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PROCESSED

Form 10A

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION

No. SCI 2014 5296

BETWEEN:

STEVEN ELLIOT WILLIAMS

Plaintiff

(by original proceeding)

and

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)

Defendant

AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)

Plaintiff by Counterclaim

and

STEVEN ELLIOT WILLIAMS & ORS  
(according to the Schedule)

Defendants to Counterclaim

(by counterclaim)

HEADING AND NOTICE ON COUNTERCLAIM  
WHERE DEFENDANT NEW PARTY

Date of document: 15 December 2014  
Filed on behalf of: The Defendant  
Prepared by:  
**Herbert Smith Freehills**  
Lawyers  
Level 43 101 Collins Street  
Melbourne VIC 3000

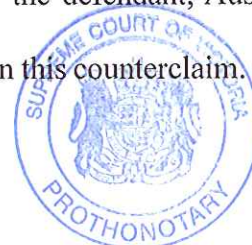
Solicitor's Code: 420  
DX: 240 Melbourne  
Tel: +61 3 9288 1234  
Fax: +61 3 9288 1567  
Ref: KAA:REO:82264663  
Email: [ken.adams@hsf.com](mailto:ken.adams@hsf.com) /  
[ruth.overington@hsf.com](mailto:ruth.overington@hsf.com)



To: Hume City Council  
of: 1079 Pascoe Vale Road, Broadmeadows VICTORIA 3047

To: Active Tree Services Pty Ltd (ACN 002 919 299)  
of: Level 10, 50 Berry Street, North Sydney NSW 2060

TAKE NOTICE that this proceeding has been brought against you by the defendant, AusNet  
Electricity Services Pty Ltd (ACN 064 651 118), for the claim set out in this counterclaim.



IF YOU INTEND TO DEFEND the claim YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the counterclaim has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the defendant's address for service, which is set out at the end of the counterclaim.

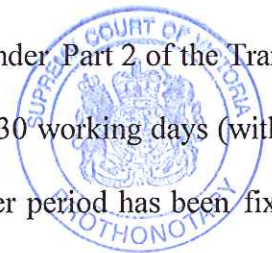
IF YOU FAIL to file an appearance within the proper time, the defendant may OBTAIN JUDGMENT AGAINST YOU on the counterclaim without further notice.

\*THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the counterclaim in Victoria, within 10 days after service;
- (b) where you are served with the counterclaim out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the counterclaim in Papua New Guinea, within 28 days after service;
- (d) where you are served with the counterclaim in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the counterclaim.

### COUNTERCLAIM

The counterclaim is set out in the defence and counterclaim attached.



The address of the defendant is—

Level 31

2 Southbank Boulevard

Southbank VIC 3006

The address for service of the defendant is—

Herbert Smith Freehills

Lawyers

Level 43 101 Collins Street

Melbourne VIC 3000

DX: 240 Melbourne



Prothonotary

**FILED:** 15 December 2014

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION**

No. SCI 2014 5296

**SCHEDULE OF PARTIES**

BETWEEN

**STEVEN ELLIOT WILLIAMS**

Plaintiff

and

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)**

Defendant

AND BETWEEN

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)**

Plaintiff by Counterclaim

and

**STEVEN ELLIOT WILLIAMS**

First Defendant to Counterclaim

**HUME CITY COUNCIL**

Second Defendant to Counterclaim

**ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)**

Third Defendant to Counterclaim

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION

S CI 2014 5296

BETWEEN:

STEVEN ELLIOT WILLIAMS

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD  
(ACN 064 651 118)

Defendant

AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD  
(ACN 064 651 118)

Plaintiff by Counterclaim

and

STEVEN ELLIOT WILLIAMS and OTHERS

Defendants by Counterclaim

DEFENCE AND COUNTERCLAIM

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Date of document: 15 December 2014  
Filed on behalf of: The Defendant  
Prepared by:  
**Herbert Smith Freehills**  
Lawyers  
Level 43 101 Collins Street  
Melbourne VIC 3000

Solicitor's Code: 420  
DX: 240 Melbourne  
Tel: +61 3 9288 1234  
Fax: +61 3 9288 1567  
Ref: KAA:REO:82264663  
Email: [ken.adams@hsf.com](mailto:ken.adams@hsf.com) /  
[ruth.overington@hsf.com](mailto:ruth.overington@hsf.com)

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**Note:** for the avoidance of doubt, any admission of an allegation in the statement of claim is an admission of the allegation only, and not of any of the particulars supporting the allegation.

