

PROCESSED

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. SCI 2014 5296

B E T W E E N

STEVEN ELLIOTT WILLIAMS

Plaintiff

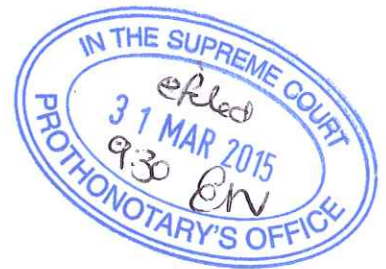
and

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)
& ORS (ACCORDING TO THE ATTACHED SCHEDULE)

Defendants

THIRD DEFENDANT'S DEFENCE TO AUSNET'S COUNTERCLAIM

Date of Document:	30 March 2015
Filed on behalf of:	Third Defendant
Prepared by:	CR 101079
Wotton + Kearney	DX 182 Melbourne
Level 15, 600 Bourke Street	Tel: (03) 9604 7900
Melbourne VIC 3000	Ref: ARS 3002436 WPR William.robinson@wottonkearney.com.au



To the Counterclaim of the First Defendant (**AusNet**) dated 15 December 2014, the Third Defendant (**Active Tree Services**) says as follows:

1-36 Active Tree Services does not plead to paragraphs 1 to 36 as the said paragraphs raise no allegations against it.

Vegetation Management Services Agreement

37. To paragraph 37(d) to (k) Active Tree Services says as follows:

- (d) Active Tree Services admits that it was engaged by AusNet to provide vegetation management services under a written agreement dated 2 August 2012 (**the Vegetation Management Services Agreement**), it otherwise does not admit the allegations in paragraph 37(d);
- (e) Active Tree Services admits that its appointment under the Vegetation Management Services Agreement was made following a closed tender

process conducted by AusNet by which AusNet assessed Active Tree Services' competence to undertake the services, and it says further that:

- (i) on or about 17 February 2010 AusNet issued an Invitation to Tender No ITT/2009/T20 entitled *Vegetation Management – Distribution Assets (the Invitation to Tender)*;
- (ii) the Invitation to Tender included Section E – Scope of Services, which described the services *inter alia* as:
 - (A) the contractor will undertake electrical line clearing work directly for AusNet in Un-Declared areas as well as for private trees in Declared areas;
 - (B) AusNet will manage the work program and instruct the contractor to perform the scope of work;
 - (C) in undertaking the work the contractor must comply with *inter alia* all applicable legislation, regulations and AusNet directives;
 - (D) the objective of the vegetation control is to reduce potential risk to public safety and prevent damage or interference with AusNet's Overhead Network, even during adverse weather conditions;
 - (E) work must be carried out in accordance with AusNet's procedure VEM 20-08 *Cutting Procedure* and VEM 20-03 *Assessment Procedure (Distribution)*;

Particulars

Active Tree Services refers to the Invitation to Tender, Section E – Scope of Services, a copy of which is in the possession of Active Tree Services' solicitors and may be inspected by appointment.

- (iii) on or about 22 March 2010 Active Tree Services provided AusNet with its tender submission (**the Active Tree Services Tender Submission**);

Particulars

Active Tree Services Tender Submission was in writing, a copy of which is in the possession of Active Tree Services' solicitors and may be inspected by appointment.

- (iv) the Active Tree Services Tender Submission:
 - (A) constituted an offer by Active Tree Services to provide services in accordance with *inter alia* the Invitation to Tender, Section E – Scope of Services;
 - (B) included a schedule of rates, being prices for the services being offered;
- (v) on or about 21 June 2010 AusNet's authorised delegate approved Active Tree Services for a contract for vegetation management in the South Morang region;

Particulars

Active Tree Services refers to AusNet's Order Approval Request ref 5.5 15/06/10 signed by an authorised delegate on or about 21 June 2010, a copy of which is in the possession of Active Tree Services' solicitors and may be inspected by appointment.

