

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

S CI 2012 4538

BETWEEN

~~RODERIC LIESFIELD~~ KATHERINE ROWE

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (FORMERLY SPI
ELECTRICITY PTY LTD) ~~SPI ELECTRICITY PTY LTD (ACN 064 651 118)~~ & Ors
(according to the Schedule)

Defendants

(by original proceeding)

AND BETWEEN

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (FORMERLY SPI
ELECTRICITY PTY LTD) ~~SPI ELECTRICITY PTY LTD (ACN 064 651 118)~~

Plaintiff by Counterclaim

and

**ACN 060 674 580 PTY LTD (ACN 060 674 580)
& ORS (in accordance with the schedule attached)**

Defendants by Counterclaim

(by counterclaim)

**DEFENCE AND COUNTERCLAIM TO ~~SIXTH~~ SEVENTH AMENDED STATEMENT OF
CLAIM**

(Filed pursuant to the order of his Honour Dixon J on 4 ~~April~~ 30 October 2014)

Date of document: ~~8 May~~ 21 November
2014
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DEFENCE

In answer to the plaintiff's ~~sixth~~ seventh amended statement of claim dated ~~7 April~~ 29 October 2014, the first defendant (~~SP AusNet~~ AusNet Services) says as follows (adopting the definitions used in the ~~sixth~~ seventh amended statement of claim save where otherwise indicated):

1. It admits paragraph 1.
- 1A. It does not admit paragraph 1A.
2. It admits paragraph 2.
3. As to paragraph 3:
 - (a) it says that on the afternoon of 7 February 2009 a fire started near the Murrindindi Sawmill on Wilhelmina Falls Road at Murrindindi in the State of Victoria (the **Murrindindi Fire**) and that it burnt the Murrindindi bushfire area;
 - (b) it otherwise denies paragraph 3.
- 3A. It admits paragraph 3A.
4. It does not admit paragraph 4.
5. As to paragraph 5:
 - (a) for the purposes only of responding to the allegation that the requirements of section 33C(1) of the *Supreme Court Act 1986* (Vic) are satisfied, it admits that at the date of commencement of this proceeding, there were 7 or more persons who were asserting claims against it;
 - (b) it otherwise denies paragraph 5.
6. As to paragraph 6:
 - (a) it says that it has since 11 May 1994 been a corporation capable of being sued but otherwise denies paragraph 6(a);
 - (b) it says that:
 - (i) it was incorporated on 11 May 1994 with the corporate name DB One Limited;
 - (ii) from 29 August 1994 to 29 March 2003 it was called Eastern Energy Limited;

- (iii) from 30 March 2003 to 26 August 2004 it was called TXU Electricity Limited and from 27 to 29 August 2004 it was called TXU Electricity Pty Ltd;
- (iv) from 30 August 2004 to 3 August 2014 it ~~has been~~ was called SPI Electricity Pty Ltd;
- (v) from 4 August 2014 it has been called AusNet Electricity Services Pty Ltd;

but otherwise denies paragraph 6(b);

- (c) it admits paragraph 6(c) and says further that:
 - (i) in carrying on the electricity 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 licence area (the **distribution network**);
 - (ii) as at 7 February 2009 the distribution network supplied electricity to not less than 600,000 customers in an area of not less than 80,000 square kilometres;
 - (iii) as at 7 February 2009 the distribution network comprised approximately 379,000 “spans” (being the distance between two poles) covering approximately 38,000 “route kilometres” (calculated on the basis of the distances between the poles which comprise the distribution network without accounting for the “sag” of a conductor as it hangs between two poles);
 - (iv) as at 7 February 2009 the distribution network included approximately 189,000 spans (covering approximately 30,000 route kilometres of overhead electricity powerlines) in locations which were, as at 7 February 2009, designated by the Country Fire Authority (the **CFA**) to be hazardous bushfire risk areas.
- (d) it admits paragraph 6(d);
- (e) it denies paragraph 6(e) and says further that:
 - (i) it is a wholly owned subsidiary of SP Australia Networks (Distribution) Limited (**SP Distribution**);

- (ii) SP Distribution acquired its interest in ~~SP AusNet~~AusNet Services under an agreement with TXU Corp (the **Sale agreement**);

Particulars

The Sale agreement is in writing and dated 23 April 2004. The Sale agreement is confidential. A confidential copy of the Sale agreement may be inspected at the offices of the solicitors for ~~SP AusNet~~AusNet Services by appointment.

- (f) it admits paragraph 6(f);
- (g) it admits paragraph 6(g) and says further that the ~~SP AusNet~~AusNet Services Electricity Safety Management Scheme or ESMS states that the inspection of overhead network follows a five-year cyclical inspection program which has been developed on the basis of risk management processes and comprehensive historical data.

Particulars

The ~~SP AusNet~~AusNet Services ESMS, Scheme Description clause 2.10.5.1(a).

7. ~~It~~ admits paragraph 7.
8. As to paragraph 8:
- (a) subject to reference to the full terms and effect of section 75 of the ES Act, it admits that at all relevant times that section required ~~SP AusNet~~AusNet Services to take reasonable care to ensure that all parts of the distribution network were safe and operated safely;
- ~~(b) it says that the obligation imposed upon SP AusNet by section 75 of the ES Act to take reasonable care to ensure that all parts of the distribution network were safe and operated safely was limited to, and was wholly discharged by, compliance with the requirements imposed by the regulatory framework governing the technical operation of the distribution network (the **technical regulatory framework**);~~

Particulars

- ~~(i) As at 7 February 2009 the technical regulatory framework included the:~~
- ~~(A) terms of the distribution licence;~~
- ~~(B) ES Act;~~

- ~~(C) *Electrical Safety (Bushfire Mitigation) Regulations 2003 (Vic) (the **Bushfire Mitigation Regulations**);*~~
- ~~(D) *Electricity Safety (Installations) Regulations 1999 (the **Installations Regulations**);*~~
- ~~(E) *Electricity Safety (Network Assets) Regulations 1999 (Vic) (the **Network Assets Regulations**);*~~
- ~~(F) *ESMS Regulations;*~~
- ~~(G) *Energy Safe Victoria Act 2005 (Vic) (the **ESV Act**);*~~
- ~~(ii) Clause 6.1 of the distribution licence obliged SP AusNet to distribute electricity to such locations within the licence area so as to enable the supply of electricity to any person within the licence area who requested the supply of electricity;~~
- ~~(iii) The Bushfire Mitigation Regulations were introduced following the preparation of a regulatory impact statement dated 4 December 2002. Section 83A of the ES Act and the Bushfire Mitigation Regulations at all material times required SP AusNet to annually create a plan to mitigate (but not eradicate) the risk of fire created by way of electricity discharged from the distribution network (a **Bushfire Mitigation Plan**). The Bushfire Mitigation Plan for each year was to be reviewed and approved by ESV, an instrumentality of the State of Victoria created pursuant to the ESV Act. SP AusNet's performance in accordance with the Bushfire Mitigation Plan was audited each year by or on behalf of ESV;~~
- ~~(iv) At all material times the Network Assets Regulations prescribed standards for the design, construction, operation and maintenance of the assets comprising a distribution network operated by a distribution business;~~
- ~~(v) At all material times, Division 2 of Part 10 of the ES Act and the ESMS Regulations entitled SP AusNet to submit to ESV or its predecessor the OCEI for acceptance by the Governor in Council, a scheme for the design, construction, operation and maintenance of the distribution network (such a scheme being an Electricity Safety Management Scheme or ESMS). The ESV was required to recommend to the Governor that an ESMS submitted to it by SP AusNet be accepted if it was satisfied that the scheme was appropriate for the distribution network and complied with sub-section 107(2) of the ES Act and the ESMS Regulations and if it was satisfied that the level of safety to be provided by the ESMS minimised as far as practicable the hazards and risks of damage to property and any person arising from the distribution network;~~
- ~~(vi) The SP AusNet ESMS:

 - ~~(A) described the assets on the distribution network;~~~~

- ~~(B) — outlined the systems in place in relation to the design, construction, operation and maintenance of those assets;~~
- ~~(C) — included a safety assessment of network assets;~~
- ~~(D) — outlined the systems in place to manage the identified risks to safety; and~~
- ~~(E) — described the steps taken to ensure that all parts of the distribution network were safe and were operated safely;~~
- ~~(vii) — The SP AusNet ESMS was accepted by the Governor in Council on 26 October 2004 on the recommendation of ESV and was in operation on 7 February 2009;~~
- ~~(viii) — At all relevant times, in Victoria there was no statutory or regulatory requirement to place cables/lines underground, other than as follows:

 - ~~(A) — in respect of private electric lines: Regulation 403 of the Installations Regulations which requires any private electric line which is going to be constructed or reconstructed to be placed underground;~~
 - ~~(B) — ESV, or a relevant distribution company, subject to any code applying in relation to the exercise of powers by the ESC, may in relation to electric lines order (if by a distribution company, with the agreement of the ESV) that any electric line proposed to be constructed or to be substantially reconstructed be placed underground: section 85(b) of the ES Act;~~~~
- ~~(ix) — Further, clause 6 of SP AusNet's licence requires it to provide underground services if requested by a particular person or end user.~~
- ~~(c) — it says further that the scope and content of the obligation imposed upon it by section 75 of the ES Act as referred to in paragraph 8(a) herein is limited and informed both by the technical regulatory framework and the regulatory framework governing the economic operation of the distribution business as a regulated entity (the **economic regulatory framework**);~~

Particulars

- ~~(i) — As at 7 February 2009 the economic regulatory framework included:

 - ~~(A) — the terms of the distribution licence;~~
 - ~~(B) — the *Essential Services Commission Act 2001 (Vic)* (the **ESC Act**);~~
 - ~~(C) — Part 2 of the EI Act;~~~~

- ~~(D) — the Electricity Distribution Price Review 2006-10 Final Decision (the **Price Determination**) which operated during a period which included 7 February 2009;~~
- ~~(E) — a Memorandum of Understanding dated 8 March 2007 between the ESV and the ESC (the **MoU**);~~
- ~~(ii) — Clause 22.1 of the distribution licence obliged SP AusNet to comply with all applicable provisions of the Electricity Distribution Price Determination 2001-2005, the 2001 Electricity Distribution Price Review Re-Determination and any other price determination in force;~~
- ~~(iii) — At all material times the maximum prices which SP AusNet could charge for the provision of services in operating the distribution business were set by the ESC pursuant to the Price Determination;~~
- ~~(iv) — As the Victorian electricity industry regulator for distributors at all relevant times, the ESC was required to meet the overall objective of promoting the long term interests of Victorian electricity consumers: sub-section 8(1) of the ESC Act;~~
- ~~(v) — In seeking to achieve that objective, the ESC was required by sub-section 8(2) of the ESC Act (at the time the Price Determination was made) to have regard to, inter alia, the following objectives:

 - ~~(A) — to facilitate efficiency in the electricity industry and the incentive for efficient long term investment;~~
 - ~~(B) — to facilitate the financial viability of the electricity industry;~~
 - ~~(C) — to facilitate effective competition and promote competitive market conduct;~~
 - ~~(D) — to ensure the regulatory decision making had regard to the relevant health, safety, environmental and social legislation applying to the electricity industry;~~
 - ~~(E) — to ensure that users and consumers (including low income and vulnerable consumers) would benefit from the gains from competition and efficiency;~~
 - ~~(F) — to promote consistency in regulation between States and on a national basis;~~~~
- ~~(vi) — Further, in seeking to achieve the objectives referred to in paragraphs (iv) and (v) above, the ESC was required by sub-section 8(3) of the ESC Act to perform its functions and exercise its powers in such a manner as the ESC considered would best achieve the objectives specified in other relevant legislation under which an electricity distributor operated;~~
- ~~(vii) — Further, in making a price determination (such as the Price Determination), the ESC was required by sub-section 33(3) of the ESC Act (at the time the Price Determination was made) to have regard to:~~

- ~~(A) — the particular circumstances of the electricity industry;~~
- ~~(B) — the costs of making, producing or supplying electricity;~~
- ~~(C) — the cost of complying with relevant health, safety, environmental and social legislation applying to the electricity industry;~~
- ~~(D) — the return on assets in the electricity industry of the relevant participant;~~
- ~~(E) — any relevant interstate and international benchmarks for prices, costs and return on assets in comparable industries;~~
- ~~(F) — the financial implications of the determination for the electricity industry and the participants in it;~~
- ~~(G) — any factors specified in relevant legislation pertaining to the electricity industry;~~
- ~~(viii) — the Price Determination was published by the ESC in October 2005. It set service standards for both urban and rural feeders across the SP AusNet distribution network, including service reliability targets for each type of feeder, against a number of reliability measures, including planned and unplanned service interruptions (known as SAIDI, SAIFI and MAIFI) all of which were directed at maximising the continuity of supply of electricity to consumers;~~
- ~~(ix) — Under the MoU the ESC and the ESV agreed to consult with and involve the other in the performance of any function that would or would be likely to have a material implication for the other: clause 5.3(a) of the MoU;~~
- ~~(x) — The purpose and effect of the MoU was to avoid conflict between the level of tariffs that SP AusNet was entitled to charge for the provision of services in conducting the distribution business and the level of capital and operating expenditure required to ensure that SP AusNet complied with the requirements imposed by the technical regulatory framework;~~
- ~~(xi) — In the premises, the revenue allowance approved by the ESC in the Price Determination took into account the costs which ESV anticipated would be reasonably incurred by SP AusNet in complying with the requirements imposed by the technical regulatory framework;~~
- ~~(xii) — The costs as aforesaid included those within the ESC's allowance as to the infrastructure and other capital expenditure to be incurred in relation to bushfire risk. As SP AusNet could not control the prices charged for electricity supply during the price determination period of 2006-10, this constrained the extent to which SP AusNet could invest in activities aimed at reducing bushfire risk;~~

- ~~(xiii) Prior to making the Price Determination applicable to SP AusNet's distribution business, the ESC had implemented a policy in relation to another distribution company that revenue allowances would not be approved so as to cover the cost of undergrounding of electricity lines in hazardous bushfire areas;~~
- ~~(xiv) In the premises, the cost of human life and property arising from bushfire risk from overhead powerlines was not the main and/or a determining factor in the cost-benefit analysis performed by the ESC in the course of setting price determinations and according to the ESC there was no justification for spreading that cost across the community through electricity price increases;~~
- ~~(xv) The mitigation of the risk of loss of human life and damage to property arising from bushfire was therefore dealt with only in, relevantly, the 2003 Bushfire Mitigation Regulations as aforesaid;~~
- ~~(xvi) According to the regulatory impact statement dated 4 December 2002 as aforesaid prepared in order for the Bushfire Mitigation Regulations to be introduced, the stated objectives of the regulations were:

 - ~~(A) to minimise the risk of a repeat of the 1977 and 1983 bushfires on the community;~~
 - ~~(B) to minimise the risk of private electric lines being the cause of bushfires;~~
 - ~~(C) to minimise the risk to persons, businesses and property (including electrical assets), as a result of bushfire arising from electrical assets;~~~~
- ~~(xvii) The impact statement noted that the context for the objectives was that the OCEI was concerned that if another major bushfire occurred (after 2003), up to 80% of the State would be at risk of destruction, and if of a similar scale to the 1983 fires, the cost (in 2002) would be around \$800m and that the social fabric of many communities would be destroyed. The impact statement further noted that prior to the introduction of the then proposed regulations, the likely time lapse between bushfires was 10 years, and that with the making of the proposed regulations, this would be reduced to 1 in 30 years. Further, the impact statement records economic analysis undertaken to justify the introduction of the regulations. This included an assumption that a major bushfire would cause in the order of \$100m in damage which would occur once every 10 years, costing \$10m annually. The statement noted that this would be reduced to \$3.3m annually if the regulations were effective to reduce bushfires from electrical assets to 1 in 30 years, providing an incremental benefit to the community of around \$6.7m annually;~~
- ~~(xviii) In the premises, the mitigation measures in the Bushfire Mitigation Regulations were introduced to minimise the risk of~~

~~major further bushfires from electrical assets from 10 to 30 year occurrences, with no regulator (neither ESV nor ESC) requiring anything further of a distribution business by way of additional capital or other expenditure towards bushfire mitigation, with the effect that electricity prices would not be, and were not, increased by reason of such measures;~~

~~(xix) In the premises, the distribution business revenue for the Price Determination period (2006-11) was set on the basis that SP AusNet would be required to meet its obligations under the technical regulatory regime including the SP AusNet ESMS and the Bushfire Mitigation Regulations but not more.~~

~~(d)(b)~~ it says further that section 75 of the ES Act did not impose upon it any statutory duty owed to the plaintiff, any other group member (together and severally **claimants**), or any other person or particular class of persons;

~~(e)(c)~~ it says further that section 75 of the ES Act did not give rise to or create any private right or cause of action for the benefit of any claimant or any other person or particular class of persons.

9. As to paragraph 9:

- (a) it denies the allegations therein and repeats paragraph 8 herein;
- (b) further or in the alternative it says that if, which is denied, section 75 of the ES Act did, in relation to the Murrindindi assets, impose upon it any statutory duty owed to a particular class of persons or give rise to or create any private right or cause of action for the benefit of a particular class of persons, the class of persons to whom such duty was owed or for whose benefit such private right or cause of action was created was limited to:
 - (i) persons physically proximate enough to the Murrindindi assets to be electrocuted or otherwise injured as a consequence of:
 - (1) electricity being discharged from the assets forming part of the Murrindindi assets and flowing through them; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling onto them or onto objects which then came into contact with them;
 - (ii) persons having an interest in real or personal property that was physically proximate enough to the Murrindindi assets to be damaged as a consequence of:

- (1) electricity being discharged from the assets forming part of the Murrindindi assets and flowing through the property; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling onto the property or onto objects which then came into contact with the property;
 - (c) further or in the alternative it says that if, which is denied, section 75 of the ES Act did, in relation to the Murrindindi assets, impose upon it any statutory duty owed to a particular class of persons or give rise to or create any private right or cause of action for the benefit of a particular class of persons, the class of persons to whom such duty was owed or for whose benefit such private right or cause of action was created was limited to:
 - (i) persons who were present; and
 - (ii) persons who had an interest in real or personal property that was located,
in the immediate vicinity of the Murrindindi assets;
 - (d) it says that the claimants and the real and personal property in which they had an interest were located too remotely from the Murrindindi assets to fall within the class of persons referred to in the previous two sub-paragraphs.
10. It denies the allegations in paragraph 10 and further refers to and repeats paragraphs 8 and 9 herein.
 11. It denies the allegations in paragraph 11 and further refers to and repeats paragraphs 8 and 9 herein.
 12. As to paragraph 12:
 - (a) it says that since 3 October 1994 it has had responsibility for the establishment of systems concerning the planning, design, construction, inspection, modification and maintenance of the distribution network, but otherwise denies paragraph 12(a);
 - (b) further in relation to paragraph 12(b):
 - (i) it admits that since 3 October 1994 it had the right to construct, inspect, modify, repair, and operate the distribution network, including the Murrindindi assets, and to give directions as to its construction,

inspection, modification, repair, or operation and that, save to the extent that it contractually conferred the right to construct, inspect, modify, repair or operate on another party, such rights were held to the exclusion of other private persons; and

~~(ii) it says that its right to construct, inspect, modify, repair, and operate the distribution network, including the Murrindindi assets, and to give directions as to its construction, inspection, modification, repair, or operation were limited by the requirements imposed by the technical regulatory framework, the economic regulatory framework, and good industry practice, and could not be exercised otherwise than in accordance with those requirements;~~

~~(iii)(ii)~~ it otherwise denies paragraph 12(b);

(c) further in relation to paragraph 12(c):

(i) it admits that it exercised the right to construct, inspect, modify, repair, and operate the distribution network, including the Murrindindi assets, and to give directions as to its construction, inspection, modification, repair, or operation and that, save to the extent that it contractually conferred the right to construct, inspect, modify, repair or operate on another party;

~~(ii) it says that its right to construct, inspect, modify, repair, and operate the distribution network, including the Murrindindi assets, and to give directions as to its construction, inspection, modification, repair, or operation were exercised in accordance with the technical regulatory framework, the economic regulatory framework, and good industry practice;~~

~~(iii)(ii)~~ it otherwise denies paragraph 12(c);

(d) it denies paragraph 12(d) and refers to and repeats paragraphs ~~8(b) and 8(c)~~ and 12(a), 12(b), and 12(c) above.

13. As to paragraph 13:

(a) it admits paragraph 13(a);

(b) in relation to paragraph 13(b):

- (i) it says that at all material times the distribution of electricity along the Subtransmission line and the Feeder line was safe and created no material risk of unintended discharges of electricity from the Subtransmission line or the Feeder line;
 - (ii) it otherwise denies paragraph 13(b);
- (c) in relation to paragraph 13(c):
 - (i) it says that an unintended discharge of electricity from the Subtransmission line or the Feeder line might be capable of causing death, serious injury to persons and damage to or loss of property by reason of the matters referred to in sub-paragraphs (i) to (iii) (inclusive) of paragraph 13(c);
 - (ii) it says further that the risk of fire ignition as a result of the discharge of electricity from the Subtransmission line or the Feeder line was extremely low; and
 - (iii) it otherwise denies paragraph 13(c);
- (d) it denies paragraph 13(d) and refers to and repeats paragraph 13(b) hereof;
- (e) it says that it was aware of the matters set out in paragraphs 13(a) and 13(c) above, but otherwise denies paragraph 13(e);
- (f) it says further that:
 - (i) the Subtransmission line is a component of a Subtransmission network and the Feeder line is a component of a High Voltage Distribution network;
 - (ii) Subtransmission and High Voltage Distribution networks have at all relevant times serviced customers across large areas of Australia, and in other countries and have for more than sixty years been accepted as a safe and reliable system for the distribution of electricity in rural areas.

14. It denies paragraph 14.

15. As to paragraph 15:

- (a) save to the extent that any persons may have had control over forces, circumstances, events or occurrences external to the assets and component

parts of the Murrindindi assets and which were capable of having an impact upon or damaging the Murrindindi assets so as to cause a discharge of electricity, it admits paragraph 15(i);

- (b) it denies paragraph 15(ii);
- (c) it denies paragraph 15(iii) and says that if any dependency existed, which is denied, the dependency was upon the CFA and/or the DEPI Secretary (as defined in paragraph 72 herein) and/or Victoria Police meeting the duties owed by them as alleged herein;
- (d) it says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, the class of persons described in paragraph 15 of the statement of claim was an indeterminate class of persons;
- (e) it says further:
 - (i) at all material times, insurance cover for losses caused by bushfire was available to persons residing in Victoria and the claimants did or were able to protect themselves against the risk of bushfire to their property or business undertakings by arranging appropriate insurance cover;
 - (ii) in the premises the claimants were not vulnerable to property damage or economic loss as a result of fire.

16. It does not admit paragraph 16 and says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, the alleged class described in paragraph 15 of the statement of claim was an indeterminate class of persons.

17. As to paragraph 17:

- (a) it denies that it owed the alleged SPI General Duties to the claimants or to any other person;
- (b) it says further that it did not owe any other duty of care to any or all of the claimants;

- (c) it says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, the class of persons to whom the SPI General Duties are alleged to be owed was indeterminate;
- (d) further or in the alternative, it denies that it owed any of the SPI General Duties or any other duty of care to avoid acts and omissions which could cause loss and damage of such magnitude or to a class of persons of such magnitude that the potential loss and damage or class of persons would be out of all proportion to the seriousness of the act or omission or the extent of the want of care, if any, which resulted in the act or omission;
- (e) further or in the alternative, it denies that it owed any of the SPI General Duties or any other duty of care to any persons who were not vulnerable to the risk of property damage or economic loss as a result of fire and says that such persons included:
 - (i) the State of Victoria and its instrumentalities;
 - (ii) the Commonwealth of Australia and its instrumentalities;
 - (iii) owners of timber plantations within the distribution network area;
 - (iv) persons who had protected themselves or were capable of protecting themselves against the risk of property damage or economic loss as a result of bushfire by arranging appropriate insurance cover;
 - (v) persons who by reason of measures which ought to have been taken by the CFA and/or the DEPI Secretary and/or Victoria Police in accordance with the duties owed by the CFA and/or the DEPI Secretary and/or Victoria Police as pleaded herein would not have suffered personal injury loss or damage, property damage or economic loss;
- (f) further or in the alternative, it denies that it owed any of the SPI General Duties or any duty of care to:
 - (i) persons who were too physically remote from the Murrindindi assets for it to be reasonably foreseeable that they may be electrocuted or otherwise injured as a consequence of:

- (1) electricity being discharged from the assets forming part of the Murrindindi assets; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling or being damaged;
- (ii) persons having an interest in real or personal property that was too physically remote from the Murrindindi assets for it to be reasonably foreseeable that the property may be damaged as a consequence of:
- (1) electricity being discharged from the assets forming part of the Murrindindi assets; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling or being damaged;
- (iii) persons having business interests that were too remote from the Murrindindi assets for it to be reasonably foreseeable that the interests may be damaged as a consequence of:
- (1) electricity being discharged from the assets forming part of the Murrindindi assets; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling or being damaged;
- (g) further or in the alternative, it denies that it owed any of the SPI General Duties or any other duty of care to:
- (i) persons who were not present; or
 - (ii) persons who did not have an interest in real or personal property that was located,

in the immediate vicinity of the Murrindindi assets;
- (h) it says that the claimants and the real and personal property in which they had an interest were located so remotely from the Murrindindi assets that they fell within the class of persons referred to in the previous two sub-paragraphs to whom ~~SP AusNet~~ AusNet Services owed no duty of care;
- ~~(i) further or in the alternative, it says that any duty of care (and the content thereof) which it owed to the claimants (which is denied) was limited to, and~~

would be wholly discharged by, compliance with the requirements imposed by the technical regulatory framework;

~~(j)~~ further or in the alternative, it says that any duty of care (and the content thereof) which it owed to the claimants (which is denied) was limited and informed by the technical regulatory framework and the economic regulatory framework;

~~(k)~~(i) further or in the alternative, it says that any duty of care (and the content thereof) which it owed to the claimants (which is denied) did not require it to ensure that reasonable care was taken by any independent agents or contractors engaged by it but only required it to take reasonable care in the selection, direction and oversight of such agents and contractors;

~~(l)~~(j) further or in the alternative, it says that any duty of care (and the content thereof) which it owed to the claimants (which is denied) did not extend to requiring ~~SP AusNet~~AusNet Services to undertake steps out of all proportion to the magnitude of the risks which the steps were intended to avoid or the loss or damage likely to be thereby avoided;

~~(m)~~(k) further or in the alternative, it says that any duty of care (and the contents thereof) which it owed to the claimants (which is denied) did not extend to taking precautions against a risk of harm unless:

- (i) the risk was foreseeable; and
- (ii) the risk was not insignificant; and
- (iii) in the circumstances a reasonable person in ~~SP AusNet's~~AusNet Services' position would have taken those precautions;

Particulars

~~SP AusNet~~AusNet Services relies upon section 48(1) of the *Wrongs Act 1958 (Vic)* (***Wrongs Act***).

~~(n)~~(l) it denies that:

- (i) the risk of harm alleged to have been suffered by the claimants was foreseeable;

Particulars

It refers to and repeats paragraph 14 herein.

- (ii) the risk of harm alleged to have been suffered by the claimants was not insignificant;

Particulars

It refers to and repeats paragraphs 13 and 14 herein and the matters pleaded in sub-paragraphs (e), (f), (g), (h) and (j) of this paragraph.

- (iii) in the circumstances a reasonable person in ~~SP AusNet's~~AusNet Services' position would have taken the precautions that the claimants allege ought to have been taken.

Particulars

It refers to paragraphs 6, 8, 13, 14 and 16 and sub-paragraphs (c), (d), (e), (f), (g), (h), (i) and, (j), ~~(k) and (l)~~ of this paragraph.

17A. As to paragraph 17A it:

- (a) refers to and repeats paragraphs 8 and 17; and
- (b) otherwise denies the allegations.