To the statement of claim indorsed on the writ the defendant (**AusNet Services**) says –

1. To paragraph 1 –

- (a) it admits that a fire ignited on 9 February 2014 at Mickleham in Victoria;
- (b) otherwise, it does not admit the allegations therein.

2. To paragraph 2 –

- (a) it admits that the Plaintiff was at all material times, a Registered Joint Proprietor with Leah Barbara Berezy of real property located at 5 Vanessa Drive, Mickleham in the State of Victoria described in Volume 10743 Folio 654;
  - (b) otherwise, it does not admit the allegations therein.
- 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) 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;
  - (d) it says that 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**);
  - (e) 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.

7. To paragraph 7 –

(a) as to sub-paragraph (a) –

- (i) it says that in the course of and for the purposes of the Distribution Business it owned the pole, pole fittings, conductors, fuses, transformers, substations and like installations together and severally comprising the three-phase 66 kV electricity sub-transmission line which in part runs adjacent to the eastern side of Mickleham Road between Mount Ridley Road and Bardwell Drive, Mickleham in the State of Victoria (the **66 kV line**);
- (ii) it denies that it owned or had the use and management of the three phase 22 kV electricity distribution line (the **22 kV line**) built beneath the 66 kV line and says that the 22 kV line was owned, used and managed by Jemena Electricity Networks (VIC) Ltd (ABN 82 064 651 083);
- (iii) otherwise, it denies the allegations therein;

(b) as to sub-paragraph (b) –

- (i) it denies the allegations therein;
- (ii) it says that it operated the distribution work, including the 66 kV line, which carried electricity from a transmission network to the point at which supply is passed to end users of electricity in the licensed area.

8. To paragraph 8 –

- (a) it admits that the 66 kV line was part of a “supply network” as defined by s 3 of the *Electricity Safety Act*;

- (b) it says that the 22 kV line was part of a separate “supply network” as defined by s 3 of the *Electricity Safety Act*;
  - (c) otherwise, it denies the allegations therein.
- 9. Subject to full reference to the relevant statutory provisions, it admits the allegations in paragraph 9.
- 10. To paragraph 10 -
  - (a) it denies the allegations therein;
  - (b) further, it denies that s 98 of the *Electricity Safety Act* (either before or after 1 January 2012) 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 paragraph 17 of this defence.
- 11. It denies the allegations in paragraph 11.
- 12. It denies the allegations in paragraph 12.
- 13. To paragraph 13 -
  - (a) it admits that it had the right to construct, repair, modify, inspect, maintain and operate the 66 kV line and to give directions as to its construction, repair, modification, inspection, maintenance or operation;
  - (b) 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;
  - (c) in respect of the 66 kV line it admits sub-paragraphs (b) and (c);
  - (d) otherwise, it denies the allegations therein.
- 14. To paragraph 14 –
  - (a) as to sub-paragraph (a) –
    - (i) it admits that at all material times it used the 66 kV line to distribute electricity at a nominal voltage of 66 kV;



- (ii) otherwise, it denies the allegations therein;
- (b) as to sub-paragraph (b) –
  - (i) it admits that the transmission of electricity along a 66 kV line could create a risk of unintended discharges of electricity;
  - (ii) it refers to 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 66 kV 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 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 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, latent features of surrounding vegetation, 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 66 kV 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).

15. To paragraph 15 –

- (a) it admits that it was reasonably foreseeable that a discharge of electricity from a 66 kV 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 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 denies the allegations in sub-paragraph (f);
  - (g) it refers to and repeats the matters alleged in sub-paragraph 14(c)(ii) and (iii) above;
  - (h) it specifically denies that it was reasonably foreseeable that there was a material risk –
    - (i) of a discharge of electricity from the 66 kV line the subject of the plaintiff's claim;
    - (ii) that, if such discharge caused a fire it that it could cause loss or death, injury or loss of the kind alleged in sub-paragraphs 15(c) to (e);
    - (i) otherwise, it denies the allegations in paragraph 15.
16. To paragraph 16 –
- (a) it denies the allegations therein;
  - (b) 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 16 is indeterminate, and was not at any relevant time capable of being reasonably determined.
17. To paragraph 17 -