- (vi) on or about 1 July 2010 AusNet and Active Tree Services executed an agreement for Vegetation Management Services under which AusNet agreed to purchase from Active Tree Services, on an as needs and non-exclusive basis, and Active Tree Services agreed to provide, the services on the terms and conditions set and for the prices set out in the agreement;
 - (vii) on or about 2 August 2012 AusNet and Active Tree Services executed a document entitled 'Contract Amendment and Restatement Services Agreement Vegetation Management Services – Distribution Assets', being the Vegetation Management Services Agreement referred to in paragraph 37(d) above, under which AusNet agreed to purchase from Active Tree Services, on an as needs and non-exclusive basis, and Active Tree Services agreed to provide, the services on the terms and conditions and for the prices set out in the Vegetation Management Services Agreement;
- (f) Active Tree Services says that under the express terms and conditions of the Vegetation Management Services Agreement, upon a proper construction, Active Tree Services was obliged and entitled to perform the line clearance assessments pursuant to the express terms and conditions contained therein, including relevantly as follows:

- (i) Active Tree Services agreed that it will, if and as requested by AusNet from time to time (in its absolute discretion) carry out, on a non-exclusive basis, the services (being those services described in an order) for AusNet from the commencement date to the expiry date (clause 2.1);
- (ii) AusNet may from time to time during the term of the Vegetation Management Services Agreement, in its absolute discretion:
 - (A) invite Active Tree Services to carry out, on a non-exclusive basis, the services detailed in an order; and,
 - (B) the order must detail the services required by AusNet, the order value and the time period in which the services must be carried out:
(clause 2.2);
- (iii) Active Tree Services would carry out the services in accordance with the scope of works (or scope of services, being the services outlined in Schedule 1 of the Vegetation Management Services Agreement) to the levels specified in the key performance indicators specified in Schedule 1 of the Vegetation Management Services Agreement;
- (iv) AusNet would manage the work programme and instruct Active Tree Services to perform the scope of work (Schedule 1, clause 1.1);
- (v) in undertaking work under the Vegetation Management Services Agreement Active Tree Services must comply with all applicable legislation, regulations, Australian Standards, Codes of Practice, field guides, Worksafe publications, AusNet supplied directives, and all other legal requirements (Schedule 1, clause 1.1);
- (vi) the objective of vegetation control is to reduce the potential risk to public safety and prevent damage or interference with AusNet's overhead network even during adverse weather conditions, and a zero value Bushfire Mitigation Index at Declaration date for High Bushfire Risk Areas must be achieved (Schedule 1, clause 1.2);

- (vii) under the Vegetation Management Agreement the agreed price per span for an assessment under AusNet's guideline *Assessment Procedure (Distribution)* VEM 20-03 was \$7.81 per span (Schedule 2, Item 11.);
- (viii) Active Tree Services otherwise admits the matters pleaded at sub-paragraphs 37(f)(i)-(vi) of AusNet's Defence;
- (ix) Active Tree Services says further that by clause 36 of the Vegetation Management Services Agreement the parties expressly agreed that:
 - (A) the executed document embodies the entire understanding and agreement between the parties as to the subject matter of the Vegetation Management Services Agreement;
 - (B) all previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of the Vegetation Management Services Agreement are merged in and superseded by the Vegetation Management Services Agreement and no party shall be liable to any other party in respect of those matters;
 - (C) no oral explanation or information provided by any party to another, including an estimate or forecast, will alter the meaning or interpretation of the Vegetation Management Services Agreement or constitute any collateral agreement, warranty or understanding between the parties;
- (x) Active Tree Services otherwise refers to and relies on the Vegetation Management Services Agreement for its full force and effect;
- (g) as to the specific clauses pleaded in sub-paragraphs 37(g)(i)-(viii), subject to production of the Vegetation Management Services Agreement at the trial and reference to its full terms and effect, Active Tree Services admits all express terms therein:

- (h) Active Tree Services does not plead to paragraph 37(h) as it makes no allegations against it;
- (i) to paragraph 37(i) Active Tree Services says:
 - (i) it admits that it received, from time to time, AusNet's guideline *Assessment Procedure (Distribution)* VEM 20-03 (as amended from time to time);
 - (ii) it otherwise does not admit the allegations in paragraph 37(i) as the said allegations are too vague;
- (j) Active Tree Services admits paragraph 37(j);
- (k) Active Tree Services does not admit paragraph 37(k).

