason of the matters alleged in sub-paragraphs (c) to (j) above, the Ausnet Services System was such a system;
  - (iii) the Technical Regulatory Framework did not require Ausnet Services to put in place any system other than the Ausnet Services System.

17. It denies the allegations in paragraph 17.

18. It denies the allegations in paragraph 18.

19. It admits the allegations in paragraph 19.
20. To paragraph 20, subject to production of, and reference to the relevant legislation —
  - (a) it admits the allegations in sub-paragraph (a);
  - (b) as to sub-paragraph (b) -
    - (i) it admits the allegations therein;
    - (ii) it says further that it was entitled to and did in fact discharge its responsibility by appointing a competent contractor to perform vegetation management services as alleged in paragraph 27 below;
  - (c) it admits the allegations in sub-paragraph (c), but subject to any necessary action being undertaken in accordance with the Code;
  - (d) as to sub-paragraph (d) -
    - (i) it admits the allegations therein;
    - (ii) it says further that it was entitled to and did in fact discharge that obligation by appointing a competent contractor to perform vegetation management services as alleged in paragraph 27 below;
  - (e) in admits the allegations in sub-paragraph (e);
  - (f) it admits the allegations in sub-paragraph (f);
  - (g) it admits the allegations in sub-paragraph (g);
  - (h) in relation to sub-paragraph (h):
    - (i) it admits the allegations in sub-paragraph (h);
    - (ii) it says further that it was entitled to and did in fact discharge ~~that~~ those obligations by appointing a competent contractor to perform vegetation management services as alleged in paragraph 27 below.
21. To paragraph 21 —
  - (a) it denies the allegations therein;

- (b) further -
- (i) as to the Statutory Duties, it refers to and repeats paragraph 9 of this defence;
  - (ii) it says that reasonable care required that it do no more than put into effect a reasonable system for the mitigation of risks caused by its operation of the Distribution Network and that by reason of the facts and considerations alleged in sub-paragraphs 16(c) to (j) above, the Ausnet Services System was such a system; and
  - (iii) it says that it was reasonably entitled to discharge its responsibility by appointing a competent contractor to perform vegetation management services.

21A. To paragraph 21A –

- (a) it denies the allegations therein;
- (b) it says that reasonable care required that it do no more than put into effect a reasonable system for the mitigation of risks caused by its operation of the Distribution Network and that by reason of the facts and considerations alleged in sub-paragraphs 16(c) to (j) above, the Ausnet Services System was such a system; and
- (c) it says that it was reasonably entitled to discharge its responsibility by appointing a competent contractor to perform vegetation management services.

22. It admits the allegations in paragraph 22.

23. To It admits the allegations in paragraph 23 –

- (a) it does not admit the allegations therein;
- (b) it says that at all material times in accordance with the Code, the minimum clearance space around the SWER line between poles 22 and 23 away from the

poles was, for the centre two-thirds of the span, 2.25 metres in all directions plus an additional distance to allow for sag and sway of the conductors, except vertically upwards, in which direction all space was within the minimum clearance space.

23A To paragraph 23A -

- (a) it denies the allegations therein;
- (b) it expressly denies that at any relevant time the Code specified any required allowance for sag and sway.

24. To paragraph 24 -

- (a) it admits that on 9 February 2014 there were two pinus radiata trees (the Trees) growing approximately 150 metres south east of pole 23;
- (b) otherwise, it does not admit the allegations therein in paragraph 24.

25. It does not admit the allegations paragraph 25.

26. It does not admit the allegations in paragraph 26.

26A. To paragraph 26A -

- (a) it admits that on or about 11 February 2013 its employee Nick Jones inspected the SWER line between poles 22 and 23;
- (b) it admits that Mr Jones assigned to the span in question an action code "PT1720";
- (c) it says that on 11 February 2013 Mr Jones was conducting a bushfire mitigation assessment for the purpose only of assessing whether vegetation was likely to grow into the clearance space during the then current fire declared period;
- (d) otherwise, it does not admit the allegations therein.

26B. To paragraph 26B -

- (a) it refers to the admission in paragraph 25(a) above;
- (b) otherwise, it denies the allegations therein.