17B. As to paragraph 17B:

- (a) it admits paragraph 17B(a);
- (b) as to paragraph 17(B)(b) it:
 - (i) says that Pole 6 was installed in 1985; and
 - (ii) otherwise denies the allegations;
- (c) as to paragraph 17B(c) it:
 - (i) says that:
 - (A) one of the materials from which Pole 6 was and is made is concrete; and
 - (B) Pole 6 also contained and contains steel reinforcing; and
 - (ii) otherwise denies the allegations;
- (d) as to paragraph 17B(d) it:
 - (i) admits that:

- (A) Pole 6 supports three 66kV conductors on two separate steel cross-arms fitted to the pole (one for the span to Pole 7 and one for the span to Pole 5); and
- (B) the conductors and cross-arms were constructed, installed and maintained;
- (ii) says that:
 - (A) the conductors and cross-arms were installed in 1985; and
 - (B) there were scheduled inspections of Pole 6 on the dates set out in paragraph 17D below; and
- (iii) otherwise denies the allegations;
- (e) as to paragraph 17B(e) it:
 - (i) says that until the construction and installation works referred to in paragraph 17B(f)(i) below, Pole 6 supported a 12.7kV Single Wire Earth Return; and
 - (ii) otherwise denies the allegations;
- (f) as to paragraph 17B(f) it:
 - (i) admits that in or about the period from 1993 to 1997~~9~~, Pole 6 was the subject of construction and installation works to construct a new subsidiary 22kV three-phase feeder line (being the Feeder line);
 - ~~(i)~~(ii) says that records in the possession of AusNet Services state that the 22kV Feeder line supported by Pole 6 was first energised on or about 14 October 1999; and
 - ~~(ii)~~(iii) otherwise denies the allegations;
- (g) as to paragraph 17B(g) it:
 - (i) admits that:
 - (A) Pole 6 supports three 22kV conductors on:
 1. a third steel cross-arm fitted to the pole; and
 2. a pole-mounted 22kV disc insulator located above the bottom cross-arm located beneath the Subtransmission line (66kV) cross-arms and conductors; and

- (B) the conductors, cross-arm and disc insulator were constructed, installed and maintained; and
- (ii) otherwise denies the allegations;
- (h) it admits paragraph 17B(h);
- (i) as to paragraph 17B(i) it:
 - (i) admits that the three 66kV conductors and the Feeder line changed direction between Poles 5 and 7 at Pole 6; and
 - (ii) otherwise denies the allegations;
- (j) as to paragraph 17B(j) it:
 - (i) admits that:
 - (A) as at 7 February 2009 Pole 6 was supported by two stay wires;
 - (B) the stay wires were constructed, installed and maintained;
 - (C) as at 7 February 2009 the northern stay wire was attached to Pole 6 below the lower of the two 66kV cross-arms and above the 22kV cross-arm;
 - (D) as at 7 February 2009, the western stay wire was attached to Pole 6 between the two 66kV cross-arms.
 - ~~(ii) says that as at 7 February 2009 the northern stay wire was attached to Pole 6 below the lower of the two 66kV cross-arms and above the 22kV cross-arm; and~~
 - ~~(iii)~~(ii) otherwise denies the allegations.

17C. As to paragraph 17C it:

- (a) says that records in the possession of ~~SP AusNet~~AusNet Services state that in the period from 1 January 2002 to 6 February 2009 there have been four unplanned outages on the Feeder line; and
- (b) otherwise denies the allegations.

Particulars

The unplanned outages as recorded in ~~SP AusNet's~~AusNet Services' PowerOn database were as follows.

- (i) Operation of the blue phase 25E Boric Acid fuse at isolating device number 602473 on 31 October 2004;
- (ii) Operation of the red phase 25E Boric Acid fuse at isolating device number 602473 on 6 March 2005;
- (iii) Operation of the white phase 25E Boric Acid fuse at isolating device number 602473 on 31 August 2005; and
- (iv) Operation of the red phase 25E Boric Acid fuse at isolating device number 602473 on 21 November 2006.

17D. As to paragraph 17D it:

- (a) admits that prior to 7 February 2009, ~~SP AusNet~~AusNet Services and/or its servants, contractors or agents undertook scheduled and unscheduled inspections of, and performed maintenance on, the Murrindindi assets;
- (b) says that records in the possession of ~~SP AusNet~~AusNet Services state that scheduled inspections of Pole 6 were undertaken on 18 June 1990, 7 November 1990, 31 July 1996, 22 July 1999, 16 March 2005 and 28 May 2008; and
- (c) says that photographs of Pole 6 taken during the scheduled inspection on 28 May 2008 were subsequently reviewed by AusNet Services; and
- ~~(e)~~(d) otherwise denies the allegations.

Particulars

The dates of the scheduled inspections of Pole 6 before 7 February 2009 are recorded in ~~SP AusNet's~~AusNet Services' Q4 database.

17E. It admits paragraph 17E.

17F. As to paragraph 17F:

- (a) it admits paragraph 17F(a) and says further that:
 - (i) the high voltage fuses protecting the Feeder line comprised three 25E Boric Acid fuses on Pole 7A (asset ID 20530); and
 - (ii) one of the 25E Boric Acid fuses referred to in paragraph 17F(a)(i) above was installed on the northern (red phase) conductor, one was

installed on the centre (white phase) conductor and one was installed on the southern (blue phase) conductor;

- (b) it admits paragraph 17F(b) and says further that the other protection systems protecting the Feeder line comprised sensitive earth fault protection which was in place at all material times;
- (c) as to paragraph 17F(c) it:
 - (i) says that
 - (A) in the event of a conductor break on the Feeder line, current could continue to be transmitted through parts of the conductor until one or both of the following events occurred:
 1. the earth fault protection had operated; or
 2. all of the 25E Boric Acid fuses had operated; and
 - (B) the amount of current transmitted, the duration of the transmission and the parts of the conductor through which the current could be transmitted would depend on the location of the conductor break; and
 - (ii) otherwise denies the allegations.

17G. As to paragraph 17G:

- (a) it denies paragraph 17G(a);
- (b) it admits paragraph 17G(b);
- (c) it denies paragraph 17G(c);
- (d) it admits paragraph 17G(d);
- (e) it admits paragraph 17G(e);
- (ea) it does not admit paragraph 17G(ea);
- (eb) it denies paragraph 17G(eb);
- (f) it denies paragraph 17G(f);
- (g) it denies paragraph 17G(g);
- (h) it denies paragraph 17G(h);
- (i) it denies paragraph 17G(i); and

(j) it denies paragraph 17G(j).

17H. As to paragraph 17H it:

(a) refers to and repeats the denials and positive averments made in paragraphs 17A to 17G above;

(b) says that that it knew or ought to have known of the following matters set out in this defence by 16 March 2005, save as otherwise noted below:

- (i) 17B(a);
- (ii) 17B(b)(i);
- (iii) 17B(c)(i);
- (iv) 17B(d)(i);
- (v) 17B(d)(ii)A;
- (vi) 17B(d)(ii)B from the dates they occurred;
- (vii) 17B(e)(i);
- (viii) 17B(f)(i);
- (ix) 17B(g)(i);
- (x) 17B(h);
- (xi) 17B(i)(i);
- (xii) 17B(j)(i) as at 7 February 2009;
- ~~(xiii) 17B(j)(ii) as at 7 February 2009;~~
- ~~(xiv)(xiii)~~ 17C(a) from the date they occurred;
- ~~(xv)(xiv)~~ 17D(a) from the date they occurred;
- ~~(xvi)(xv)~~ 17D(b) from the date they existed;
- (xvi) 17D(c) from the date it occurred;
- (xvii) 17E {from the date they occurred};
- (xviii) 17F(a);
- (xix) 17F(b);
- (xx) 17F(c)(i);

- (xxi) 17G(b);
- (xxii) 17G(d);
- (xxiii) 17G(e); and

(c) otherwise denies the allegations.

17HA It denies paragraph 17HA.

17I As to paragraph 17I:

- (a) it denies paragraph 17I(a);
- (b) it denies paragraph 17I(b) and refers to and repeats paragraph 17D above;
- (c) it denies paragraph 17I(c);
- (d) it admits paragraph 17I(d);
- (e) as to 17I(e) it:
 - (i) refers to and repeats the matters set out in paragraph 17F(c) above; and
 - (ii) otherwise denies the allegations.
- (f) as to paragraph 17I(f) it:
 - (i) admits that it knew or ought to have known of the matters set out in paragraphs 17I(d) and 17I(e)(i) above prior to 7 February 2009; and
 - (ii) otherwise denies the allegations.

17J. As to paragraph 17J it:

- (a) says that by late 2008 (approximately) it was reasonably foreseeable by ~~SP~~ AusNetAusNet Services that a day of extreme bushfire risk could occur in February 2009; and
- (b) otherwise denies the allegations.

17K. As to paragraph 17K it:

- (a) says that:
 - (i) at or shortly prior to 11.50am on 7 February 2009, electricity supply was interrupted to the northern conductor and to spur lines supplied by the northern conductor;

- (ii) in the afternoon of 7 February 2009, ~~SP AusNet~~AusNet Services, its servants or agents undertook patrols of the Feeder line, the Canty Spur, the Mill Spur and the Mitchell Spur. The patrols were completed prior to 2.45pm;
- (iii) on the afternoon of 7 February 2009, ~~SP AusNet~~AusNet Services, its servants or agents reconnected electricity supply to the northern conductor. The reconnection was achieved by ~~SP AusNet's~~AusNet Services' employees replacing and closing the 25E Boric Acid fuse on the northern conductor at Pole 7A. The reconnection occurred prior to 2.45pm; and

(b) otherwise denies the allegations.

17L. As to paragraph 17L it:

(a) as to paragraph 17L(a) it:

- (i) -admits that it attached the northern stay wire to pole 6 at a point above the bottom cross arm; and
- (ii) -otherwise denies the allegations;

(b) as to paragraph 17L(b) it:

- (i) says that it had not relocated the attachment point of the northern stay wire to a location below the bottom cross-arm; and
- (ii) otherwise denies the allegations;

(bb) as to paragraph 17L(bb) it:

- (i) refers to and repeats paragraphs 17L(a)(i) and 17L(b)(i); and
- (ii) otherwise denies the allegations;

(c) denies paragraph 17L(c);

(d) denies paragraph 17L(d);

(e) as to paragraph 17L(e) it:

- (i) says that it had not ~~coated~~insulated the northern stay wire with ~~insulative wrap~~ in the vicinity of the northern conductor ~~or at all~~; and
- (ii) otherwise denies the allegations;

(f) as to paragraph 17L(f) it:

(i) says that it had not ~~coated~~ insulated the northern conductor with ~~insulative wrap~~ in the vicinity of the northern stay wire ~~or at all~~; and

(ii) otherwise denies the allegations;

(g) denies paragraph 17L(g);

(h) denies paragraph 17L(h);

(i) denies paragraph 17L(i);

(j) denies paragraph 17L(j);

(k) denies paragraph 17L(k) and refers to and repeats paragraph 17I(b) and 17D above;

(l) denies paragraph 17L(l);

(m) denies paragraph 17L(m);

(n) denies paragraph 17L(n);

(o) denies paragraph 17L(o);

(p) denies paragraph 17L(p);

(q) denies paragraph 17L(q);

~~(q)~~(r) denies paragraph 17L(~~q~~r);

~~(r)~~(s) as to paragraph 17L(~~r~~s) it:

(i) refers to and repeats paragraph 17K(a)(iii) above; and

(ii) otherwise denies the allegations;

~~(s)~~(t) as to paragraph 17L(~~s~~t) it:

(i) refers to and repeats paragraph 17L(~~r~~s) above; and

(ii) otherwise denies the allegations;

~~(t)~~(u) as to paragraph 17L(~~t~~u) it:

(i) refers to and repeats paragraph 17K(a)(ii) above; and

(ii) otherwise denies the allegations; and

~~(u)~~(v) as to paragraph 17L(~~u~~v) it:

(i) refers to and repeats paragraphs 17L(~~r~~s) above; and

(ii) otherwise denies the allegations.

17M. It denies paragraph 17M.

17N. As to paragraph 17N it:

- (a) refers to and repeats paragraphs 17L(a)-(h) above; and
- (b) otherwise denies the allegations.

17NA. As to paragraph 17NA it:

- (a) refers to and repeats paragraphs 17L(i)-(q) above; and
- (b) otherwise denies the allegations.

17NB. As to paragraph 17NB it:

- (a) refers to and repeats paragraphs 17L(r)-(v) above; and
- (b) otherwise denies the allegations.

18. As to paragraph 18:

- (a) it says that on the afternoon of 7 February 2009 the northern (red phase) conductor on the Feeder line on the Sawmill Span (the **Red Phase Conductor**) fell from around the vicinity of Pole 6; and
- (b) it otherwise denies paragraph 18.

18AA. Further to the denial alleged in paragraph 18, it says further as follows:

- (a) the Murrindindi Fire started at the roadside reserve located between the fence (on the one part) and Wilhelmina Falls Road (on the other part), within the area identified by cross-shading in the map annexed hereto styled "Annexure 1A";
- (b) the Murrindindi Fire preceded the falling of the red phase conductor;
- (c) the Murrindindi Fire was started by reason of a human act.

Particulars

The human act referred to is:

- (i) an act of arson, by an at present unknown individual or individuals;
- (ii) an act of discarding an ignition source in vegetation, by an at present unknown individual or individuals;

- (iii) ignition by hot exhaust, hot exhaust particles, or by other material discharged or displaced from a hot exhaust, on the part of an at present unknown individual or individuals.

Further particulars of the act or acts relied upon will be provided after discovery is complete, and in advance of the trial of the matter.

18A It denies paragraph 18A.

18B. It denies paragraph 18B.

18C. It denies paragraph 18C.

18D. It denies paragraph 18D.

19. It denies paragraph 19.

19A Further, insofar as the plaintiff alleges by paragraph 19 of the statement of claim that ~~SP AusNet~~AusNet Services breached the alleged SPI Statutory Duty and/or the alleged SPI General Duties by reason of alleged acts and omissions in relation to its asset inspection and maintenance system and asset inspections, ~~SP AusNet~~AusNet Services says

(a) asset inspection was an essential part of its approach to asset management;

(aa) from on or about 11 May 1994 to on or about 30 December 1999, AusNet Services undertook:

(i) ground-level and aerial inspection and condition assessment of poles and all attached hardware and conductors (**asset inspection**);

(ii) maintenance works and activities required to address maintenance items identified by asset inspection;

(ab) AusNet Services set requirements according to which it undertook asset inspection;

Particulars

The asset inspection requirements applicable as at December 1995 were in writing and contained in a document entitled "Line Inspection Manual" dated December 1995 (SPN.005.001.0406).

The asset inspection requirements applicable as at August 1997 were in writing and contained in a document entitled "Line Inspection Manual" dated August 1997 (SPN.005.001.0981).

Copies of the Line Inspection Manuals may be inspected at the offices of the solicitors for AusNet Services by appointment.

- (ac) records in the possession of AusNet Services state that AusNet Services undertook scheduled inspections of Pole 6 on 31 July 1996 and 22 July 1999.
- (ad) records in the possession of AusNet Services state that the 22kV Feeder line supported by Pole 6 was first energised on or about 14 October 1999.
- (ae) on or about 31 December 1999, AusNet Services entered into an agreement with Powerline Management Systems Pty Ltd (ACN 061 157 015) (**Powerline**) under which Powerline agreed to provide asset inspection services to AusNet Services throughout the distribution network for six years based on two year approvals;

Particulars

The agreement is in writing and is evidenced by a document titled "Contract Amendment" dated 6 January 2000 (SPN.826.145.0045). A copy may be inspected at the offices of the solicitors for AusNet Services by appointment.