38-69 Active Tree Services does not plead to paragraphs 38 to 69 as the said paragraphs raise no allegations against it.

Active Tree Services

- 70. Active Tree Services admits the allegations in paragraph 70.
- 71. To paragraph 71 Active Tree Services refers to and repeats the matters set out in paragraph 37 above.
- 72. Active Tree Services admits paragraph 72 but it refers to and repeats the matters set out in paragraph 37 above.
- 73. To paragraph 73 Active Tree Services says as follows:
 - (a) it denies that it provided services throughout the Distribution Network including in respect of the 66kV line referred to in paragraph 7(a)(i) of AusNet's Defence;
 - (b) Active Tree Services says that as at 9 February 2014 the Distribution Network covered an area of not less than 80,000 square kilometres and comprised approximately 370,000 poles and 560,000 kilometres of overhead lines and underground cable;

Particulars

Active Tree Services refers to and adopts the matters pleaded by AusNet at paragraph 6(e) of AusNet's Defence.

- (c) the Distribution Network was divided by AusNet into regions which included the following;

- (i) Bairnsdale with approximately 32,000 spans;
 - (ii) Beaconsfield with approximately 20,000 spans;
 - (iii) Bennalla with approximately 24,500 spans;
 - (iv) Leongatha with approximately 26,000 spans;
 - (v) South Morang with approximately 13,000 spans;
 - (vi) Traralgon with approximately 27,000 spans;
- (d) during February to June 2010 AusNet conducted a closed tender process in which Active Tree Services and other contractors tendered for the provision of vegetation management services in each of the abovementioned regions;

Particulars

Active Tree Services refers to paragraph 37(e) above. Further particulars may be provided after AusNet provides proper discovery of all relevant documents.

- (e) on or about 21 June 2010 AusNet's authorised delegate approved Active Tree Services for a contract for vegetation management in the South Morang region;

Particulars

Active Tree Services refers to paragraph 37(e)(v) above.

- (f) the Vegetation Management Services Agreement was limited to the South Morang region;
- (g) AusNet entered into separate contracts with other contractors for vegetation management services in the other regions referred to above;

Particulars

Active Tree Services does not know the particulars of the separate contracts with other contractors for vegetation management services in the other regions referred to. Further particulars may be provided after AusNet provides proper discovery of all relevant documents.

- (h) the 66 kV line referred to in paragraph 7(1)(a) of AusNet's Defence was at all material times:
- (i) outside of the South Morang region;

- (ii) outside of the area covered by the Vegetation Management Services Agreement.
74. Active Tree Services denies paragraph 74 and refers to and repeats the matters pleaded in paragraph 73 above.
75. Active Tree Services denies paragraph 75.
76. Active Tree Services denies paragraph 76 and says further that:
- (a) the Plaintiff and group members were not vulnerable in the sense alleged, because at all material times AusNet was undertaking a hazard tree assessment programme;
 - (b) insofar as any of the Plaintiff and group members relied on anyone to protect themselves and their property and their economic interests against the Risks, they would have relied on AusNet to:
 - (i) conduct a proper hazard tree assessment; and,
 - (ii) remove or prune the Tree.
77. Active Tree Services denies paragraph 77.
78. In the absence of particulars, Active Tree Services does not admit the allegations in paragraph 78.
79. Active Tree Services denies each and every allegation contained in paragraph 79 and it says further that:
- (a) Active Tree Services' assessors when performing vegetation clearance assessments under the Vegetation Management Services Agreement:
 - (i) were required to assess the distance of clearance of vegetation relative to power lines in accordance with:
 - (A) the *Code of Practice for Electric Line Clearance* prescribed under the *Electricity Safety (Electric Line Clearance) Regulations 2010*; and,
 - (B) AusNet's guideline *Assessment Procedure (Distribution) VEM 20-03* (as amended from time to time);
 - (ii) were not required to inspect each and every tree in the vicinity of AusNet's electrical assets or power lines;
 - (iii) were not required to be qualified arborists;