27. To paragraph 27 -

- (a) it does not admit the allegations in sub-paragraph (a);
- (b) it does not admit the allegations in sub-paragraph (b);
- (c) it denies the allegations in sub-paragraph (c);
- (d) ~~it denies the allegations in sub-paragraph (d);~~ [there is no sub-paragraph (d)];
- (e) it says that pursuant to a written agreement dated 2 August 2012 (the **Services Agreement**), and an Approval Order issued under clause 2.2 of the Services Agreement, it appointed Gippsland Contracting Pty Ltd (trading as BJ & BJ Murphy Contracting) (**BJ Murphy**) to provide to it vegetation management service;
- (f) the engagement of BJ Murphy as a contractor was made following a tender process conducted by Ausnet Services by which it assessed BJ Murphy's competence to undertake the services;
- (g) the Services Agreement provided, relevantly, that -
  - (i) BJ Murphy was to undertake electric line clearance work including the management of allocated feeders throughout the period of the contract to ensure that assessment and cutting programs as agreed and managed by Ausnet Services were met, and assessing vegetation (**Services**);
  - (ii) assessments were to be undertaken in accordance with Clearance Procedure VEM 20-03;
  - (iii) all spans in high bushfire risk areas (**HBRA**) were to be assessed prior to 15 August each year with re-inspections commencing on 1 September and being completed prior to 30 October each year;

- (iv) a programmed review of HBRA spans prior to and throughout the declared bushfire period must be instigated by BJ Murphy and agreed with Ausnet Services to ensure compliance to the Code clearance for all vegetation;
  - (v) Ausnet Services would conduct random sampling of the contractor's work in order to verify compliance with relevant standards and with the contract;
  - (vi) all contractor personnel must be Ausnet Services' minimum training requirements;
- (h) there were written terms of the Services Agreement that BJ Murphy should —
- (i) perform the services to that standard of care and skill to be expected of a service provider who regularly acted in the capacity in which BJ Murphy was engaged and who possessed the knowledge, skill and experience of a service provider qualified to act in that capacity [clause 2.4];
  - (ii) comply with Ausnet Senders' policies and procedures [clause 3(c)];
  - (iii) comply with all applicable legislative requirements [clause 3(e)];
  - (iv) remain fully responsible for the services carried out notwithstanding any review of acceptance of those services by Ausnet Services [clause 3(d)];
  - (v) employ personnel with appropriate qualifications and experience to carry out the services [clause 7.3(a)];
  - (vi) ensure that all personnel engaged to carry out the services were adequately trained and were competent to carry out their duties [clause 7.3(b)];
  - (vii) conduct sample audits of all its work, procedures and practices in order to verify compliance with relevant standards, codes and requirements of the contract [Schedule 1, Section 4, clause 1.2];
- (i) Ausnet Services will rely at trial on the Services Agreement for its full terms and effect;

- (j) from the commencement of the Services Agreement and from time to time thereafter AusNet Services provided to BJ Murphy copies of its policies as amended from time to time, including its Vegetation Management Plans, Clearance Procedure VEM 20-03 and the Training Policies (as alleged in subparagraphs 160(iii), (iv) and (v) above);
- (k) for the purposes of the Services Agreement Ausnet Services -
  - (i) required that BJ Murphy demonstrate to it that its personnel including, relevantly, its vegetation assessors, had undertaken training as required by the contract and the training policies; and
  - (ii) provided training concerning the Clearance Procedure VEM 20-03 to BJ Murphy personnel (including the BJ Murphy employee who had last assessed feeder FTR12 on the Jack River Spur between poles 22 and 23);
- (l) the services provided to Ausnet Services by BJ Murphy were audited by it in accordance with its Compliance Audit Policy and its Bushfire Mitigation Audit Policy;
- (m) BJ Murphy carried out a clearance assessment in relation to feeder FTR12 on the Jack Rivers Spur between poles 22 and 23 on 15 August 2013 (the **August 2013 Assessment**);
- (n) by giving effect the policies comprising the Ausnet Services System and by appointing BJ Murphy as alleged herein, it put into effect a reasonable system for the mitigation of risk caused by the operation of the Distribution Network and thereby discharged any duty of care or obligation that it owed to the plaintiff and group members;
- (o) it says further that -