- (af) in or about 17 January 2000, Powerline and AusNet Services amended the terms of the abovementioned agreement (the **Powerline Contract**);

Particulars

- (i) The Powerline Contract was in writing and comprised:
- (A) a document titled "Contract Amendment" dated 6 January 2000 executed by John Kelso for and on behalf of AusNet Services and by David Grant for and on behalf of Powerline;
- (B) an Agreement dated 31 December 1999 executed by John Kelso for and on behalf of AusNet Services and D W Grant for and on behalf of Powerline, which includes incorporated documents and other documents where relevant (the **Powerline Agreement**);
- (C) Schedules 1 to 10 to the Powerline Agreement, which includes incorporated documents and other documents where relevant;
- (D) the General Terms and Conditions – Services detailed in Annexure A to the Powerline Agreement, which includes incorporated documents and other documents where relevant (the **General Terms and Conditions – Services**).

(ii) AusNet Services refers to Clauses 3 and 24 of the Powerline Agreement. Each of the items set out in (A) to (D) above are in writing. A copy of each may be inspected at the offices of the solicitors for AusNet Services by appointment.

(ag) the asset inspection services to be provided by Powerline under the Powerline Contract included:

(i) asset inspection;

(ii) the employment and training of asset inspectors;

(iii) internal auditing of asset inspectors and independent auditing of asset inspectors and quality system;

(iv) reporting to AusNet Services in relation to asset inspection;

Particulars

Powerline Agreement, cl 7, 16, 23 and schedule 1; General Terms and Conditions – Services, cl 16 and 24.3.

(ah) in or about late January 2000, Powerline assigned to ACN 060 674 580 Pty Limited, trading as Utility Asset Management (UAM), its rights and obligations under the Powerline Contract;

Particulars

AusNet Services' agreement to the assignment is in writing and is contained in a letter from David Grant on behalf of Powerline to John Kelso on behalf of AusNet Services dated 24 January 2000. A copy may be inspected at the offices of the solicitors for AusNet Services by appointment.

(ai) in the premises, UAM assumed Powerline's rights and obligations under the Powerline Contract;

(aj) the term of the Powerline Contract was extended:

(i) from 1 January 2002 to 31 December 2003;

(ii) from 1 January 2004 to 31 December 2005;

(iii) from 1 January 2006 to 31 October 2006;

(iv) from 31 October 2006 to 31 December 2006;

(v) from 31 December 2006 to 28 February 2007;

(vi) from 28 February 2007 to 31 March 2007;

Particulars

The extensions are evidenced in:

- (A) letter from UAM to AusNet Services dated 23 May 2001;
- (B) letter from UAM to AusNet Services dated 10 January 2005;
- (C) letter from UAM to AusNet Services dated 9 January 2006;
- (D) letter from AusNet Services to UAM dated 16 October 2006;
- (E) letter from AusNet Services to UAM dated 19 December 2006;
- (F) letter from AusNet Services to UAM dated 8 February 2007.

Copies of the documents set out in (A) to (F) may be inspected at the offices of the solicitors for AusNet Services by appointment.

- (ak) in the premises, the term of the Powerline Contract was 31 December 1999 to 31 March 2007;
- (al) during the term of the Powerline Contract, AusNet Services set requirements for asset inspection;

Particulars

The asset inspection requirements applicable from 31 December 1999 were in writing and contained in a document entitled "Line Inspection Manual" dated August 1997 (SPN.005.001.0981), as modified, including:

- (i) on or about 13 July 2004 by the insertion of a new section titled "Inspection of Steel Poles Process"; and
- (ii) on or about 23 December 2004 by the revision of the section titled "Inspection of Private Electric Lines".

A copy of the Line Inspection Manual may be inspected at the offices of the solicitors for AusNet Services by appointment.

- (am) the asset inspection regime and practices prescribed in the Line Inspection Manual accorded with good industry practice;
- (an) it was a requirement of the Powerline Contract that asset inspectors conduct all asset inspections in accordance with the asset inspection requirements set out in the Line Inspection Manual;

Particulars

Powerline Agreement, cl 23.4.

- (ao) by further terms of the Powerline Contract:

- (i) UAM was required to ensure that all personnel employed by UAM to perform functions pursuant to the Powerline Contract were fully trained and competent and possessed the necessary skills and ability to provide quality assurance of workmanship to ensure fulfilment of the obligations of UAM pursuant to the Powerline Contract;
- (ii) UAM was required to carry out all work in a good, proper and professional manner and with due expedition and in accordance with good practice having regard to economy and safety, and at all times exercise due care and skill in accordance with best international practices;
- (iii) UAM represented and warranted that it had the necessary skills, resources and experience to perform the Powerline Contract;

Particulars

Powerline Agreement, cll 8, 11(c), 23.4, 23.5, Schedule 1, Schedule 7; General Terms and Conditions – Services, cll 16, 17 and 24.

- (ap) pursuant to the Powerline Contract it engaged UAM to conduct an inspection of Pole 6 (11526) in March 2005 in accordance with the Line Inspection Manual and the requirements of the Powerline Contract (the **March 2005 asset inspection**);
- (aq) it had no reason to believe that UAM did not conduct the March 2005 asset inspection in accordance with the Line Inspection Manual and the requirements of the Powerline Contract;
- (ar) records in the possession of AusNet Services state that UAM undertook the March 2005 asset inspection on 16 March 2005 and did not notify AusNet Services of any matter including that any part of the Murrindindi assets were faulty, defective, deteriorated in condition or incorrectly assembled such that they were at risk of failure and ought be replaced before the next scheduled asset inspection;
- (b) on or about 1 April 2007, ~~SP AusNet~~AusNet Services entered into an agreement with ACN 060 674 580 Pty Limited, trading as ~~Utility Asset Management~~ (UAM) under which UAM agreed to provide asset inspection

services to ~~SP AusNet~~AusNet Services throughout the distribution network for a period of 3 years (the **UAM Contract**);

Particulars

- (i) The UAM Contract was in writing and comprised:
 - (A) an Instrument of Agreement located at the commencement of the document entitled "Contract Terms and Conditions" executed on 1 April 2007 by Nino Ficca for and on behalf of ~~SP AusNet~~AusNet Services and Richard Janssen for and on behalf of UAM (the **Instrument of Agreement**);
 - (B) the Special Conditions of Contract detailed in Schedule 1 to the Contract Terms and Conditions (the **Special Conditions**);
 - (C) the Contract Terms and Conditions following the Instrument of Agreement together with all Schedules, Appendices, incorporated documents and other documents where relevant including the Scope of Contract Works detailed in Schedule 2 to the Contract Terms and Condition (including other Schedules and Documents where relevant) and the Specifications referred to in Schedule 2 (the **Terms and Conditions**);
 - (D) any Works Order pursuant to which ~~SP AusNet~~AusNet Services engaged UAM to carry out discrete items of work (**Works Order**).
 - (ii) ~~SP AusNet~~AusNet Services refers to Clause 1 of the Instrument of Agreement. Each of the items set out in (A) to (C) above are in writing. A copy of each may be inspected at the offices of the solicitors for ~~SP AusNet~~AusNet Services by appointment.
- (c) the asset inspection services to be provided by UAM under the UAM Contract included:
- (i) ~~ground level and aerial inspection and condition assessment of poles and all attached hardware and conductors~~ (asset inspection);
 - (ii) maintenance works and activities required to address maintenance items identified by asset inspection;
 - (iii) the employment and training of ~~persons to conduct asset inspection~~ (asset inspectors);
 - (iv) at least bi-monthly internal auditing of asset inspectors and at least annual independent auditing of asset inspectors and internal auditors;
 - (v) monthly reporting to ~~SP AusNet~~AusNet Services in relation to asset inspection;

Particulars

Terms and Conditions, Schedule 2.

- (d) at all material times ~~SP AusNet~~AusNet Services set requirements for asset inspection (**asset inspection requirements**);

Particulars

The asset inspection requirements applicable from 1 July 2007 were in writing and contained in a document entitled "**Asset Inspection Manual**" being ~~SP AusNet~~AusNet Services document number 4111 (SPN.005.001.0001). A copy of the Asset Inspection Manual may be inspected at the offices of the solicitors for ~~SP AusNet~~AusNet Services by appointment.

- (e) the asset inspection regime and practices prescribed in the Asset Inspection Manual accorded with good industry practice ~~and were consistent with the SP AusNet ESMS, the technical regulatory framework and the economic regulatory framework~~;
- (f) it was a requirement of the UAM Contract that asset inspectors conduct all asset inspections in accordance with the asset inspection requirements set out in the Asset Inspection Manual;

Particulars

Terms and Conditions, Schedule 2.

- (g) at all material times ~~SP AusNet~~AusNet Services set minimum requirements for the training of asset inspectors (**asset inspection training**) which were designed to ensure that asset inspectors:
- (i) had an adequate understanding of the contents of the Asset Inspection Manual; and
 - (ii) had the knowledge and skills required to safely and effectively undertake asset inspection as required by the UAM Contract.

Particulars

The asset inspection training requirements are described in:

- (a) Part 13-1 of the Asset Inspection Manual;
- (b) UAM Contract Terms and Conditions Schedule 1, Special Conditions.

- (h) the asset inspection training was in accordance with good industry practice ~~and was consistent with the SP AusNet ESMS, the technical regulatory framework and the economic regulatory framework;~~
- (i) it was a requirement of the UAM Contract that asset inspectors complete the asset inspection training, that the appropriate recognised training courses be conducted by a registered training organisation except where otherwise agreed by ~~SP AusNet~~AusNet Services and that asset inspectors be sufficiently skilled and competent to perform asset inspection;

Particulars

Terms and Conditions, Schedule 1, Special Conditions.

- (j) by further terms of the UAM Contract:
 - (i) UAM was required to ensure that all workmanship was of the highest quality and standard and that work performed under the UAM Contract was carried out competently, regularly, diligently, with due expedition, without delay and in accordance with best industry practice;
 - (ii) UAM represented and warranted that it had the necessary skills, resources and experience to perform the UAM Contract;

Particulars

Terms and Conditions: clauses 8.1 and 8.2.

- (k) pursuant to the UAM Contract it engaged UAM to conduct an inspection of Pole 5 (11525) and Pole 6 (11526) in May 2008 in accordance with the Asset Inspection Manual and the requirements of the UAM Contract (the **May 2008 asset inspection**);
- (l) it had no reason to believe that UAM did not conduct the May 2008 asset inspection in accordance with the Asset Inspection Manual and the requirements of the UAM Contract;
- (m) save for recommending the replacement of some 66kV insulators on Pole 5 and some conductor clamp fittings on the 66kV circuit on Pole 6, UAM did not notify ~~SP AusNet~~AusNet Services of any matters observed during the May 2008 asset inspection which suggested that the Red Phase Conductor or any of the other part of the Murrindindi assets were faulty, defective,

deteriorated in condition or incorrectly assembled such that they were at risk of failure and ought be replaced before the next scheduled asset inspection.

20. It refers to and repeats paragraphs 19A above and otherwise denies paragraph 20.
21. As to paragraph 21:
 - (a) it does not admit that the plaintiff or any other person suffered injury or death, loss of or damage to property or economic loss in connection with interference in their use and enjoyment of interests in land as a consequence of any fire which ignited on 7 February 2009 near the Murrindindi Sawmill on Wilhelmina Falls Road at Murrindindi;
 - (b) it otherwise does not plead to that paragraph.
22. As to paragraph 22:
 - (a) it denies the allegations therein and refers to and repeats paragraph 13 herein;
 - (b) further, it says that the “land”, the “interests in land” and the persons alleged to have been entitled to the use or enjoyment of the “interests in land” are indeterminate.
23. It denies paragraph 23.
24. It does not admit paragraph 24.
25. It denies paragraph 25 and says further that:
 - (a) ~~SP AusNet~~AusNet Services was authorised to distribute electricity along the Murrindindi assets and the Red Phase Conductor ~~pursuant to the technical regulatory framework~~;
 - (b) having regard to the matters referred to in paragraphs 6, 8, 12, 13 and 17, herein, it took reasonable care in doing so; and
 - (c) further or alternatively:
 - (i) the weather conditions on 7 February 2009;
 - (ii) the Red Phase Conductor breaking on a high fire danger day;
 - (iii) a fire being ignited as the result of the Red Phase Conductor breaking (which is denied);

- (iv) a fire, if ignited as the result of the Red Phase Conductor breaking (which is denied), not being extinguished or adequately controlled or suppressed by relevant fire fighting agencies;
 - (v) the speed and/or extent of the spread of the resulting fire; and
 - (vi) the destruction caused by the resulting fire;
- were acts of God or alternatively were inevitable events and/or accidents.

26. It denies paragraph 26 and refers to and repeats paragraphs 27 to 39 herein.

27. As to paragraph 27:

(a) it says that:

- (i) State Electricity Commission of Victoria (**SECV**) is, and was at all material times, a body corporate with perpetual succession and capable in law of suing and being sued, by operation of section 4 of the *State Electricity Commission Act 1958* (Vic) (**SEC Act**);
- (ii) SECV has, and had at all material times, the functions, duties and powers conferred by the SEC Act and any other applicable Act as in force from time to time;

(b) it otherwise does not admit paragraph 27.

28. As to paragraph 28:

- (a) it admits that immediately before 3 January 1994 SECV owned the Murrindindi assets;

Particulars

3 January 1994 was the “appointed day” on which section 64 of the *Electricity Industry Act 1993* (Vic) (EI Act) and the 1993 Allocation Statement (as that term is defined in the statement of claim) took effect: Victorian Government Gazette No. SG 97, 23 December 1993.

(b) it otherwise does not admit paragraph 28.

29. As to paragraph 29:

(a) it admits that:

(i) between 5 October 1993 and 30 June 1997, Electricity Services Victoria (**ES-Victoria**) was a body corporate with perpetual succession and capable in law of suing and being sued, by operation of:

(A) between 5 October 1993 and 13 December 1993: section 14 of the *State Owned Enterprises Act 1992* (Vic) (**SOE Act**) and the *State Owned Enterprises (State Body – Electricity Services Victoria) Order 1993* (**1993 Order**);

Particulars

- (i) 5 October 1993 was the date on which ES-Victoria was established by the 1993 Order: Victorian Government Gazette No. S 74, 7 October 1993.
- (ii) 13 December 1993 was the last day before ES-Victoria was re-established under section 20 of the *Electricity Industry Act 1993* (Vic) (**EI Act**) as described in paragraph 24D(a)(ii) below.