- (b) AusNet's guideline *Assessment Procedure (Distribution)* VEM 20-03 (as amended from time to time) expressly provided that:
- (i) the assessor has the freedom to determine the most efficient or logical way in which to undertake an assessment as it is not always possible or necessary to follow each span consecutively (in the supply direction) or to access the entire length of the span;
 - (ii) it is recognised that assessors may take the following approaches in the field to undertake assessments;
 - (A) follow and assess the line in reverse;
 - (B) remain in the vehicle and drive the entire length of the span or sections of the span;
 - (C) walk the entire length of the span or parts of the span;
 - (D) seek a vantage point anywhere within the span or parts of the span that provides a clear view of the distance between the apparatus and vegetation so that an accurate assessment can be undertaken;
 - (iii) depending on the circumstances and the approach the assessor has taken to assess the span, there is no requirement for the assessor to position himself close to vegetation for the purpose of looking for potentially hazardous trees;
 - (iv) there is no requirement for the assessor to protrude beyond the vegetated wall surrounding the apparatus for the purpose of looking for potentially hazardous trees;
 - (v) there is no requirement for the assessor while carrying out normal inspection cycle assessments to position themselves close to vegetation for the purpose of looking for obvious hazardous trees;
 - (vi) similarly there is no requirement for the assessor to protrude beyond the vegetated wall adjacent to the conductors or apparatus for the purpose of looking for obvious hazardous trees;

- (vii) it is acknowledged that amongst the assessor pool, there is varying degrees of arboricultural knowledge held by each individual, therefore the scope of hazardous tree identification is constrained to the identification of rating 4 & 5 trees which are generally more obvious;
- (viii) AusNet requires that the assessor at every opportunity (notwithstanding the 'Freedom to Determine' statements above) carry out a quick visual inspection of the adjacent vegetation from the location where they have positioned themselves to view the 'clearance space', for the purposes of identifying any obvious hazard tree;
- (ix) typically an obvious hazard tree would exhibit:
 - (A) poor anchorage/instability (ie root uplift, severed roots);
 - (B) major stage of decline (ie dead and dangerous limbs etc);
 - (C) major decay and cavities;
 - (D) excessive imbalance towards electrical apparatus;
 - (E) obvious cracks/splits in the structure;
 - (F) parts of a tree that may be unstable and could fall on the apparatus under a range of weather conditions that can reasonably be expected to prevail in the area where the tree is located;
- (x) a Rating 5 hazard tree is a tree where the failure has already occurred and/or the tree exhibits structural defects that have deteriorated and the failure of the tree is imminent;
- (xi) a Rating 4 hazard tree is a tree with structural damage and/or structural defects and have a high risk of failure, and be actioned within 6 months of being assessed ie a major decay and/or major cavities;
- (c) by reason of the matters referred to in subparagraphs (a) and (b) above, Active Tree Services was under no duty, obligation or requirement, whether under the Vegetation Management Services Agreement or any other legal obligation or otherwise, to conduct an inspection of individual

trees when assessing electric line clearances under the Vegetation Management Services Agreement;

- (d) further, Active Tree Services denies that assessors performing electric line clearance assessments under the Vegetation Management Services Agreement were required to conduct their assessments pursuant to AusNet's guideline *Hazard Tree Assessment Guidelines* VEM 20-01;
- (e) Active Tree Services says that AusNet's guideline *Hazard Tree Assessment Guidelines* VEM 20-01 provided as follows:
 - (i) it expressly recognises that it is impracticable to undertake a close monitoring of individual trees or abatement of trees with any defect;
 - (ii) the purpose of the guide was to provide guidance to AusNet Vegetation and Easement arborists in the process of conducting tree risk assessments of trees adjacent to or in the strike zone of electrical assets, so that the degree of potential risk posed by tree failure can be managed as low as reasonably practicable;
 - (iii) the purpose of tree risk assessments is to assess the likelihood of tree or limb failure from defects or weaknesses in trees that may contact electrical assets so that appropriate measures can be taken before failure occurs;
 - (iv) for the purpose of *Hazard Tree Assessment Guidelines* VEM 20-01:
 - (A) the level of assessment that the arborist is required to conduct in the evaluation of the potential risk associated with trees is a 360 degree ground-based visual inspection for obvious hazards/symptoms;
 - (B) this is a component of the arboricultural industry accepted hazard tree evaluation method named Visual Tree Assessment (VTA);
 - (v) assessments pursuant to the guideline *Hazard Tree Assessment Guidelines* VEM 20-01 must be undertaken by arborists having as a minimum the following qualifications and experience:

- (A) the qualification of National Certificate Level IV in Horticulture (Arboriculture) including the "Assess Trees" module/unit, or an equivalent qualification; and,
 - (B) at least 3 years of field experience in assessing trees;
- (vi) the arborist is required to evaluate the risks associated with a specific tree and categorise the tree into specified ratings (Rating 5 to Rating 0) and complete a Tree Assessment –Hazard Span or 56M Span form containing information critical for resulting actions;
- (f) Active Tree Services says that its assessors performing line clearance assessments under the Vegetation Management Services Agreement were not qualified or trained or required to conduct the specialist inspections and reports under the guideline *Hazard Tree Assessment Guidelines* VEM 20-01;
- (g) further, Active Tree Services denies that it ever received any order from AusNet, whether under the Vegetation Management Services Agreement or otherwise, to conduct any inspection, including any inspection under the guideline *Hazard Tree Assessment Guidelines* VEM 20-01, of:
- (i) the Tree;
 - (ii) any tree in the vicinity of the Tree; or
 - (iii) any tree in the vicinity of the 66 kV line referred to in paragraph 7(1)(a) of AusNet's Defence (**the 66 kV line**);
- (h) Active Tree Services refers to and relies on clause 1.9 of Schedule 1 of the Vegetation Management Services Agreement which provides *inter alia* that during the normal span assessment process, the assessor must report any hazardous tree that they observe whilst performing their normal duties;
- (i) further, the Vegetation Management Services Agreement expressly provided at clause 1.10 that:
- (i) AusNet may elect to engage Active Tree Services in a particular region to undertake the review of hazardous trees;

- (ii) the work if required will be negotiated between Active Tree Services and AusNet;
- (j) Active Tree Services says that:
 - (i) AusNet did not elect to engage Active Tree Services to undertake the review of hazardous trees in the vicinity of the 66 kV line pursuant to clause 1.10 of Schedule 1 of the Vegetation Management Services Agreement;
 - (ii) Active Tree Services and AusNet did not conduct any negotiation, and did not reach any agreement, concerning any review by Active Tree Services of hazardous trees in the vicinity of the 66 kV line pursuant to clause 1.10 of Schedule 1 of the Vegetation Management Services Agreement, or otherwise;
 - (iii) AusNet performed its own hazardous tree review within the Distribution Network using its own internal resources;

Particulars

Particulars will be provided after AusNet makes proper discovery of all relevant records.

- (k) further, Active Tree Services says that many structural defects in trees cannot be detected or reasonably detected on assessment or inspection;

Particulars

Active Tree Services refers to and adopts paragraph 23(c) of AusNet's Defence.

- (l) Active Tree Services otherwise denies each and every allegation contained in paragraph 79.

80. To paragraph 80 Active Tree Services says:

- (a) it denies each and every allegation contained in paragraph 80;
- (b) it refers to and repeats the matters set out in paragraph 79 above;
- (c) says that pursuant to s. 48 of the *Wrongs Act* 1958 Active Tree Services is deemed not to be negligent in failing to inspect every tree for the purposes of identification of hazard trees, so as to protect the Plaintiff and group members against the risk of bush fire because, in the circumstances set out in paragraphs 37 and 79 above, a reasonable

person in Active Tree Services' position would not have inspected every tree for the purposes of identification of hazard trees.