- (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 facts and considerations set out in sub-paragraphs (c) to (h) below;
- (c) throughout the Distribution Network there were at all relevant times large populations of trees in proximity to network assets which could not be maintained free or substantially free of risk unless power lines were relocated or placed underground or all trees in the 'hazard space' were removed or pruned;
- (d) the scale of the Distribution Network for which AusNet Services was responsible was as alleged at sub-paragraph 6(e) above;
- (e) AusNet Services was not free to set its own prices for the services it supplied by operating its Distribution Business;
- (f) 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;
- (g) 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 regulatory payment;
- (h) 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;

- (i) 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 of Practice for Electric Line Clearance (**Code**);
  - (v) the *Electricity Safety (Management) Regulations 2009* (Vic); and
  - (vi) the *Energy Safe Victoria Act 2005* (Vic);
- (j) 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 network (**bushfire mitigation plan**) [*Electricity Safety Act*, s 113A];
  - (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 Code –
    - (A) required that a ‘responsible person’ must create and maintain the required clearance spaces around a power line in accordance with Parts 2 and 3 and the Schedule to the Code (**clearance space**) [clause 2(1)];
    - (B) stipulated in respect of ‘hazard trees’, that , ‘If a person identifies a tree as likely to fall onto or otherwise come into contact with an electric line a responsible person may cut or remove the tree provided that -
      - (a) the tree has been assessed by a suitably qualified arborist; and
      - (b) that assessment confirms the likelihood of contact with an electric line having regard to foreseeable local conditions.’ [clause (3)];
  - (viii) the Technical Regulatory Framework made no other express provision concerning the management of hazard trees by network operators;
  - (ix) the Line Clearance Regulations required that a responsible person who was a major electricity company must ensure that for each year a management plan relating to compliance with the Code was prepared in accordance with the Code (**vegetation management plan**), and submit it to Energy Safe Victoria for approval [reg 9];
  - (k) 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.
18. It denies the allegations in paragraph 18.
19. It denies the allegations in paragraph 19.
20. To paragraph 20:
- (a) it admits the allegation in sub-paragraph (a);

- (b) as to sub-paragraph (b):
    - (i) it admits that at all relevant times there were gum trees growing on the Mickleham Road Reserve that were sufficiently close to the 66 kV and 22 kV lines that if they fell or shed branches in the direction of the lines there was a risk that the trees or branches would fall across the lines;
    - (ii) it says further that at all material times the gum trees growing on the Mickleham Road Reserve were outside the minimum clearance space specified by the Code;
    - (iii) otherwise, it denies the allegations therein.
21. To paragraph 21, subject to production of, and reference to the relevant legislation –
- (a) it denies the allegations in sub-paragraph (a);
  - (b) it denies the allegations in sub-paragraph (b);
  - (c) it admits the allegations in sub-paragraph (c);
  - (d) it admits the allegations in sub-paragraph (d);
  - (e) as to paragraph (e) –
    - (i) in admits the allegations therein;
    - (ii) it says further that its Vegetation Management plans, as approved by Energy Safe Victoria, made provision for the management of vegetation outside the clearance space as set out in sub-paragraph 17(i) above;
  - (f) to sub-paragraph (f) –
    - (i) subject to production of its Vegetation Management Plan (Distribution), it admits that, because the 66 kV was in a hazardous bushfire risk area, it was required by clause 4.2.2 of the plan to undertake a vegetation and easement assessment of the 66 kV line annually;
    - (ii) it says that –
      - (A) by clause 4.2.2 of the Vegetation Management Plan (Distribution), such assessment was to be undertaken in accordance with the procedure VEM 20-03 ‘Vegetation and Easement Management Assessment’;