(B) between 14 December 1993 and 30 June 1997: section 20 of the EI Act;

Particulars

- (i) 14 December 1993 was the date on which section 20 of the EI Act, which re-established ES-Victoria, came into effect: Victorian Government Gazette No. SG 93, 14 December 1993.
- (ii) 30 June 1997 was the last day before section 8 of the *Electricity Industry (Amendment) Act 1994* (Vic), which repealed section 20 of the EI Act and abolished ES-Victoria, came into effect: Victorian Government Gazette No. G 22, 5 June 1997.

(ii) ES-Victoria had, at all material times, the functions, duties and powers conferred by the EI Act and any other applicable Act as in force from time to time;

(b) it otherwise does not admit paragraph 29.

30. As to paragraph 30:

(a) it admits that, from 3 January 1994 to 2 October 1994, ES-Victoria owned the Murrindindi assets.

Particulars

- (i) 3 January 1994 was the “appointed day” on which section 64 of the EI Act and the 1993 Allocation Statement took effect: Victorian Government Gazette No. SG 97, 23 December 1993.
 - (ii) 3 October 1994 was the “relevant date” on which the 1994 Allocation Statement (as that term is defined in the statement of claim) took effect, for the purposes of section 119 of the EI Act: 1994 Allocation Statement page 1.
- (b) it otherwise does not admit paragraph 30.
31. As to paragraph 31:
- (a) it admits that:
 - (i) immediately before 3 January 1994, SECV was the owner of the Murrindindi assets;
 - (ii) from 3 January 1994 to 2 October 1994, ES-Victoria was the owner of the Murrindindi assets;
 - (b) it otherwise does not admit paragraph 31.
32. It does not admit paragraph 32 and refers to and repeats paragraphs 13(c)(i) and (ii) and 13(f) herein.
33. It does not admit paragraph 33 and says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, and the length of time between the periods referred to in paragraph 31 of the statement of claim, the time of the Murrindindi Fire and the unknown “service life” of the Feeder line (as that term is defined in the statement of claim), the class of persons described in paragraph 33 of the statement of claim was an indeterminate class of persons.
34. As to paragraph 34:
- (a) save to the extent that any persons may have had control over forces, circumstances, events or occurrences external to the assets and component parts of the Murrindindi assets and which were capable of having an impact upon or damaging the Murrindindi assets so as to cause a discharge of electricity, it admits that the members of the public described in paragraph 33 of the statement of claim had, or were likely to have, no ability to prevent or

minimize the risk of electricity discharges of the kind referred to in paragraph 32 of the statement of claim;

- (b) it otherwise does not admit that paragraph and says further:
- (i) if any dependency existed (which is denied) the dependency was upon the CFA and/or the DEPI Secretary and/or Victoria Police (or the agencies which from time to time had the functions and duties of those agencies) meeting the duties owed by them as alleged herein;
 - (ii) having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, and the length of time between the periods referred to in paragraph 31 of the statement of claim, the time of the Murrindindi Fire and the unknown “service life” of the Feeder line, the class of persons described in paragraph 33 of the statement of claim was an indeterminate class of persons;
 - (iii) at all material times:
 - (1) insurance cover for losses caused by bushfire was available to persons residing in Victoria and the claimants did or were able to protect themselves against the risk of bushfire to their property or business undertakings by arranging appropriate insurance cover;
 - (2) in the premises the claimants were not vulnerable to property damage or economic loss as a result of fire.

35. It does not admit paragraph 35 and says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, and the length of time between the periods referred to in paragraph 31 of the statement of claim, the time of the Murrindindi Fire and the unknown “service life” of the Feeder line, the class of persons described in paragraph 33 and 34 of the statement of claim was an indeterminate class of persons.
36. As to paragraph 36:
- (a) it denies that SECV or ES-Victoria owed the SECV duty as defined in that paragraph to the claimants or to any other person;
 - (b) it says further that SECV or ES-Victoria did not owe any other duty of care to any or all of the claimants;
 - (c) it says further that having regard to paragraph 14(e) of the statement of claim, the definition of “fire area” in paragraph 14(f) of the statement of claim and the definition of “affected areas” in paragraph 14(g) of the statement of claim, and the length of time between the periods referred to in paragraph 31 of the statement of claim, the time of the Murrindindi Fire and the unknown “service life” of the Feeder line, the class of persons to whom the SECV duty is alleged to be owed was indeterminate;
 - (d) further or in the alternative, it denies that SECV or ES-Victoria owed the SECV duty or any other duty of care to avoid acts or omissions which could cause loss and damage of such magnitude or to a class of persons of such magnitude that the potential loss and damage or class of persons would be out of all proportion to the seriousness of the act or omission or the extent of the want of care, if any, which resulted in the act or omission;
 - (e) further or in the alternative, it denies that SECV or ES-Victoria owed the SECV duty or any other duty of care to any persons who were not vulnerable to the risk of property damage or economic loss as a result of fire and says that such persons included:
 - (i) the State of Victoria and its instrumentalities;
 - (ii) the Commonwealth of Australia and its instrumentalities;

- (iii) owners of timber plantations within the distribution network area;
 - (iv) persons who had protected themselves or were capable of protecting themselves against the risk of property damage or economic loss as a result of bushfire by arranging appropriate insurance cover;
 - (v) persons who by reason of measures which ought to have been taken by the CFA and/or the DEPI Secretary and/or Victoria Police in accordance with the duties owed by the CFA and/or the DEPI Secretary and/or Victoria Police as pleaded herein would not have suffered personal injury loss or damage, property damage or economic loss;
- (f) further or in the alternative, it denies that SECV or ES-Victoria owed the SECV duty or any duty of care to:
- (i) persons who were too physically remote from the Murrindindi assets for it to be reasonably foreseeable that they may be electrocuted or otherwise injured as a consequence of:
 - (1) electricity being discharged from the assets forming part of the Murrindindi assets; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling or being damaged;
 - (ii) persons having an interest in real or personal property that was too physically remote from the Murrindindi assets for it to be reasonably foreseeable that the property may be damaged as a consequence of:
 - (1) electricity being discharged from the assets forming part of the Murrindindi assets; or
 - (2) infrastructure or assets forming part of the Murrindindi assets falling or being damaged;
- (g) further or in the alternative, it denies that SECV or ES-Victoria owed the SECV duty or any other duty of care to:
- (i) persons who were not present; or
 - (ii) persons who did not have an interest in real or personal property that was located,

- in the immediate vicinity of the Murrindindi assets;
- (h) it says that the claimants and the real and personal property in which they had an interest were located so remotely from the Murrindindi assets that they fell within the class of persons referred to in the previous two sub-paragraphs to whom SECV and ES-Victoria owed no duty of care;
- (i) further or in the alternative, it denies that SECV or ES-Victoria owed the SECV duty or any other duty of care to:
- (i) persons who were not present; or
 - (ii) persons who did not have an interest in real or personal property that was located; or
 - (iii) persons who did not carry on business;
- in the fire area or affected areas, in the periods referred to in paragraph 31 of the statement of claim.
- (j) further or in the alternative, it says that any duty of care (and the content thereof) which SECV or ES-Victoria owed to the claimants (which is denied) did not extend to requiring SECV or ES-Victoria to undertake steps out of all proportion to the magnitude of the risks which the steps were intended to avoid or the loss or damage likely to be thereby avoided;
- (k) further or in the alternative, it says that any duty of care (and the contents thereof) which it owed to the claimants (which is denied) did not extend to taking precautions against a risk of harm unless:
- (i) the risk was foreseeable; and
 - (ii) the risk was not insignificant; and
 - (iii) in the circumstances a reasonable person in SECV's or ES-Victoria's position would have taken those precautions;

Particulars

Sections 48(1) and 66(1) of the *Wrongs Act*.

- (l) it denies that:
- (i) the risk of harm alleged to have been suffered by the claimants was foreseeable;

Particulars

It refers to and repeats paragraph 13(c)(ii), 13(f) herein and the matters pleaded in sub-paragraphs (c), (f), (g), (h) and (i) of this paragraph.

- (ii) the risk of harm alleged to have been suffered by the claimants was not insignificant;

Particulars

It refers to and repeats paragraphs 13(c)(ii) and 13(f) herein and the matters pleaded in sub-paragraphs (d), (e), (f), (g), (h), (i) and (j) of this paragraph;

- (iii) in the circumstances a reasonable person in SECV's or ES-Victoria's position would have taken the precautions that the claimants allege ought to have been taken.

Particulars

It refers to paragraphs 13(c)(ii), 13(f), 35 and sub-paragraphs (c), (d), (e), (f), (g), (h), (i) and (j) of this paragraph.

- (m) it says further that the imposition of the SECV duty or any other duty of care to any or all of the claimants on SECV or ES-Victoria would be inconsistent with the principles in section 83 of the Wrongs Act, namely:
 - (i) each of SECV and ES-Victoria was a public authority within the meaning of section 79 of the Wrongs Act;

Particulars

- (i) In respect of SECV: SEC Act sections 4(1), 12; Wrongs Act section 79 paragraph (c) of the definition of "public authority".
- (ii) In respect of ES-Victoria: SOE Act section 14, 1993 Order; EI Act sections 21, 23; Wrongs Act section 79 paragraphs (a), (c), (e).
- (iii) Wrongs Act section 87(1).
- (ii) the functions required to be exercised by SECV and ES-Victoria are limited by the financial and other resources reasonably available to them for the purpose of exercising those functions; and

- (iii) the functions required to be exercised by SECV and ES-Victoria are to be determined by reference to the broad range of their activities, and not merely by reference to the matter to which this proceeding relates.

Particulars

- (i) In respect of SECV: SEC Act sections 4(1), 12.
- (ii) In respect of ES-Victoria: 1993 Order; EI Act section 23.

37. It denies paragraph 37, refers to and repeats paragraphs 13(c)(ii), 13(f) and 36 above, and says further:

- (a) if the conductor failure was a necessary condition of the occurrence of the Murrindindi Fire, which is denied, it is not appropriate that the scope (if any, which is denied) of SECV's, ES-Victoria's or ~~SP AusNet's~~ AusNet Services' liability to any claimant extend to any harm to such claimant so caused (which is denied), because the ignition was causally too remote from the harm; and

Particulars

- (i) The incidence of conductor failure in the distribution network is low in central areas characterised by undulating terrain.
 - (ii) ~~SP AusNet's~~ AusNet Services refers to and repeats paragraphs 13(c)(ii) and 13(f) herein.
- (b) it was not reasonably foreseeable prior to 7 February 2009 that the Red Phase Conductor would fail on 7 February 2009 and lead to a fire start; and
 - (c) a finding that SECV or ES-Victoria breached the SECV duty or any other duty of care to the complainants would be inconsistent with the principles in section 83 of the Wrongs Act set out in paragraph 36(m) above.

38. It does not admit paragraph 38.

39. It denies paragraph 39.

40. It denies paragraph 40.

41. It does not plead to paragraphs 41 to 66 which contain no allegations against it.

67. As to paragraph 67:

- (a) in respect of sub-paragraph (a):
 - (i) subject to production of the Powerline Contract and the UAM Contract and reference to the full terms and effect thereof it admits that pursuant

to the Powerline Contract and the UAM Contract ~~SP AusNet~~AusNet Services had the contractual rights alleged;

- (ii) it says further that the contractual rights referred to in sub-paragraph (a) could be exercised in the manner and circumstances provided by the Powerline Contract and the UAM Contract and not otherwise;
 - (iii) it says further that the contractual rights referred to in sub-paragraph (a) could be exercised at ~~SP AusNet's~~AusNet Services' discretion and that ~~SP AusNet~~AusNet Services was under no duty to exercise them at all or in any particular manner or circumstance;
 - (iv) it says further that the exercise by ~~SP AusNet~~AusNet Services of the contractual rights conferred upon it by the Powerline Contract and the UAM Contract was subject to and limited by ~~the requirements imposed by the technical regulatory framework, the economic regulatory framework, and~~ good industry practice and such rights could not be exercised otherwise than in accordance with those requirements.
- (b) in respect of sub-paragraph (b):
- (i) in response to (i), it refers to and repeats sub-paragraph (a) above;
 - (ii) in response to (ii), it admits that from time to time, and solely in its discretion, it exercised the contractual rights referred to in sub-paragraph (a) in a manner and circumstances provided by the Powerline Contract and the UAM Contract and consistent with ~~the requirements imposed by the technical regulatory framework, the economic regulatory framework and~~ good industry practice and not otherwise;
 - (iii) it otherwise does not admit the allegations therein.
- (c) it admits that it relied upon UAM to perform UAM's obligations under the Powerline Contract and the UAM Contract and that such performance was intended to assist ~~SP AusNet~~AusNet Services to discharge its obligations under the ESMS, but it otherwise denies sub-paragraph (c);
- (d) it refers to and repeats sub-paragraphs (a)-(c) above but otherwise denies the allegations in sub-paragraph (d).

- (e) it denies sub-paragraph (e).
 - (f) it denies sub-paragraph (f).
68. It refers to and repeats paragraphs 8 to 20 above and otherwise denies paragraph 68.
69. As to paragraph 69:
- (a) it denies subparagraph (a);
 - (b) insofar as it contains allegations against it, it denies sub-paragraph (b);
 - (c) it does not plead to sub-paragraph (c) which makes no allegations against it.
70. It does not plead to paragraphs 70 – ~~188~~245 as they contain no allegations against it.
71. It does not admit paragraph ~~189~~246.

CONCURRENT WRONGDOING CLAIMS – WRONGS ACT 1958 (VIC) Part IVAA

72. In further answer to the whole of the claims made by the claimants, ~~SP AusNet~~AusNet Services says that:
- (a) the claims by the claimants are or include claims for economic loss and/or damage to property made in an action for damages arising from alleged failures by ~~SP AusNet~~AusNet Services, SECV or ES-Victoria to take reasonable care (the **economic loss and property damage claims**);
 - (b) the economic loss and property damage claims are apportionable claims within the meaning of sections 24AE and 24AF(1)(a) of the *Wrongs Act* to which Part IVAA of the *Wrongs Act* applies;
 - (c) if any alleged act or omission by it, SECV or ES-Victoria caused any of the alleged loss or damage that is the subject of the economic loss and property damage claims (which is denied) then on the grounds alleged below, the following parties are concurrent wrongdoers in relation to the economic loss and property damage claims within the meaning of section 24AH(1) of the *Wrongs Act*:
 - (i) UAM; and

- (ii) the Secretary to the Department of Environment and Primary Industry
(**DEPI Secretary**).