Particulars

Active Tree Services relies on the following acts matters and circumstances:

- (i) Active Tree Services entered into the Vegetation Management Services Agreement after a closed competitive tender process and for specific services and for the prices specified therein;
- (ii) Active Tree Services was only paid by AusNet to conduct electrical line clearance assessments in accordance with the express terms and conditions of the Vegetation Management Services Agreement including AusNet's guideline *Assessment Procedure (Distribution)* VEM 20-03, as set out in paragraph 79(b) above including relevantly the following express provisions:
 - (A) the assessor was entitled to remain in the vehicle and drive the entire length of the span or sections of the span;
 - (B) there is no requirement for the assessor to position himself close to vegetation for the purpose of looking for potentially hazardous trees;
 - (C) there is no requirement for the assessor while carrying out normal inspection cycle assessments to position themselves close to vegetation for the purpose of looking for obvious hazardous trees;
- (iii) the agreed price per span was \$7.81 for an assessment under AusNet's guideline *Assessment Procedure (Distribution)* VEM 20-03, whereas the costs per tree for an inspection by a qualified arborist pursuant to AusNet's guideline *Hazard Tree Assessment Guidelines* VEM 20-01 would be far in excess of \$7.81;
- (iv) Active Tree Services was not requested or paid by AusNet to conduct the review of hazard trees pursuant to clause 1.10 of Schedule 1 to the Vegetation Management Services Agreement;
- (v) it was not reasonable for Active Tree Services to have taken the precaution of inspecting every tree in the vicinity of AusNet's electrical assets for the purposes of identifying any hazard tree or potential hazard tree unless it were requested and paid by AusNet to do so.

81. Active Tree Services says that if at any time AusNet had been notified that the Tree had been identified as a hazardous tree, then:

- (a) depending on the nature of the notification, in all likelihood AusNet would have arranged for an assessment by a qualified arborist pursuant to *Hazard Tree Assessment Guidelines* VEM 20-01;
- (b) upon inspection of the Tree by a qualified arborist, the Tree might have been classified as a hazardous tree Rating 0 to Rating 5 depending on the state of the Tree as observed and assessed during any such inspection;

- (c) further action might have been taken at some time, depending on the classification of the tree after any such inspection and report;
- (d) Active Tree Services otherwise denies each and every allegation in paragraph 81.

Contractual claims by AusNet against Active Tree Services

- 82. Subject to production of the Vegetation Management Services Agreement at the trial and reference to its full terms and effect, Active Tree Services admits the indemnity pleaded in paragraph 82.
- 83. Active Tree Services denies each and every allegation in paragraph 83.
- 84. Active Tree Services denies each and every allegation in paragraph 84 and it refers to and repeats the matters set out in paragraphs 37, 73 and 79 above.
- 85. Active Tree Services denies each and every allegation in paragraph 85.

Contribution – Wrongs Act Part IV

- 86. To paragraph 86 Active Tree Services says:
 - (a) it does not plead to paragraph 86(a) as the said paragraph raises no allegation against it;
 - (b) it does not plead to paragraph 86(b) as the said paragraph raises no allegation against it;
 - (c) it denies each and every allegation in paragraph 86(c);
 - (d) it denies each and every allegation in paragraph 86(d).

Contributory Negligence

- 87. Further, Active Tree Services says that the alleged loss and damage was not caused or contributed to by any breach of the Vegetation Management Services Agreement or any breach of the alleged duty of care on its part and that, in any event, the alleged loss and damage was caused or contributed to by AusNet as follows.
- 88. AusNet, as the owner and operator of electrical assets:
 - (a) was required under the *Electricity Safety Act 1998 (Vic)* and the *Electricity Safety (Bushfire Mitigation) Regulations 2003* to prepare an annual plan to mitigate against the risk of bushfires;

- (b) was aware that hazardous trees may fall onto AusNet's electrical assets causing ignition of bushfires;
- (c) prepared a Vegetation Management Plan during the years 2010 to 2014 (**AusNet Vegetation Management Plan**);
- (d) prepared the procedure known as *Hazard Tree Assessment Guidelines* VEM 20-01;
- (e) established a 'Vegetation and Easement Group' which was responsible for *inter alia* rating and management of hazard trees in accordance with *Hazard Tree Assessment Guidelines* VEM 20-01.