- (B) by clause 6.25 of issue 9 of the procedure VEM 20-03 'Vegetation and Easement Management Assessment Procedure (Distribution)' (and corresponding provisions in any other relevant issues of the procedure), in the terms more particularly set out therein, assessors were to carry out at every opportunity only a quick visual inspection of the adjacent vegetation from the location where they have positioned themselves to view the 'clearance space', for the purpose of identifying any obvious hazardous tree;
  - (iii) otherwise, it does not admit the allegations therein;
- (g) as to sub-paragraph (g) –
  - (i) it denies the allegations therein;
  - (ii) it refers to and repeats paragraph 17 and sub-paragraph 21(f)(ii) above.
- 22. To paragraph 22 –
  - (a) it denies the allegations therein;
  - (b) refers to and repeats paragraph 17 and sub-paragraph 21(f)(ii) above.
- 23. To paragraph 23 –
  - (a) it admits that it was reasonably foreseeable that if trees growing sufficiently close to power lines on AusNet Services' Distribution Network had structural defects that were not detected and not cleared or removed, such trees might fail and come into contact with or fall across conductors on the Distribution Network;
  - (b) it says that the prospect of such risks materialising would depend on factors including the nature and extent of the structural defects and local weather conditions in each case;
  - (c) it says further that many structural defects in trees cannot be detected or reasonably detected on assessment or inspection;
  - (d) otherwise, it denies the allegations therein.
- 24. To paragraph 24 –
  - (a) it admits the allegations in sub-paragraph (a);
  - (b) it does not admit the allegations in sub-paragraph (b);
  - (c) as to sub-paragraph (c) –

- (i) it admits that there was a risk that if the conductors on the powerline were displaced by a tree, tree stem or branch they could arc between themselves or with the tree, tree stem or branch;
  - (ii) otherwise, it denies the allegations therein;
- (d) as to sub-paragraph (d) –
  - (i) it admits that there was a risk that if arcing occurred it might cause the discharge of molten metal particles of superheated metal from the section of conductor where arcing occurred;
  - (ii) otherwise, it denies the allegations therein;
- (e) as to sub-paragraph (e) –
  - (i) it admits that there was a risk that if arcing occurred between a conductor and a tree, tree stem or branch it might cause vegetation in the tree, tree stem or branch to ignite;
  - (ii) otherwise, it denies the allegations therein;
- (f) as to sub-paragraph (f) –
  - (i) it admits the allegations in respect of the 66 kV line;
  - (ii) otherwise, it does not admit the allegations therein;
- (g) as to sub-paragraph (g) –
  - (i) it denies the allegations in respect of the 66 kV line;
  - (ii) it does not admit the allegations in respect of the 22 kV line;
- (h) as to sub-paragraph (h) –
  - (i) it admits that there was a risk that if arcing occurred molten metal sparks or electrical discharge or heat from arcing could ignite vegetation in the vicinity of the sparks, heat or discharge.
  - (ii) otherwise, it denies the allegations therein;
- (i) it does not admit the allegations in sub-paragraph (i);
- (j) it does not admit the allegations in sub-paragraph (j); and
- (k) it does not admit the allegations in sub-paragraph (k).



25. To paragraph 25 –
- (a) it admits that at material times it knew or ought to have known of the facts admitted in sub-paragraphs 24(c)(i), (d)(i), (e)(i), (f)(i) and (h)(i) above;
  - (b) otherwise, it denies the allegations therein.
26. It denies the allegations in paragraph 26.
27. To paragraph 27 –
- (a) it denies that it owed the general duty to the plaintiff and group members as alleged;
  - (b) it says that if it owed any duty (which is denied) the scope of such duty was limited to requiring it to put in place a system reasonably capable of mitigating risks posed by the operation of the Distribution Network;
  - (c) it says that it was reasonably entitled to discharge its obligations by appointing a competent contractor to perform vegetation management services;
  - (d) it specifically denies that it owed any duty or was otherwise obliged to consider the removal of potential hazards or to remove hazard trees as alleged, unless such hazards were detected as obvious hazards as alleged in sub-paragraphs 17(j) and 21(f)(ii) and determined by reason of the risk that they posed, to require removal;
  - (e) otherwise, it denies the allegations therein.
28. It does not admit the allegations in paragraph 28.
29. It does not admit the allegations in paragraph 29.
30. It does not admit the allegations in paragraph 30.
31. It does not admit the allegations in paragraph 31.
32. It denies the allegations in paragraph 32.
33. It does not admit the allegations in paragraph 33.
34. It denies the allegation in paragraph 34.
35. It denies the allegations in paragraph 35.
36. It admits the allegations in paragraph 36.
37. To paragraph 37 –