- (i) BJ Murphy was an independent contractor and not an employee of Ausnet Services;
  - (ii) if, which is denied, BJ Murphy or any of its servants or agents was negligent, or acted in breach of any statutory obligation when carrying out the services, including in connection with the August 2013 Assessment, Ausnet Services denies that it is liable (vicariously or otherwise) for any such acts or omissions;
  - (p) otherwise, it does not admit the allegations therein.
28. To paragraph 28 -
- (a) it denies the allegations therein;
  - (b) it refers to and repeats paragraph 27 above.
- 28A. To paragraph 28A -
- (a) it refers to its allegations against BJ Murphy in paragraphs 40 to 52 below which (inter alia) are premised on it being established that during a period no later than about 1 October 2012 and continuing up to 9 February 2014, two pine trees were within the required clearance space around the SWER line; and
  - (a) otherwise, to the extent that any allegation therein affects it, it does not admit the same.
- 28B. It denies the allegations in paragraph 28B.
29. It does not admit the allegations in paragraph 29.
30. It denies the allegations in paragraph 30.
31. It denies the allegations in paragraph 31.
32. It does not admit the allegations in paragraph 32.
33. To paragraph 33 -
- (a) it refers to and repeats paragraphs 13(c) and 14 above;

(b) it specifically denies that it was reasonably foreseeable that there was a material risk that a bushfire ignited by a discharge of electricity from the SWER line would unreasonably interfere with the use or enjoyment of interests in land as alleged;

(c) otherwise, it denies the allegations therein.

34. It denies the allegations in paragraph 34.

35. It denies the allegations in paragraph 35.

36. It denies the allegations in paragraph 36.

37. It denies the allegations in paragraph 37.

38. It denies the allegations in paragraph 38.

39. It does not admit any allegations in paragraphs 39 to 58, but refers to its allegations against BJ Murphy below.

~~39. To paragraph 39 —~~

~~(a) — it admits that the question in sub-paragraph (a) is a question common to the claims of the plaintiff and each of the group members;~~

~~(b) — it does not admit that any of the questions in sub-paragraphs (b) to (d) is a common question;~~

~~(c) — it denies that the question in sub-paragraph (c) is a common question.~~

### **BJ Murphy**

40. At all relevant times BJ Murphy was incorporated pursuant to the *Corporations Act 2001* (Cth).

41. Pursuant to the Services Agreement alleged in paragraph 27(e) above, BJ Murphy agreed to provide the Services subject to the terms alleged in sub-paragraphs 27(g) and (h).

42. During the term of the Services Agreement BJ Murphy provided services to Ausnet Services throughout the Distribution Network, including in respect of the SWER line referred to in paragraph 7(b) of the statement of claim, and was the sole entity engaged to

conduct, and which conducted, vegetation assessments on that part of the Distribution Network.

43. By reason of the matters alleged at paragraphs 27, 42 and 44 of this defence, BJ Murphy had responsibility for and control over -
- (a) the assessment of vegetation clearances surrounding the Distribution Network, including the SWER line referred to in paragraph 7(b) of the statement of claim;
  - (b) the implementation and observance by its employees of the requirements of the Services Agreement and of Ausnet Services' policies and procedures, including Clearance Procedure VEM 20-03, during and for the purposes of assessing vegetation clearance surrounding the Distribution Network.
44. During the term of the Services Agreement it was reasonably foreseeable that any failure by BJ Murphy, its servants or agents to observe and implement the requirements of the Services Agreement and of Ausnet Services' policies in respect of the assessment of vegetation clearances surrounding the Distribution Network, in particular to assess vegetation clearances in accordance with Clearance Procedure VEM 20-03, could result in —
- (a) vegetation encroaching into the clearance space surrounding the Distribution Network;
  - (b) vegetation coming into contact with network assets including SWE.R lines;
  - (c) arcing between SWER lines or conductors and vegetation which could cause a
  - (d) discharge of sparks and heat;
  - (e) sparks and heat igniting nearby fuel and starting a fire;
  - (f) such a fire —
    - (i) spreading over a wide geographic area;