Asset Inspection by UAM

Common law duty to the claimants

73. UAM is and was at all material times a company incorporated pursuant to law and capable of being sued.
74. Pursuant to the Powerline Contract and the UAM Contract, UAM agreed to provide to ~~SP AusNet~~AusNet Services services in respect of asset inspection on the terms and conditions set out therein.
75. The asset inspection services included, inter alia, the matters referred to in paragraph 19A herein.
- 75A. The Powerline Contract provided that UAM shall execute and complete the whole of the works described in any order in every respect to the satisfaction of AusNet Services in accordance with the Contract Documents being the Powerline Agreement, the General Terms and Conditions – Services and any Powerline Works Order: Powerline Agreement, Cl 7, 8, 9, 23, and Schedule 1; General Terms and Conditions – Services, Cl 3.
- 75B. The Powerline Contract contained the following terms in the Powerline Agreement:
- (a) UAM warrants that all work undertaken under the terms of the Powerline Contract shall be performed in a good and proper manner and warrants and guarantees all of its works against faulty or inadequate workmanship for a period of 12 months from the date of completion: Powerline Agreement, Cl 8;
- (b) UAM shall provide and maintain in a reasonable condition at its own risk and expense all labour, supervision, plant, vehicles, tools, equipment and every other service and item which is necessary for, or incidental to the carrying out of the works: Powerline Agreement, Cl 11(a);
- (c) UAM shall carry out all work in a good, proper and professional manner and with due expedition and in accordance with good practice having regard to economy and safety, and shall at all times exercise due care and skill in accordance with best international practices: Powerline Agreement, Cl 11(c) and 23.4;

- (d) AusNet Services has the right to visit work sites both during and after inspections or repair work by UAM to audit the practices and procedures undertaken by UAM to ensure that they are being maintained to AusNet Services' standards: Powerline Agreement, CI 16;
- (e) UAM shall be responsible to audit its employees and sub-contractors for quality, performance and health and safety, and shall make available the results of these audits to AusNet Services: Powerline Agreement, CI 16(e);
- (f) UAM shall provide AusNet Services with an inspection of assets which includes the reporting and transfer of data relating to the inspection of assets and where required by the Standards, the carrying out of preventative maintenance: Powerline Agreement, CI 23.1;
- (g) UAM shall, wherever it is applicable, comply with, inter alia, the Electricity Supply and Construction Regulations 1988 (Vic), the Linesworker's Handbook, the Line Inspection Manual: Powerline Agreement, CI 23.4;

75C. The Powerline Contract contained the following terms in Schedule 1 to the Powerline Agreement:

- (a) UAM shall provide to AusNet Services performance reports monthly, audit plans yearly, audit results monthly, and asset condition reports as required: Powerline Agreement, Schedule 1, (a);
- (b) UAM shall provide the service of packaging works identified through asset inspections into works construction files, based on AusNet Services' maintenance policies: Powerline Agreement, Schedule 1, (c);
- (c) UAM shall provide inspection activities including:
 - (i) inspecting for evidence of defects in cross arms, insulators, conductors and their attachment ties, plus all other ancillary gear mounted on poles;
 - (ii) recording all observations via a portable data entry device;
 - (iii) provision of detailed assessment of pole top structures/hardware including advice on any replacement specification;
 - (iv) provision of the service of a visual inspection of pole top assembly and recording the asset condition, including the inspection of line clearances;Powerline Agreement, Schedule 1, "Inspection Units";

75D. The Powerline Contract contained the following terms in the General Terms and Conditions – Services:

- (a) UAM shall perform the Services specified in the orders for works: General Terms and Conditions – Services, Cl 2 and 3(1);
- (b) AusNet Services may inspect or test or inspect and test the Services provided by UAM and AusNet Services may require UAM to re-perform any Services if, in the reasonable opinion of AusNet Services, the Services will not or do not comply with the Powerline Contract: General Terms and Conditions – Services, Cl 3.2 and 3.3;
- (c) UAM shall comply with all applicable legislation, regulations, ordinances, and all other legal requirements in the provision of the Services: General Terms and Conditions – Services, Cl 4.1;
- (d) UAM must perform the Services on the date or within the period stated in the orders for works: General Terms and Conditions – Services, Cl 6.1;
- (e) UAM warrants that the Services provided:
 - (i) comply in all respects with the quality and description of the Services; and
 - (ii) comply with all relevant statutory requirements and all relevant Australian Standards;

General Terms and Conditions – Services, Cl 7;
- (f) UAM will be liable for all damages, actions, claims, proceedings, injury, loss and expenses whatsoever incurred (including, but not limited to economic loss, loss of profit and consequential loss and damage) incurred by AusNet Services arising out of the failure of UAM to comply with its obligations under the Powerline Contract, including, but not limited to the failure of the Services to meet the requirements of the Powerline Contract: General Terms and Conditions – Services, Cl 8;
- (g) UAM indemnifies and agrees to keep indemnified AusNet Services, its agents and employees from and against all liability of AusNet Services, its agents and employees for any claims for nuisance, damage, loss, injury to, or in respect of persons or property which nuisance, damage, loss or injury arises out of, or is in respect of UAM's act or neglect or the act or neglect of

an agent or servant of UAM in the course of the performance of the Powerline Contract: General Terms and Conditions – Services, Cl 9;

- (h) all personnel working under the Powerline Contract were required to meet the minimum requirements with regards to training as reasonably required by AusNet Services: General Terms and Conditions – Services, Cl 16.1;
- (i) AusNet Services may audit the training undertaken by personnel working under the Powerline Contract to test their knowledge and skills to carry out the provision of the Services and if not satisfied with the audit results, may direct UAM to not allow that person to be involved in the provision of the Services until such time as he or she has obtained the required training: General Terms and Conditions – Services, Cl 16.2 and 16.3;
- (j) UAM must ensure that all personnel employed by UAM to perform functions pursuant to the Powerline Contract are fully trained and competent and possess the necessary skills and ability to provide quality assurance of workmanship to ensure fulfilment of the obligations of UAM pursuant to the Powerline Contract: General Terms and Conditions – Services, Cl 17.1;
- (k) UAM's quality system or system elements must be in accordance with the relevant Australian Standard, and may be audited by AusNet Services to establish or review conformance: General Terms and Conditions – Services, Cl 24.2 and 24.3;

75E. It was an implied term of the Powerline Contract that UAM would exercise reasonable care and skill in the provision of services pursuant to the Powerline Contract (the **Powerline implied term**).

Particulars

The term was implied by law into the Powerline Contract being a contract for the performance of professional services.

75F. At all relevant times, UAM held itself out to AusNet Services to be fully experienced, competent and qualified with respect to carrying out the works required under the Powerline Contract and, to UAM's knowledge, in reliance thereon, AusNet Services agreed to engage UAM to carry out the works in accordance with the Powerline Contract.

76. The UAM Contract provided that UAM shall execute and complete the whole of the works described in any Works Order in every respect to the satisfaction of ~~SP AusNet~~AusNet Services in accordance with the Contract Documents being the Instrument of Agreement, the Special Conditions, the Terms and Conditions and any Works Order: Instrument of Agreement, Clauses 1 and 2.
77. The UAM Contract contained the following terms in the Terms and Conditions:
- (a) UAM shall comply with all applicable laws, by-laws, ordinances, regulations, proclamations, orders and rules and with the lawful requirements of the relevant authorities that may be in any way related to the Contract Works: Terms and Conditions, Clause 2.7.2, 1.1.16;
 - (b) all workmanship shall be of the highest quality and standard and the Contract Works shall be carried out competently, regularly, diligently, with due expedition, without delay and in accordance with best industry practice and comply with all applicable Australian Standards and/or other referenced codes, and the requirement of relevant Statutory Authorities and the Law: Terms and Conditions, Clause 8.1, 1.1.16;
 - (c) UAM, in agreeing to perform the Contract Works, represents and warrants to ~~SP AusNet~~AusNet Services that it has the necessary skills, resources and experience to successfully perform the Contract Works in accordance with the requirements of the UAM Contract, and that it is appropriately licensed or registered where this is required by law: Terms and Conditions, Clause 8.2, 1.1.16.
78. The UAM Contract contained the following terms in the Special Conditions:
- (a) UAM must ensure that it supplies and maintains a trained and competent workforce at all times: Special Conditions, "Training";
 - (b) all personnel employed by UAM to perform work must meet the minimum requirements set out in the special conditions with regards to ~~SP AusNet~~AusNet Services minimum training and as reasonably required by ~~SP AusNet~~AusNet Services: Special Conditions, "Training";
 - (c) the training courses for asset inspectors listed in the Special Conditions of the UAM contract are the minimum training requirements for asset inspectors and it was the responsibility of UAM to ensure that all personnel engaged

under the UAM contract had completed the appropriate recognised training courses and were skilled and competent to perform the requested tasks, such that UAM may need to supply additional training in order to comply with all government guidelines and regulations for the tasks being undertaken: Special Conditions, "Training";

(d) all training unless otherwise agreed by ~~SP AusNet~~AusNet Services must be conducted by a Registered Training Organisation: Special Conditions, "Training"; and

(e) UAM in providing services under the UAM Contract, shall at all times carry out all activities in accordance with and comply with, inter alia, ~~SP AusNet's~~AusNet Services' technical standards and procedures and such other standards as ~~SP AusNet~~AusNet Services may from time to time require: Special Conditions, "Standards of Quality and Guidelines".

79. Schedule 2 to the Terms and Conditions contained the following terms of the UAM Contract regarding the Scope of Works to be carried out by UAM under the UAM Contract:

(a) the core components of the UAM Contract include asset inspection services, aerial inspection services, asset and aerial inspection coordination and defective private electric line management: Schedule 2, "Introduction";

(b) UAM is engaged to undertake a range of activities at each individual pole and/or site throughout ~~SP AusNet's~~AusNet Services' distribution and sub-transmission network, including an initial ground-level inspection of assets, followed by subsequent aerial inspections and maintenance activities as required: Schedule 2, "Introduction";

(c) the ground level activities that UAM was required to undertake included:

(i) pole inspection involving ground line condition inspection and treatment of wood, concrete or steel poles in accordance with the Asset Inspection Manual 30-4111;

(ii) line hardware inspection involving condition assessment of all attached hardware and conductors at each pole/site as per the Asset Inspection Manual 30-4111, including inter alia:

(A) defective cross-arms;

- (B) defective insulators;
 - (C) defective conductors, including LV servicing and conductor attachments/mid-span splices/servicing points of attachment at customer installations;
 - (D) low conductors and LV Servicing as per ESMS Management Plan 30-2654;
- (d) all defects detected during ground level activities are to be reported with the appropriate priority and Q4 Failure Codes/Required Information as outlined in ~~SP AusNetAusNet~~ AusNet Services Distribution Network Asset, Inspection Information, Appendix A: "Q4 Failure Code and Reporting Guide for Asset Inspectors": Schedule 2, "Ground Level Activities";
 - (e) failure to accurately identify any priority defect that is found to be either a contributing factor, or sole cause, of a major incident (wildfire, fatality etc) would result in immediate contract suspension and cessation of all works undertaken by UAM: Schedule 2, "Ground Level Activities";
 - (f) UAM must complete certain mandatory minor maintenance activities at the time of inspection and should complete certain discretionary maintenance activities at the time of inspection: Schedule 2, "Ground Level Activities";
 - (g) UAM must complete certain minor maintenance activities at the time of assessing reported defective attachments in the same zone: Schedule 2, "Aerial Activities";
 - (h) UAM was required to undertake a ground level and aerial activities coordination function to ensure all inspection targets are met and an even flow of work maintained between asset inspectors and the ~~SP AusNetAusNet~~ AusNet Services Electricity Maintenance Division: Schedule 2, "Ground Level and Aerial Activities Coordination";
 - (i) in undertaking ground level and aerial activities coordination, UAM is required to compile an asset inspection schedule prior to the commencement of each inspection year; maintain and update the schedule with relevant information; undertake exception reporting to ensure that no inspections are scheduled beyond their due dates; ensure all inspection targets are met, including the 3-week inspection package deadline and HBRA Asset Inspection; undertake

inspection data management between the Q4 Asset Management Database and Portable Field Devices; verify completed inspection data prior to upload into the Q4 Asset Management Database; prepare AM/FM maps for individual Asset Inspection packages; and coordinate Aerial Inspection activities and deadlines: Schedule 2, "Ground Level and Aerial Activities Coordination";

- (j) in undertaking asset inspection, UAM was required to capture all information electronically via hand-held PDE (portable data entry) device and record all defects identified using the appropriate Q4 "Failure Code" and Priority as set out in the "Q4 Failure Code and Reporting Guide for Asset Inspectors" (~~SP AusNet~~AusNet Services Distribution Network Asset, Inspection Information, Appendix A: "Q4 Failure Code and Reporting Guide for Asset Inspectors"): Schedule 2, "Information and Data Recording";
- (k) UAM was required to undertake frequent audits of all field staff to ensure quality of works/compliance with policies and procedures and adherence to HS&E policies and work practices and the frequency of such audits would be a minimum of bi-monthly for each asset inspector: Schedule 2, "Compliance Auditing";
- (l) in addition to its internal auditing, UAM must engage at its expense an independent auditor at least once in any 12-month contract period to undertake audits on all UAM asset inspectors and UAM internal auditors: Schedule 2, "Compliance Auditing";
- (m) UAM was required to submit to ~~SP AusNet~~AusNet Services a monthly report outlining the progress of various inspection regimes, the number of completed units for the month, the results, trends and progress of internal audits and other matters: Schedule 2, "Reporting".

- 80. Pursuant to the UAM Contract, UAM agreed to indemnify and keep indemnified ~~SP AusNet~~AusNet Services and its officers, employees and agents against all claims, demands, proceedings, liabilities, costs, charges and expenses arising as a result of any act, neglect or default of UAM, its officers, employees or agents related to its execution of the Contract Works.

Particulars

UAM Contract, Terms and Conditions clauses 5, 1.1.16.

81. It was an implied term of the UAM Contract that UAM would exercise reasonable care and skill in the provision of services pursuant to the UAM Contract (the **UAM implied term**).

Particulars

The term was implied by law into the UAM Contract being a contract for the performance of professional services.

82. At all relevant times, UAM held itself out to ~~SP AusNet~~ AusNet Services to be fully experienced, competent and qualified with respect to carrying out the works required under the UAM Contract and, to UAM's knowledge, in reliance thereon, ~~SP AusNet~~ AusNet Services agreed to engage UAM to carry out the works in accordance with the UAM Contract.

Particulars

Recital B of the UAM Contract.