- (a) it admits that it did not remove the tree or the eastern stem of the tree;
- (b) it refers to sub-paragraphs 17(c) to (k), 21(f)(ii) and 27(b), (c) and (d) above;
- (c) otherwise, it denies the allegations therein;
- (d) 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 Active Tree Services Pty Ltd (**Active Tree Services**) to provide to it vegetation management services;
- (e) the engagement of Active Tree Services as a contractor was made following a tender process conducted by AusNet Services by which it assessed Active Tree Services' competence to undertake the services;
- (f) the Services Agreement provided, relevantly, that –
  - (i) Active Tree Services 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 procedure VEM 20-03 (namely, the Vegetation and Easement Management Assessment Procedure (Distribution));
  - (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 Active Tree Services 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 meet AusNet Services' minimum training requirements;

- (g) there were written terms of the Services Agreement that Active Tree Services 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 Active Tree Services 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 Services' 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];
  - (viii) during the normal span assessment process, report any hazardous tree that the assessor observes whilst performing their normal duties, as per AusNet Services' procedure VEM 20-01 'Hazard Tree and 56M Assessment Procedure', and in accordance with procedure VEM 20-02 'Hazardous Tree and 56M Management Procedure' that pose a potential threat to the AusNet Services Distribution Network [Schedule 1, Section 1, clause 1.9].
- (h) AusNet Services will rely at trial on the Services Agreement for its full terms and effect;
- (i) from the commencement of the Services Agreement and from time to time thereafter AusNet Services provided to Active Tree Services copies of its policies as amended from time to time, including its Vegetation Management Plans, and in

particular procedure VEM 20-03 'Vegetation and Easement Management Assessment Procedure (Distribution)';

- (j) for the purposes of the Services Agreement AusNet Services -
  - (i) required that Active Tree Services 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 Active Tree Services personnel;
- (k) the services provided to AusNet Services by Active Tree Services were audited by it in accordance with its Compliance Audit Policy and its Bushfire Mitigation Audit Policy;
- (l) accordingly, AusNet Services discharged any duty owed to the plaintiff or group members.

38. It denies the allegations in paragraph 38.

39. It does not admit the allegations in paragraph 39.

40. It denies the allegations in paragraph 40.

41. It denies the allegations in paragraph 41.

42. It does not admit the allegations in paragraph 42.

43. To paragraph 43 –

- (a) it denies the allegations therein;
- (b) it refers to and repeats sub-paragraph 14(c) above.

44. It denies the allegations in paragraph 44.

45. It denies the allegations in paragraph 45.

46. It denies the allegations in paragraph 46.

47. It denies the allegations in paragraph 47.

48. It denies the allegations in paragraph 48.

49. To paragraph 49:

- (a) it admits that the question in sub-paragraph (a) is a common question;

- (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 questions in sub-paragraphs (e) and (f) are common questions.

### **Proportionate liability – Wrongs Act, Part IVAA**

50. 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 52 to 69 below, the acts or omissions of Hume City Council by itself or by its employees or agents also caused the loss or damage the subject of the claim;
  - (b) by reason of the matters alleged in paragraphs 71 to 81 below, the acts or omissions of Active Tree Services by itself or by its employees or agents also caused the loss or damage the subject of the claim;
  - (c) 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
  - (d) judgment must not be given against AusNet Services for more than that amount.

## **COUNTERCLAIM**

### **Introduction**

51. AusNet Services refers to and repeats as if set out seriatim the admissions and positive allegations in paragraphs 1(a), 2(a), 3, 6, 7(a)(i) and (b)(ii), 8, 9, 13(a) to (c), 14(a)(i) and (b)(i), 15(a) to (d), 23(a), 24(a), (c)(i), (d)(i), (e)(i), (f)(i) and (h)(i) of the defence.

### **Hume City Council**

52. Hume City Council (**Hume**) is and was at all relevant times –
- (a) a municipal council; and
  - (b) a body corporate pursuant to s 5 of the *Local Government Act 1989* (Vic).
53. At all relevant times –