- (ii) causing injury to persons and loss or damage to property within the area affected by the fire;
  - (iii) causing economic loss to people affected by the fire:
    - (A) by disrupting or impairing their income earning activities;
    - (B) by impeding the use or amenity of their properties if they were located in areas affected by the fire;
    - (C) by reducing the value of real property or businesses located in the area affected by the fire,(collectively, **the Risks**).
45. Throughout the term of the Services Agreement BJ Murphy, and its relevant employees, knew or ought reasonably to have known of the matters alleged in paragraph 44 above.
46. Throughout the term of the Services Agreement the plaintiff and group members were –
- (a) vulnerable to the Risks materialising; and
  - (b) for the purposes of protecting themselves and their property against the Risks, reliant on BJ Murphy by its servants and agents exercising reasonable care in undertaking the Services .
47. In the premises, throughout the term of the Services Agreement, BJ Murphy and its relevant employees owed to the plaintiff and group members a duty to take reasonable care and to ensure that reasonable care was taken by them —
- (a) in providing the Services, in particular, in conducting vegetation clearance assessments;
  - (b) to ensure that the assessment of vegetation clearances was undertaken competently and with due care, skill and diligence;

- (c) to ensure that the assessment of vegetation clearances was undertaken in accordance with the requirements of the Services Agreement and of Ausnet Services' policies and procedures including Clearance Procedure VFM 20-03.
48. During or following the August 2013 assessment BJ Murphy, by an employee —
- (a) inspected feeder FTR12;
  - (b) made an assessment that there was no vegetation in the clearance space surrounding the network between poles 22 and 23 on feeder FTR12 and that no vegetation would encroach upon the minimum clearance space during the period commencing 365 days after the inspection and ending 720 days after the inspection, assigning to the span in question an action code “PT720”; and
  - (c) conveyed that assessment to Ausnet Services.
49. If, as the plaintiff alleges, during a period no later than about 1 October 2012~~3~~ and continuing up to 9 February 2014, two pine trees were within the required clearance space around the SWER line —
- (a) in accordance with Clearance Procedure VFM 20-03 and the terms of the Code at the time of its assessments, including the August 2013 Assessment, BJ Murphy by its employees should reasonably have —
    - (i) determined that vegetation was within the minimum clearance space (assigning an action code “PT30”);
    - (ii) alternatively, determined that vegetation was outside the minimum clearance space but was likely to encroach upon it prior to the end of the declared fire danger period in the current assessment year (assigning an action code “PT365”);
    - (iii) alternatively, determined that vegetation was outside the minimum clearance space but there was some uncertainty whether or not it may

encroach upon it prior to the next assessment cycle (assigning an action code “RE”);

(b) accordingly -

(i) the August 2013 Assessment was not undertaken in accordance with the requirements of the Services Agreement, or with Clearance Procedure VEM 20-03;

(ii) the August 2013 Assessment was not conducted with reasonable care, skill and diligence.

50. In the premises, BJ Murphy itself, or by its employee, breached the duty of care alleged in paragraph 47 above.

51. Had BJ Murphy by its employee conducted the August 2013 assessment with reasonable care and skill and in accordance with Clearance Procedure VEM 20-03, then on the allocation of an appropriate action code, Ausnet Services would have caused any vegetation within clearance space between poles 22 and 23 on feeder FTR12 to be pruned back so that it was outside clearance space.

52. If the Jack River bushfire was caused as alleged in paragraph 26 of the statement of claim, then by reason of the matters alleged in paragraphs 48 to 51, the Jack River bushfire was caused by the negligence of BJ Murphy itself or by its employees.

**Proportionate liability - Wrongs Act, Part IVAA**

53. If, which is denied, Ausnet Services is liable to the plaintiff for any economic loss or damage to property as alleged, then Ausnet Services says that —

(a) by reason of the matters alleged in paragraphs 48 to 52 above, the acts or omissions of BJ Murphy by itself or by its employees also caused the loss or damage the subject of the claim;

- (b) accordingly, pursuant to s 24AI(1) of the *Wrongs Act*, the liability of Ausnet Services is limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Ausnet Services' responsibility for the loss or damage; and
- (c) judgment must not be given against Ausnet Services for more than that amount.

54. To paragraph 59 of the statement of claim –

- (a) it admits that the question in sub-paragraph (a) is a question common to the claims of the plaintiff and each of the group members;
- (b) it does not admit that any of the questions in sub-paragraphs (b) to (d) is a common question;
- (c) it denies that the question in sub-paragraph (e) is a common question;
- (d) it admits that the questions in (e1) are common questions; and
- (e) it does not plead to the questions alleged in (e2) to (e4), as they are directed to BJ Murphy.