83. Throughout the term of the Powerline Contract and the UAM Contract, UAM provided to ~~SP AusNet~~ AusNet Services asset inspection services under the Powerline Contract and the UAM Contract throughout the distribution network including in respect of the Murrindindi assets.
84. In the premises, throughout the term of the Powerline Contract and the UAM Contract, UAM had responsibility for and control over:
- (a) asset inspection throughout the distribution network, including on the Murrindindi assets;
 - (b) asset inspection training for asset inspectors who conducted asset inspection throughout the distribution network, including on the Murrindindi assets;
 - (c) the implementation and observance by asset inspectors of the asset inspection requirements set out in the Line Inspection Manual or the Asset Inspection Manual as appropriate in conducting asset inspections throughout the distribution network, including on the Murrindindi assets;
 - (d) the identification through asset inspection of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the distribution

network including poles, conductors and associated hardware on the Murrindindi assets;

- (e) undertaking maintenance activities in response to defects, faults, deterioration in condition and incorrect assembly identified through asset inspection of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi assets;
- (f) reporting to ~~SP AusNet~~AusNet Services defects, faults, deterioration in condition and incorrect assembly of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi assets and notifying ~~SP AusNet~~AusNet Services of necessary or desirable maintenance and replacement of such assets.

85. Throughout the term of the Powerline Contract and the UAM Contract, UAM knew or ought to have known of the terms of the Powerline Contract and the UAM Contract set out above and the matters referred to in the previous paragraph.

86. Throughout the term of the Powerline Contract and the UAM Contract, it was reasonably foreseeable to UAM that:

- (a) any failure by an asset inspector to implement and observe the asset inspection requirements set out in the Line Inspection Manual or the Asset Inspection Manual as appropriate in conducting asset inspections throughout the distribution network, including on the Murrindindi assets;
- (b) any failure by an asset inspector to identify defects, faults, deterioration in condition or incorrect assembly of assets forming part of the distribution network including poles, conditions and associated hardware on the Murrindindi assets;
- (c) any failure by an asset inspector to undertake, or to procure the undertaking of, maintenance activities in response to defects, faults, deterioration in condition or incorrect assembly identified through asset inspection of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi assets;
- (d) any failure by UAM to report to ~~SP AusNet~~AusNet Services defects, faults and deterioration in condition or incorrect assembly of assets forming part of the distribution network including poles, conductors and associated hardware

on the Murrindindi assets or to notify ~~SP AusNet~~AusNet Services of necessary or desirable maintenance or replacement of such assets;

could result in the unexpected failure before the next scheduled asset inspection of assets forming part of the distribution network, including conductors and associated hardware on the Murrindindi assets.

87. Further, throughout the term of the Powerline Contract and the UAM Contract it was reasonably foreseeable to UAM that the risks of the unexpected failures referred to in the previous paragraph would increase if the asset inspectors who conducted asset inspections throughout the distribution network, including on the Murrindindi assets, were not adequately trained in asset inspection or failed to exercise due skill, care and diligence in conducting asset inspection.

88. Further, throughout the term of the Powerline Contract and the UAM Contract, UAM knew or ought reasonably to have known that:

- (a) ~~SP AusNet~~AusNet Services used the Sawmill Span to distribute electricity;
- (b) if a conductor failed, a discharge of electricity could occur leading to ignition of flammable material in the vicinity of the assets;
- (c) such fire could spread over a wide geographic area;
- (d) such fire could cause death or injury to persons and loss of or damage to property within the fire area and consequential losses including economic losses;
- (e) such fire could cause damage to property within the affected area and consequential losses including economic losses;
- (f) such fire or its consequences could:
 - (i) disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
 - (ii) impede the use or amenity of property located in the fire area or affected areas; or
 - (iii) reduce the value of property or businesses located in the fire area or affected areas;

and thereby cause economic loss to those persons or the owners of those properties or businesses;

(collectively the matters referred to in sub-paragraphs (b)-(f) are referred to as **the risks**).

89. Throughout the term of the Powerline Contract and the UAM Contract, the claimants:

- (a) had no ability or no practical or effective ability, to prevent or minimise the risks;
- (b) were vulnerable to the impact of the risks; and consequently;
- (c) were to a material degree dependent for the protection of their persons and property, upon UAM exercising reasonable care in the discharge of its obligations under the Powerline Contract and the UAM Contract.

90. In the premises, throughout the term of the Powerline Contract and the UAM Contract, UAM owed to each of the claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken by agents, contractors or other persons engaged by it,

in the discharge of UAM's obligations under the Powerline Contract and the UAM Contract to ensure that any conductors and associated hardware on the Murrindindi assets were adequately inspected and that defects, faults, deterioration in condition or incorrect assembly were adequately identified, reported to ~~SP AusNet~~AusNet Services and addressed by appropriate maintenance activities (the **UAM duty**).

91. The UAM duty required UAM to:

- (a) by its officers, servants or agents, conduct asset inspections on the Murrindindi assets with due care, skill and diligence;
- (b) by its officers, servants or agents, conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi assets;
- (c) exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Line Inspection Manual or the Asset Inspection Manual as appropriate in conducting asset inspections on the Murrindindi assets;

- (d) take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (e) take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (f) take reasonable steps to report to ~~SP AusNet~~AusNet Services defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets and address them by appropriate maintenance activities.

Breach of duty to the claimants

- 92. UAM failed, following the March 2005 asset inspection, the May 2008 asset inspection, or at any time prior to 7 February 2009, to identify, notify ~~SP AusNet~~AusNet Services of, or conduct maintenance necessary to rectify, any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets.
- 93. UAM's failure, following the March 2005 asset inspection, the May 2008 asset inspection, or at any time prior to 7 February 2009, to identify, notify ~~SP AusNet~~AusNet Services of, or conduct, or procure the conducting of, maintenance necessary to rectify, any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets was due to the following breaches of the UAM duty:
 - (a) failure by its officers, servants or agents, to conduct asset inspections on the Murrindindi assets with due care, skill and diligence;
 - (b) failure by its officers, servants or agents, to conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi assets;
 - (c) failure to exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Line Inspection Manual or the Asset Inspection Manual as appropriate in conducting asset inspections on the Murrindindi assets;

- (d) failure to take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (e) failure to take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (f) failure to take reasonable steps to report SPI defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets.

Causation

94. If the Murrindindi fire was ignited by reason of a failure of the conductor on the Sawmill Span that arose from any breach of any duty of care owed by ~~SP Ausnet~~ AusNet Services to the claimants (which is denied), then the Murrindindi fire was caused by the breaches by UAM of the UAM duty alleged above.

Damage

95. If the claimants suffered any loss and damage as a result of the Murrindindi fire (which is not admitted) such loss and damage was caused by the breaches by UAM of the UAM Duty alleged above.
96. The Murrindindi fire was a natural and foreseeable consequence of the breaches by UAM of the UAM Duty alleged above.
97. In the premises, if, which is denied, ~~SP Ausnet~~ AusNet Services is liable to the claimants in respect of the economic loss and property damage claims, then UAM is a person who is one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage and/or loss as aforesaid.

Fuel Management by DEPI Secretary

98. At all relevant times the DEPI Secretary was a body corporate capable of being sued in its corporate name.

Particulars

- (i) Under section 3 of the *Forests Act 1958* (Vic) (the **Forests Act**), “Secretary” means the body corporate established by Part 2 of

the *Conservation, Forests and Lands Act 1987* (Vic) (the **Conservation, Forests and Lands Act**).

- (ii) Under sub-section 6(1) of that Part, the person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004* (Vic)) of the Department of Sustainability and Environment (DSE) and the successors in office of that person are a body corporate under the name "Secretary to the Department of Sustainability and Environment."
- (iii) Further, under sub-section 6(2) of that Part (inter alia), the Secretary may sue and be sued in its corporate name.
- (iv) Under Schedule 1 of the *Public Sector Reform (Miscellaneous Amendments) Act 1998* (Vic), in section 6 of the Conservation, Forests and Lands Act for "Department of Conservation and Natural Resources" (wherever occurring) was substituted "Department of Sustainability and Environment".
- (v) By notice published in the Victoria Government Gazette on 9 April 2013, the Department of Sustainability and Environment changed its name to the Department of Environment and Primary Industries (**DEPI**).

Statutory duties to the claimants

99. At all relevant times, the DEPI Secretary was statutorily required to carry out proper and sufficient work for the prevention and suppression of fire in every State forest and national park and on all protected public land (the **First DEPI Fire Duty**).

Particulars

- (i) Sub-section 62(2) of the Forests Act.
- (ii) A statutory duty in substantially the same terms as the First DEPI Fire Duty was initially imposed on the Forests Commission after the extensive and devastating wildfires in Victoria in 1939. The First DEPI Fire Duty was subsequently assumed, by operation of the provision referred to in subparagraph (i) above, by the DEPI Secretary.
- (iii) Recognition of the statutory duty is referred to on p1-2 of the DEPI's Fire Management Manual (version 8.1) – Fire Suppression (the **DEPI Fire Management Manual**) published by the DEPI in 2006, a copy of which may be inspected at the offices of the solicitors for ~~SP AusNet~~ AusNet Services by appointment.

100. At all material times, the DEPI Secretary was statutorily required out of the moneys available for the purpose to make provision for plans, work and plant for the

prevention and suppression of fires within fire protected areas being State forests, national parks and protected public land.

Particulars

Sub-section 20(b) of the Forests Act.

101. At all material times, a large proportion of the area to the north/north east, east and south east of Murrindindi comprised State forests, national parks and/or protected public land (the **Forested Area**) and townships and/or communities and/or residential homes adjacent or proximate to the Forested Area (collectively **Communities**).

Particulars

- (i) The Forested Area included various State forests and national parks and a State park, including the Toolangi State forest, the Black Range State forest, Marysville State forest, Big River State forest, the Yarra Ranges National Park, the Lake Eildon National Park and Cathedral Range State Park.
- (ii) The Forested Area included the Yarra Ranges National Park comprising all those pieces or parcels of land containing 77 190 hectares, more or less, situate in the Parishes of Brimbonga, Bullung, Buxton, Coornburt, Glenwatts, Gracedale, Granton, Manango, Monda, Narbethong, Noojee, St. Clair, Steavenson, Taponga, Toorongu, Torbreck, Youarrabuck and Yuonga, Counties of Anglesey, Buln Buln, Evelyn, Tanjil and Wonnangatta being the land delineated and coloured pink or coloured blue excepting the roads shown as excluded in the plans lodged in the Central Plan Office and numbered N.P. 102A/2 and N.P. 102B/2 (the **Yarra Ranges National Park**).
- (iii) The Forested Area included the Lake Eildon National Park comprising all those pieces and parcels of land containing 27 750 hectares, more or less, situate in the Parishes of Banyarbite, Darlingford, Eildon, Howqua West, Jamieson, Lodge Park, Thornton and Wappan, Counties of Anglesey and Wonangatta, being the land delineated and coloured pink excepting therefrom the roads shown as excluded in the plans lodged in the Central Plan Office and numbered N.P. 5/2 and N.P. 5A (the **Lake Eildon National Park**).
- (iv) The Forested Area included the Cathedral Range State Park comprising all those pieces or parcels of land containing 3616 hectares, more or less, situate in the Parishes of Taggerty and Torbreck, County of Anglesey, being the land delineated and bordered red excepting therefrom the roads shown as excluded also excepting therefrom land bordered blue in a plan lodged in

the Central Plan Office and numbered N.P. 41/2 (the **Cathedral Range State Park**).

- (v) The adjacent or proximate Communities as aforesaid included the townships of Narbethong, Marysville, Buxton, Taggerty and Rubicon.

102. At all material times, the Forested Area comprised State forests and national parks under sub-section 62(2) of the Forests Act which were State forests, national parks and a State park to which the First DEPI Fire Duty applied.

Particulars

- (i) The State forests within the Forested Area were State forests under the Forests Act, being either reserved forests under sub-section 42(1) of, and Schedule Two to, the Forests Act, and/or protected forests within the meaning of the Forests Act.
- (ii) The Toolangi State forest, the Black Range State forest, the Marysville State forest and the Big River State forest, are State forests as referred to in the preceding sub-paragraph hereof.
- (iii) By section 3 of the Forests Act, a national park for the purposes of sub-section 62(2) of the Forests Act means land that is or is part of a park within the meaning of the *National Parks Act 1975* (Vic) (the **National Parks Act**).
- (iv) By section 3 and sub-section 17(1) of, and Part 39 of Schedule 2 to, the National Parks Act, the Yarra Ranges National Park is a park under the National Parks Act.
- (v) By section 3 and sub-section 17(1) of, and Part 7 of Schedule 2 to, the National Parks Act, the Lake Eildon National Park is a park under the National Parks Act.
- (vi) By section 3 and sub-section 17(1A) of, and Part 8 of Schedule 2B to, the National Parks Act, the Cathedral Range State Park is a park under the National Parks Act.

103. The First DEPI Fire Duty imposed on the DEPI Secretary a duty to carry out proper and sufficient planned works within the Forested Area to reduce the fuel hazard within the Forested Area by, among other things, undertaking planned burning (**planned burning**).

Particulars

The obligation arising from the duty as aforesaid is inferred from a proper construction of sub-section 62(2) of the Forests Act.

104. The First DEPI Fire Duty was owed by the DEPI Secretary to the claimants.

Particulars

- (i) The object of protecting the claimants is to be inferred from the proper construction of sub-section 62(2) of the Forests Act.
- (ii) ~~SP AusNet~~AusNet Services relies on the proper construction of the provision read in the context of the Act as a whole and the objectives discerned from the provisions thereof and the extrinsic material produced at the time of its enactment. Those extrinsic materials include the following.
- (iii) The 1939 Report of the Royal Commission to Inquire into the Causes of and Measures Taken to Prevent the Bush Fires of January 1939, and to Protect Life and Property and The Measures to be taken to Prevent Bush Fires in Victoria and to Protect Life and Property in the Event of Future Bush Fires by L.E.B Stretton (the **Stretton Report**).
- (iv) Chapter V of the Stretton Report is headed "The measures which are necessary or desirable to be taken by any and what corporations, persons or bodies to protect life and private and public property in the event of bush fires burning in Victoria."
- (v) Within Chapter V of the Stretton Report it is stated that "The greater part of what is to be discussed under the title to this chapter may be conveniently set forth in relation to the part which the Forests Commission ought to take in respect of the matters falling under this title....Control of all Forests. – The Forests Commission should be placed in complete control for fire prevention and suppression purposes, of all forests, except in those areas in respect of which it has been recommended that they should be exempted from control by any other department."
- (vi) The Stretton Report was the basis for the introduction of the *Forests Act 1939 (Vic)* to be read and construed as one with the *Forests Act 1928 (Vic)*. Section 4 of the *Forests Act 1939 (Vic)* provided that "It shall be the duty of the Commission to carry out in every State forest proper and sufficient work for fire prevention and control."
- (vii) Section 4 as aforesaid was the predecessor provision to sub-section 62(2) of the Forests Act.
- (viii) The Victorian Parliamentary debate of the Forests Bill 1939 discloses that the Bill was directed at the preservation of life and property including by means of fire prevention and control in State forests, consistent with the Stretton Report as aforesaid.
- (ix) During the course of the 1939 debate of the Forests Bill 1939 it was observed that:" I [Member Everard] commend the Minister on his Bill, but I would direct attention to the fact that many national parks are a grave source of fire danger. There is a national park at Kinglake. It is under the control of a committee of management, which, however has no money to spend on clearing the scrub, and so reducing the danger of fire to the neighbouring settlers. Several fires have originated in that area, and have done damage to orchard country. The committees managing national parks should be provided with money to enable them to protect State assets, as well as settlers' holdings, by taking adequate precautions against the outbreak of fire. As it is, the land owners are in fear and trembling as to whether there will be a

conflagration in those parks which may spread to their own properties.”: p2,242 of Hansard, 23 November 1939.