- (a) the Tree (referred to in paragraph 28 of the plaintiff's statement of claim) formed part of an avenue of honour that was situated on the Mickleham Road Reserve; and
  - (b) the 66 kV line and the 22 kV line, referred to in paragraph 7 above, were situated on the Mickleham Road Reserve.
54. At all relevant times the Mickleham Road Reserve was –
- (a) within the municipal district of the City of Hume;
  - (b) outside the metropolitan fire district established under s 4 of the *Metropolitan Fire Brigades Act 1958* (Vic); and
  - (c) within the country area of Victoria for the purposes of the *Country Fire Authority Act 1958* (Vic).
55. At all relevant times the Mickleham Road Reserve was under –
- (a) the control;
  - (b) alternatively, the management;
  - (c) alternatively, the care and management –
- of Hume.
56. Accordingly, pursuant to s 43 of the *Country Fire Authority Act*, at all relevant times –
- (a) it was the duty of Hume to take all practicable steps to prevent the occurrence of fire on, and to minimise the danger of the spread of fires on and from the Mickleham Road Reserve; and
  - (b) Hume was empowered to –
    - (i) acquire any equipment;
    - (ii) do any thing; and
    - (iii) expend from its funds any amount –

that was necessary or expedient for the purposes of fulfilling its duty.
57. At all relevant times Hume was required by s 55A of the *Country Fire Authority Act* to prepare and maintain a municipal fire prevention plan for its municipal district.
58. At all relevant times on and after 21 October 2010 Hume was required by s 86B of the *Electricity Safety Act* to specify, in its municipal fire prevention plan –

- (a) procedures and criteria for the identification of trees that were likely to fall onto, or come into contact with, an electric line (**hazard trees**); and
  - (b) procedures for the notification of responsible persons of trees that are hazard trees in relation to electric lines for which they are responsible.
59. From time to time, including after 21 October 2010, Hume prepared municipal fire prevention plans.
60. Hume, by its employees or agents, inspected the Tree on the following occasions –
- (a) on or about 15 October 2007;
  - (b) on or about 15 February 2012;
  - (c) on or about 27 March 2012;
  - (d) on or about 18 January 2013; and
  - (e) on or about 9 September 2013.
61. Hume, by its employees or agents, determined –
- (a) as a result of the inspection on or about 15 October 2007, that the Tree required structural pruning and weight reduction; and
  - (b) by the subsequent inspections (alleged in sub-paragraphs 60(b)-(e) above) that the Tree did not require any works.
62. At all relevant times the following risks (collectively, **the Risks**) were or ought to have been reasonably foreseeable to Hume –
- (a) the trees forming the avenue of honour in Mickleham Road could fall or shed limbs and thereby come into contact with the power lines along Mickleham Road;
  - (b) contact between failed trees or their limbs and the power lines might cause arcing between power lines or conductors and vegetation which could cause a discharge of sparks and heat;
  - (c) sparks and heat might ignite nearby fuel and result in a fire;
  - (d) such a fire could –
    - (i) spread over a wide geographic area;
    - (ii) cause injury to persons and loss or damage to property within the area affected by the fire;

- (iii) cause 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; and
    - (C) by reducing the value of real property or businesses located in the area affected by the fire.
- 63. At all relevant times the plaintiff and group members were –
  - (a) vulnerable to the Risks materialising; and
  - (b) for the purposes of protecting themselves and their property and their economic interests against the Risks, dependent upon Hume exercising reasonable care in –
    - (i) managing the trees on the Mickleham Road Reserve;
    - (ii) inspecting the trees on the Mickleham Road Reserve to determine whether by reason of their health or structure they were at risk of failure or shedding limbs and at risk of coming into contact with power lines; and
    - (iii) planning and carrying out inspections of the trees.
- 64. By reason of the matters alleged in paragraphs 53 to 63 above, at all relevant times Hume –
  - (a) was under a duty to control and reduce the Risks;
  - (b) was reasonably able to exercise powers to control and reduce the Risks; and
  - (c) entered upon the exercise of powers under s 43 and s 55A of the *Country Fire Authority Act* and s 86B of the *Electricity Safety Act* to control or reduce the Risks.
- 65. In the premises, Hume was under a common law duty to the plaintiff and group members to take reasonable care to eliminate or reduce the Risks.
- 66. If, as the plaintiff alleges and which AusNet Services denies –
  - (a) by no later than 13 December 2009 and continuing up to and including 9 February 2014 the Tree –
    - (i) had very poor structure;
    - (ii) was located within the ‘hazard space’ (to which the plaintiff refers);