## COUNTERCLAIM

### Introduction

54.55. Ausnet Services refers to and repeats as if set out seriatim —

- (a) the admissions and positive allegations in paragraphs 1(a), 3, 6, 7(a) and (b), 8, 12(a) to (d), 13(a) to (c)(i), 14(a) to (d), (f) and (g), of the defence; and
- (b) the positive allegations in paragraphs 27(e) to (m) and 40 to 53 of the defence.

### Contribution - Wrongs Act Part IY

56. If, which is denied, Ausnet Services is liable to the plaintiff or any group members for any claims other than claims for economic loss or damage to property, then —

- (a) by reason of the matters alleged in paragraphs 48 to 52 of the defence BJ Murphy is liable in respect of the same damage; and
- (b) pursuant to Part IV of the *Wrongs Act*, Ausnet Services is entitled to recover contribution from BJ Murphy in such amount as is found to be just and equitable having regard to BJ Murphy's responsibility for the damage.

### **Contractual claims by Ausnet Services against BJ Murphy**

57. There were further written terms of the Services Agreement that —

- (a) BJ Murphy would hold harmless and indemnify and keep held harmless and indemnified Ausnet Services against all actions, proceedings and claims whatsoever that may be brought against Ausnet Services or its servants or agents or related corporations in relation to any injury, loss of life, loss of or damage to any property or financial loss (including fines or penalties) or other loss for or in respect of any other loss, injury, expense or damage whatsoever arising out of or in consequence of the services being carried out by or on behalf of BJ Murphy, but BJ Murphy's liability to indemnify or hold harmless Ausnet Services should be reduced proportionally to the extent that a negligent act or omission of Ausnet Services has been proved to have contributed to the loss, damage, death or injury [clause 10.2];
- (b) that the indemnity in clause 10.2 would not exclude any other right of Ausnet Services to be indemnified by BJ Murphy [clause 10.2].

58. By reason of the matters alleged at paragraphs 27, 42, 43, 48, 49 and 51 of the defence —

- (a) the claims by the plaintiff and group members arise out of or in consequence of the services being carried out by or on behalf of BJ Murphy; and

- (b) BJ Murphy is required by clause 10.2 of the Services Agreement to indemnify Ausnet Services in respect of those claims, subject to the terms of the Services Agreement, relevantly clauses 10.1 and 10.3.
59. Further, by reason of the matters alleged in paragraphs 42, 43, 48, 49 and 51 of the defence, BJ Murphy breached the Service Agreement, in particular —
- (a) by failing to perform the August 2013 Assessment in accordance with Clearance Procedure VEM 20-03, as required by clause 1.4 of Schedule 1 to the Services Agreement;
- (b) by failing to comply with Ausnet Services' policies and procedures, as required by clause 3 of the Services Agreement; and
- (c) by failing to perform the Services to that standard of care and skill to be expected of a service provider who regularly acted in the capacity in which BJ Murphy was engaged and who possessed the knowledge, skill and experience of a service provider qualified to act in that capacity, as required by clause 2.4 of the Services Agreement.
60. If Ausnet Services is liable to the plaintiff and group members or any of them and thereby suffers loss and damage by reason of such liability —
- (a) by reason of the matters alleged in paragraphs 51 to 54, such liability was caused by BJ Murphy's breach of the Services Agreement as alleged; and
- (b) BJ Murphy is liable to Ausnet Services in damages for breach of the Services Agreement.

**AND THE PLAINTIFF BY COUNTERCLAIM CLAIMS -**

- A. As against the plaintiff, a declaration that BJ Murphy is a concurrent wrongdoer within the meaning of s 24AM of the *Wrongs Act*.

B. As against BJ Murphy -

- .1 A declaration that BJ Murphy is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*.
- .1A A declaration that BJ Murphy is liable to indemnify Ausnet Services pursuant to clause 10.2 of the Services Agreement.
- .1B An order in the nature of specific performance of clause 10.2 of the Services Agreement.
- .2 Contribution.
- .3 Damages.
- .4 Interest.
- .5 Costs.

Michael Wheelahan

Lisa Nichols



**Herbert Smith Freehills**  
Solicitors for the Defendant

DATED: 3 ~~December~~ March 2016 2015