Particulars

Particulars may be provided after AusNet makes proper discovery of all relevant documents.

89. AusNet's procedure *Hazard Tree Assessment Guidelines* VEM 20-01 provided *inter alia* as follows:
- (a) assessments must be undertaken by arborists having as a minimum the following qualifications and experience:
 - (i) the qualification of National Certificate Level IV in Horticulture (Arboriculture) including the "Assess Trees" module/unit, or an equivalent qualification; and,
 - (ii) at least 3 years of field experience in assessing trees;
 - (b) the arborist is required to evaluate the risks associated with a specific tree and categorise the tree into specified ratings (Rating 5 to Rating 0) and complete a Tree Assessment – Hazard Span or 56M Span form containing information critical for resulting actions.
 - (c) the level of assessment that the arborist is required to conduct in the evaluation of the potential risk associated with trees is a 360 degree ground-based visual inspection for obvious hazards/symptoms.
90. Pursuant to its obligations referred to in the preceding paragraphs, during the period 1 January 2010 to 9 February 2014 AusNet conducted assessments, rating and management of hazard trees within the

Distribution Network in accordance with the AusNet Vegetation Management Plan and its procedure *Hazard Tree Assessment Guidelines* VEM 20-01.

Particulars

Particulars may be provided after AusNet makes proper discovery of all relevant documents.

91. If the allegations made by AusNet in paragraph 79 of its Counterclaim are correct (which allegations are expressly denied) then:
- (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 abovementioned 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 the Tree by visual inspection; and
 - (d) each of the above skills was an essential part of the skill base of an arborist performing inspections as required under the procedure *Hazard Tree Assessment Guidelines* VEM 20-01; and
 - (e) the steps in hazard tree assessment under the procedure *Hazard Tree Assessment Guidelines* VEM 20-01 which would have identified that the Tree was a potential hazard and/or a hazard tree were set out in Appendix A to *Hazard Tree Assessment Guidelines* VEM 20-01 which contained a detailed checklist for the assessment of the Tree which included:

- (i) inspection of the overall structure and stability of the roots of the Tree including looking for root rot, evidence of root uplift, decay at point of lean, roots damaged, exposed or wounded;
- (ii) inspection of the overall structure and stability of the trunk of the Tree including looking for degree of taper, co-dominant stems, presence of cavities, cracks, wounds, obstruction damage, lightening, abnormal growth, fungal fruiting bodies, oozing sap;
- (iii) inspection of major scaffold branches for structure, distribution of weight, presence of die back or deadwood, branch formation and spacing, pruning history, presence of injuries, integrity of bark, presence of disease;
- (iv) inspection of branches for structure;

then in exercising reasonable care when conducting assessments, rating and management of hazard trees within the Distribution Network, AusNet 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 the Tree was at risk of coming into contact with the power lines;
- (j) determined that the Tree had very poor structure; and,
- (k) taken appropriate action in accordance with the AusNet Vegetation Management Plan and the procedure *Hazard Tree Assessment Guidelines* VEM 20-01.

92. During the period 1 January 2010 to 9 February 2014 AusNet negligently:
- (a) failed to inspect the Tree in accordance with its guideline *Hazard Tree Assessment Guidelines* VEM 20-01;
 - (b) failed to identify the Tree as a hazard tree and/or a potential hazard;