- (iii) was a potential hazard;
- (iv) was a hazard tree; and
- (b) each of the above-mentioned conditions was visible and capable of being observed; and
- (c) an assessment conducted with due care, skill and diligence would have identified that the Tree was a potential hazard or a hazard tree –

then in exercising reasonable care Hume, its employees or agents, ought reasonably to have –

- (d) identified the Tree as a hazard tree;
- (e) identified the Tree as a potential hazard;
- (f) determined that the Tree was at risk of failure or shedding limbs;
- (g) determined that the Tree was at risk of coming into contact with power lines;
- (h) determined that the Tree had very poor structure;
- (i) pruned or removed the Tree to mitigate the risks of it failing, shedding limbs or coming into contact with power lines; and
- (j) further and alternatively, notified AusNet Services, alternatively, VicRoads, of the matters set out at sub-paragraphs (d) to (h) above.

67. Negligently, and in breach of its duty of care Hume –

- (a) failed to exercise, by its officers, servants or agents, reasonable skill, care and diligence in conducting vegetation assessments of the Tree;
- (b) failed to take reasonable steps to ensure that any of its contractors exercised reasonable skill, care and diligence in conducting vegetation assessments of the Tree; and
- (c) failed to take any of the measures alleged in sub-paragraphs 66(d) to (j) above.

68. Had Hume exercised reasonable care as alleged –

- (a) the risk of the Tree failing, shedding limbs or coming into contact with power lines would have been identified; and

- (b) prior to 9 February 2014 Hume, alternatively VicRoads, alternatively AusNet Services, would have pruned or removed the Tree to mitigate the risks of it failing, shedding limbs or coming into contact with power lines.
69. If the Mickleham Bushfire was caused as alleged in paragraph 33 of the statement of claim, then by reason of the matters alleged in paragraphs 53 to 68 above, the fire was caused by the negligence of Hume, its agents or employees.

### Active Tree Services

70. At all relevant times Active Tree Services (referred to in paragraph 37(d) above) was incorporated pursuant to the *Corporations Act 2001* (Cth).
71. AusNet Services refers to and repeats as if set out seriatim the positive allegations in paragraph 37(d) to (k) of the defence.
72. Pursuant to the Services Agreement alleged in paragraph 37(d) above, Active Tree Services agreed to provide the Services subject to the terms alleged in sub-paragraphs 37(f) and (g) above.
73. During the term of the Services Agreement Active Tree Services provided services to AusNet Services throughout the Distribution Network, including in respect of the 66 kV line referred to in paragraph 7(a)(i) above.
74. By reason of the matters alleged at paragraphs 71 and 73 above, Active Tree Services had responsibility for and control over –
- (a) the assessment of vegetation clearances surrounding the Distribution Network, including the 66 kV line;
  - (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.
75. During the term of the Services Agreement it was reasonably foreseeable that any failure by Active Tree Services, 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, could result in the materialisation of the Risks alleged in paragraph 62 above.
76. 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 and their economic interests against the Risks, reliant on Active Tree Services by its servants and agents exercising reasonable care in undertaking the Services.
77. In the premises, throughout the term of the Services Agreement, Active Tree Services 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 assessments of vegetation outside the clearance space that could fall within the clearance space and come into contact with power lines;
  - (b) to ensure that the assessment of vegetation outside the clearance space was undertaken in accordance with the requirements of the Services Agreement and of AusNet Services' policies and procedures including Clearance Procedure VEM 20-03.
78. During the term of the Services Agreement, and prior to the fire referred to in subparagraph 1(a) above, Active Tree Services, by an employee, conducted one or more inspections of the 66 kV line in the vicinity of the Tree.
79. If, as the plaintiff alleges and which AusNet Services denies –
- (a) by no later than 13 December 2009 and continuing up to and including 9 February 2014 the Tree –
    - (i) had very poor structure;
    - (ii) was located within the 'hazard space';
    - (iii) was a potential hazard;
    - (iv) was a hazard tree; and
  - (b) each of the above-mentioned conditions was visible and capable of being observed; and
  - (c) the skills necessary in order to identify that the Tree was a potential hazard and/or a hazard tree are –
    - (i) an ability to determine whether the height of the Tree exceeded the horizontal distance from the Tree to the powerline;

- (ii) an ability to identify basic faults in the structure of trees by visual inspection; and
- (d) each of the above skills was an essential part of the skill base of any vegetation inspector competent to enable AusNet to comply with its statutory obligations, its vegetation management plans and procedures VEM 20-01 and VEM 20-03; and
- (e) the steps in a vegetation assessment which would have identified that the Tree was potential hazard and/or a hazard tree were –
  - (i) a visual inspection of the location of the Tree relative to the powerline which would have disclosed that the height of the Tree far exceeded the horizontal distance from the Tree to the powerline; and
  - (ii) a visual inspection of the Tree which by reason of the visual features alleged in paragraph 31 of the statement of claim would have disclosed to any inspector with the skill set out in paragraph (c)(ii) above that the Tree had very poor structure; was located within the ‘hazard space’;

then in exercising reasonable care Active Tree Services, its employees or agents, ought reasonably to have –

- (f) identified the Tree as a hazard tree;
- (g) identified the Tree as a potential hazard;
- (h) determined that the Tree was at risk of failure or shedding limbs;
- (i) determined that the Tree was at risk of coming into contact with power lines;
- (j) determined that the Tree had very poor structure; and
- (k) notified AusNet Services of the matters set out at sub-paragraphs (d) to (h) above.

80. In the premises, Active Tree Services itself, or by its employees or agents, breached the duty of care alleged in paragraph 77 above.

81. Had Active Tree Services notified AusNet Services of the matters alleged in sub-paragraphs 79(f) to (g) above, then –

- (a) subject to arranging for an assessment by a qualified arborist; and

- (b) subject to the arborist confirming the likelihood of contact with an electric line having regard to foreseeable local conditions –

AusNet Services would have cut or removed the Tree.

### **Contractual claims by AusNet Services against Active Tree Services**

82. There were further written terms of the Services Agreement that –

- (a) Active Tree Services 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 Active Tree Services, but Active Tree Services' 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 Active Tree Services [clause 10.2].

83. By reason of the matters alleged at paragraphs 71 to 81 –

- (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 Active Tree Services; and
- (b) Active Tree Services 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.

84. Further, by reason of the matters alleged in paragraphs 71, 73, 79 and 80, Active Tree Services breached the Service Agreement, in particular –

- (a) by failing to identify the Tree as a hazardous tree and report it to AusNet Services in accordance with procedures VEM 20-01, VEM 20-2 and VEM 20-03, as required by clause 1.9 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 Active Trees Services 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.
85. 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 71 to 81 such liability was caused by Active Tree Services' breach of the Services Agreement as alleged; and
  - (b) Active Tree Services is liable to AusNet Services in damages for breach of the Services Agreement.

#### **Contribution – Wrongs Act Part IV**

86. If, which is denied, AusNet Services is liable to the plaintiff or any group member for any claims other than claims for economic loss or damage to property, then –
- (a) by reason of the matters alleged in paragraphs 52 to 69 above, Hume 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 Hume in such amount as is found to be just and equitable having regard to the responsibility of Hume for the damage;
  - (c) further or alternatively, by reason of the matters alleged in paragraphs 71 to 81 above, Active Tree Services is liable in respect of the same damage; and
  - (d) pursuant to Part IV of the *Wrongs Act*, AusNet Services is entitled to recover contribution from Active Tree Services in such amount as is found to be just and equitable having regard to the responsibility of Hume for the damage.

#### **AND THE PLAINTIFF BY COUNTERCLAIM CLAIMS -**


A. As against the plaintiff -

- .1 a declaration that Hume is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*;

- .2 a declaration that Active Tree Services is a concurrent wrongdoer within the meaning of s.24AH of the *Wrongs Act*.
- B. As against Hume –
- .1 a declaration that Hume is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*;
  - .2 contribution;
  - .3 costs.
- C. As against Active Tree Services –
- .1 a declaration that Active Tree Services is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*;
  - .2 contribution;
  - .3 damages;
  - .4 a declaration that Active Tree Services is liable, pursuant to the Services Agreement, to indemnify AusNet Services in respect of the claims by the plaintiff and group members;
  - .5 alternatively to (4), an order in the nature of specific performance that Active Tree Services indemnify AusNet Services in respect of the claims by the plaintiff and group members, pursuant to the Services Agreement;
  - .6 Costs.

Michael Wheelahan

Lisa Nichols

  
 .....  
 Herbert Smith Freehills  
 Solicitors for the Defendant

DATED: 15 December 2014.