- (c) failed to take appropriate action in accordance with the AusNet Vegetation Management Plan and the procedure *Hazard Tree Assessment Guidelines* VEM 20-01.
93. Further, during the period 13 December 2009 to 9 February 2014 AusNet negligently failed to remove and/or prune all trees and/or other vegetation within the Distribution Network which could fall onto its electrical assets including but not limited to the 66 kV line.
94. If AusNet had during the period 13 December 2009 to 9 February 2014 removed and/or pruned all trees and/or other vegetation within the Distribution Network which could fall onto its electrical assets, including the 66 kV line, then it would have removed and /or pruned the Tree and the fire would not have ignited.
95. Further, pursuant to clause 1.10 of Schedule 1 of the Vegetation Management Services Agreement:
- (a) during the period 1 July 2010 to 9 February 2014 AusNet could have elected to engage Active Tree Services to undertake the review of hazardous trees within the Distribution Network including along the 66 kV line, on terms to be negotiated between the parties;
 - (b) alternatively, during the period 1 July 2010 to 9 February 2014 AusNet could have elected to engage another contractor to undertake the review of hazardous trees within the Distribution Network including along the 66 kV line, on such terms as it negotiated.
96. During the period 1 July 2010 to 9 February 2014:
- (a) AusNet did not engage Active Tree Services to undertake the review of hazardous trees within the Distribution Network including in the vicinity of the 66 kV line pursuant to clause 1.10 of Schedule 1 of the Vegetation Management Services Agreement; and,
 - (b) AusNet did not engage any other contractor to undertake the review of hazardous trees within the Distribution Network including in the vicinity of the 66 kV line pursuant to a separate contract.
97. AusNet's negligent failure to arrange a review of hazard trees:
- (a) within the Distribution Network;
 - (b) in the vicinity of the 66 kV line:

caused the loss and damage claimed in the Amended Statement of Claim.

Particulars

Active Tree Services refers to and repeats the matters set out in paragraph 99 above.

98. In the premises, AusNet by its negligent acts or omissions as alleged in paragraphs 87 to 97 above caused and/or contributed to the loss and damage which it claims against Active Tree Services in its Counterclaim.
99. Further, pursuant to clause 10.2 of the Vegetation Management Services Agreement, any liability of Active Tree Services to AusNet under the indemnity at clause 10.2 (which liability is expressly denied) must be reduced proportionally to the extent that a negligent act or omission of AusNet is proved to have contributed to the loss or damage.

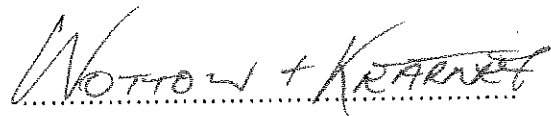
Proportionate liability

100. Hume City Council (**Hume**) is and was at all relevant times:
- (a) a municipal council;
 - (b) a body corporate pursuant to s. 5 of the *Local Government Act* 1989 (Vic).
101. If Active Tree Services has any liability to AusNet as alleged in its Counterclaim (which allegations are expressly denied) then Active Tree Services says that:
- (a) the claims brought against it by AusNet are claims for economic loss or damage to property arising from an alleged failure to take reasonable care, within the meaning of Section 24AF of the *Wrongs Act* 1958 (Vic) (**the Act**);
 - (b) if this Honourable Court determines that Hume caused or contributed to the fire as alleged in paragraphs 52 to 69 of AusNet's Counterclaim, then Hume is a person whose acts or omissions caused, independently of Active Tree Services or jointly, the loss or damage that is the subject of AusNet's claims against Active Tree Services; and
 - (c) in that case, Hume is also a concurrent wrongdoer within the meaning of the term in s. 24AH of the Act.
102. Accordingly, any liability of Active Tree Services to AusNet (which liability is expressly denied) is limited to an amount reflecting that proportion of the loss

and damage claimed that the Court considers just having regard to the extent of its responsibility for the loss and damage pursuant to s. 24A1(a) of the Act.

Dated: 30 March 2015

R. Andrew

A handwritten signature in black ink that reads "WOTTON + KEARNEY". The signature is written in a cursive, slightly stylized font. Below the signature is a horizontal dotted line.

WOTTON + KEARNEY
Solicitors for the Third Defendant

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

No. SCI 2014 5296

SCHEDULE OF PARTIES

B E T W E E N

STEVEN ELLIOTT WILLIAMS

Plaintiff

and

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

First Defendant

and

HUME CITY COUNCIL

Second Defendant

and

ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)

Third Defendant