105. Further, at all relevant times, the DEPI Secretary was statutorily required to ensure that proper and sufficient measures were taken to protect the national parks and State parks within the Forested Area (the **National Parks Section of the Forested Area**) from injury by fire (the **Second DEPI Fire Duty**).

Particulars

- (i) Sub-section 17(2)(b) of the National Parks Act.
 - (ii) By section 3 and Part 2 of the Conservation, Forests and Lands Act, the DEPI Secretary is the relevant Secretary referred to in section 17(2)(b) of the National Parks Act.
 - (iii) The relevant national parks within the Forested Area were the Lake Eildon National Park and the Yarra Ranges National Park.
 - (iv) The relevant State park within the Forested Area was the Cathedral Range State Park.
106. The Second DEPI Fire Duty included an obligation to undertake planned burning in the National Parks Section of the Forested Area.

Particulars

The obligation arising from the duty as aforesaid is inferred from a proper construction of sub-section 17(2)(b) of the National Parks Act.

107. The Second DEPI Fire Duty was owed to the claimants.

Particulars

The object of protecting the class is to be inferred from a proper construction of sub-section 17(2)(b) of the National Parks Act.

Common law duty to the claimants

108. At all relevant times, the DEPI Secretary had a duty to carry out proper and sufficient work for the prevention and suppression of fire in every State forest, national park and State park and on all protected public land (collectively, the **Public Land Area**).

Particulars

Sub-section 62(2) of the Forests Act.

109. Further, at all relevant times, the DEPI Secretary was:

- (a) the relevant fire control authority for the Forested Area;
- (b) statutorily authorised to assign a fire hazard rating of "low" or "high" to any area of land within a fire protected area including the Forested Area.

Particulars

- (i) The DEPI Secretary was and is the fire control authority as prescribed by the ES Act.
 - (ii) By section 3 of the Forests Act, the State forests, national parks and State parks within the Forested Area were and are fire protected areas.
110. At all material times, the State forests, national parks, State parks and protected public land within the Forested Area and any lands within 1.5 kilometres of those forests, parks and land were fire protected areas within the meaning of the Forests Act.

Particulars

Sub-section 3(1) of the Forests Act.

111. At all material times, the DEPI Secretary was an authorised officer within the meaning and for the purposes of the Forests Act.

Particulars

Sub-sections 3(1) and 83(4) and Schedule 1 of the Conservation, Forests and Lands Act.

112. During the 10 years prior to 7 February 2009, there were successive codes of practice for fire management on public land:
- (a) the *Code of Practice for Fire Management on Public Land*, published by the Victorian Government Department of Conservation and Natural Resources in 1995 (the **1995 Code of Practice**); and
 - (b) the updated *Code of Practice – For Fire Management on Public Land (Revision no. 1)*, published by the Victorian Government Department of Sustainability and Environment in January 2006 (the **2006 Code of Practice**),
- (collectively the **DEPI Codes of Practice**).

Particulars

- (i) The 1995 Code of Practice is an approved code of practice in accordance with s 47 of the Conservation, Forests and Lands Act.
- (ii) The 1995 Code of Practice in section 4 defines “Departmental” by reference to the Department of Conservation and Natural Resources or its successors.
- (iii) The 1995 Code of Practice in section 4 defines “Secretary” by reference to the body corporate established by Part 2 of the Conservation, Forests and Lands Act, that is, the Department of Conservation and Natural Resources or its successors.
- (iv) The 2006 Code of Practice was made in accordance with sub-section 31(1) of the Conservation, Forests and Lands Act.

A copy of the DEPI Codes of Practice is available for inspection at the offices of the solicitors for ~~SP AusNet~~ AusNet Services by appointment.

113. At all relevant times, the DEPI Secretary had knowledge and expertise in relation to the prevention and suppression of bushfires in the Public Land Area and the risks and dangers of bushfires in the Public Land Area.

Particulars

- (i) The DEPI Codes of Practice provide a framework for fire management, procedure and practice on public land in Victoria.
- (ii) The 1995 Code of Practice records that much of the Australian continent is dry and fire-prone, the geography, vegetation and climate combine to produce one of the most severe fire environments in the world: 1995 Code of Practice, paragraph 1.
- (iii) The 2006 Code of Practice records that much of the Australian continent is fire-prone, particularly parts of Victoria where dry, windy summer conditions, combined with electrical storms, lead to frequent fires, which can be difficult to suppress and may cause significant economic damage: 2006 Code of Practice, paragraph 3.

114. Further, at all relevant times, the DEPI Secretary knew or ought reasonably to have known that excessive fuel hazard in the Public Land Area posed a significant bushfire risk.

Particulars

- (i) The DEPI is required by the DEPI Codes of Practice to attempt to establish promptly the place of origin and cause of all wild fires on public land: paragraph 104 of the 1995 Code of Practice; paragraph 258 of the 2006 Code of Practice.
- (ii) Under the DEPI Codes of Practice, the DEPI must, inter alia, consider fuel management on and around sites of known high

hazard and/or risk to human life and property on or adjacent to public land and where appropriate implement measures to reduce the possibility of wild fire ignitions: paragraph 109 of the 1995 Code of Practice; paragraph 263 of the 2006 Code of Practice.

115. Further or alternatively, at all material times the DEPI Secretary knew or ought to have known that:
- (a) fire severity depends on topography, weather and fuel conditions;
 - (b) fuel is the only factor over which the land manager is able to exercise control;
 - (c) fuel management burning is the only practical method of reducing fuel levels over large areas; and
 - (d) that the management of fuel hazard in strategic areas reduces the potential for spotting from an advancing wildfire, allows wildfire damage to be moderated and facilitates wildfire control activities.

Particulars

The North East Region Fire Protection Plan (Alexandra and Broadford Fire Districts) (the **Alexandra Fire Protection Plan**), page 29.

116. At all material times, the claimants had no authority or ability to carry out any work for the prevention and suppression of fire (including planned burning) in the Public Land Area which comprises each State forest, national park, State park and protected public land within the shaded area on the map annexed to this Defence and Counterclaim entitled Annexure 1 (the **Murrindindi Fire Area Public Land**).
117. In the premises, the claimants were vulnerable to injury from fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities and were dependent for protection against such injury upon the DEPI Secretary to ensure, alternatively to take reasonable care to ensure, that proper and sufficient prescribed burning for the prevention and suppression of fire was carried out within the Murrindindi Fire Area Public Land.
118. At all relevant times, the DEPI Secretary and the DEPI had planned burning expertise and experience.

Particulars

- (i) The DEPI Codes of Practice.

- (ii) The DEPI Fire Management Manual – Prescribed Burning (Version 10.1), February 2008.

119. At all relevant times, the DEPI Secretary knew or ought to have known that:

- (a) timely and adequate planned burning in the Murrindindi Fire Area Public Land would lower the impact of a bushfire burning in the Murrindindi Fire Area Public Land Area and therefore reduce the risk of fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities; and
- (b) the effectiveness of planned burning decreases as:
 - (i) burn size and coverage decreases; and
 - (ii) time since last burn (including planned and unplanned burning) increases.

120. Further, the DEPI Secretary was obliged to manage fire and fire related activities on public land for the purpose of protecting human life, assets and other values from the deleterious effects of wildfire or inappropriate fire regimes, and to achieve management objectives, through the definition and application of principles, standards and guidelines, in conjunction with the Victorian community.

Particulars

- (i) The 1995 Code of Practice, paragraphs 26-30; the 2006 Code of Practice, paragraphs 18 – 21.
- (ii) The 1995 Code of Practice, paragraphs 36-56; Chapter 4 of the 2006 Code of Practice, paragraph 247.
- (iii) The DEPI Codes of Practice apply to all public land in Victoria including the Murrindindi Fire Area Public Land.

121. At all relevant times, the stated purpose of the DEPI Codes of Practice was to promote the efficient, effective, integrated and consistent management of fire and fire related activities on public land for the purpose of protecting human life, assets, and other values from the deleterious effects of wildfire or inappropriate fire regimes, and to achieve management objectives, through the definition and application of principles, standards and guidelines, in conjunction with the Victorian community.

Particulars

Paragraph 11 of the 1995 Code of Practice; paragraph 18 of the 2006 Code of Practice.

122. At all relevant times, the DEPI Codes of Practice:

- (a) laid down minimum state-wide standards for fire management on public land in Victoria;
- (b) required that any plan, instruction, prescription or guideline developed for activities on public land in Victoria be consistent with the relevant Code of Practice;
- (c) recognised the use of land adjoining public land and the need for the integrated management of risks and impacts between both public and adjoining private land;
- (d) according to their own terms supported the discharge of the DEPI Secretary's legislative responsibilities including specifically the duty to carry out proper and sufficient work for the prevention and suppression of fire in the Public Land Area under sub-section 62(2) of the Forests Act.

Particulars

Paragraphs 1-3, 17-18, 26-30 and 36 of the 1995 Code of Practice; paragraphs 19-21 and 26 of the 2006 Code of Practice.

123. At all relevant times, the DEPI Codes of Practice also contained provisions requiring that fire management plans be prepared for relevant areas including plans for planned burning activity.

Particulars

Sections 2.3 and 3.2 of the 1995 Code of Practice; section 2.2 of the 2006 Code of Practice.

124. At all relevant times, the DEPI Codes of Practice stated that planned burning is used in Victoria, inter alia, to reduce fuel levels for fire protection.

Particulars

Section 3 of the 1995 Code of Practice, paragraph 133; chapter 3 of the 2006 Code of Practice, paragraph 183.

125. At all relevant times, under the DEPI Codes of Practice, in respect of the Public Land Area, and therefore in respect of the Murrindindi Fire Area Public Land, planned burning was only permitted to be undertaken in accordance with an approved burn plan.

Particulars

Section 3 of the 1995 Code of Practice, paragraph 133; chapter 3 of the 2006 Code of Practice, paragraph 197.

126. Under the DEPI Codes of Practice, at all relevant times the DEPI was required to consider within its wildfire prevention operations fuel management on and around sites of known high hazard and/or risk to human life and property on public land.

Particulars

Section 2.2.5 of the 1995 Code of Practice, paragraph 109; chapter 4 of the 2006 Code of Practice, paragraph 263.

127. At all relevant times the DEPI Secretary through DEPI established a forest management plan for the Public Land Area within central Victoria and as part of such plan kept detailed records of the characteristics of the Murrindindi Fire Area Public Land including the kinds of trees and the fuel loads.

Particulars

- (i) Some of the Murrindindi Fire Area Public Land is within the Central Forest Management Area for the State of Victoria established by the DEPI for forest management, for which the DEPI maintains a Central Highlands Forest Management Plan issued in May 1998 (**FMP**).
 - (ii) It was a stated purpose of the FMP that it conform to all relevant legislation including the Forests Act and the National Parks Act.
 - (iii) The FMP records that forests of the Central Highlands are amongst the most fire-prone in the world because of the mountainous terrain, flammable vegetation and hot Summer winds: section 8.2 of the FMP. The FMP also records that a key element of relevant regional fire protection plans is a fuel-management strategy based on five zones, and with fuel reduction burns to be undertaken in three of the strategically located zones to maintain fuel to defined hazard levels so as to ensure that fires that start within, or spread into, fuel reduced areas, burn at a lower intensity and are therefore easier to suppress than those in areas carrying higher fuel levels: section 8.2 of the FMP.
128. In view of the characteristics of the Murrindindi Fire Area Public Land including the ecological vegetation classes and fuel hazard, the DEPI Secretary knew or ought to have known that it was necessary to conduct planned burning in or through the Murrindindi Fire Area Public Land in order to reduce the risk of fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities.

Particulars

- (i) The DEPI Secretary published a fire protection plan for an area which included the Murrindindi Fire Area Public Land (being the Alexandra Fire Protection Plan).

- (ii) The Alexandra Fire Protection Plan applied, inter alia, to the Toolangi State forest, the Black Range State forest, Marysville State forest, Big River State forest, the Yarra Ranges National Park, the Lake Eildon National Park and Cathedral Range State Park.
 - (iii) The DEPI Secretary also published fire operations plans for an area which included the Murrindindi Fire Area Public Land (the **Fire Operations Plans**).
 - (iv) At all relevant times, the Fire Operations Plans applied, inter alia, to the Toolangi State forest, the Black Range State forest, Marysville State forest, Big River State forest, the Yarra Ranges National Park, the Lake Eildon National Park and Cathedral Range State Park.
129. At all relevant times, it was the intention of the DEPI Secretary that through the Alexandra Fire Protection Plan and the Fire Operations Plans the objectives under the DEPI Codes of Practice of, inter alia, protecting human life and assets by fire suppression activities as aforesaid would be achieved in the Alexandra and Broadford Fire Districts, which included the Murrindindi Fire Area Public Land, by implementing the fire protection strategies detailed in the Alexandra Fire Protection Plan and the Fire Operations Plans for those districts and that area.
130. At all relevant times, there were approved burn plans for the Murrindindi Fire Area Public Land as contemplated by the DEPI Codes of Practice and/or the Alexandra Fire Protection Plan and/or the Fire Operations Plans pertaining to the Murrindindi Fire Area Public Land.

Particulars

A copy of such plans will be provided after discovery and prior to trial.

131. At all relevant times, a major feature of the Alexandra Fire Protection Plan was the classification of all the public land within the area covered by that plan and therefore the Murrindindi Fire Area Public Land into five fuel management zones (**Zones**) having regard, inter alia, to the following considerations:
- (a) the strategic importance of the area to fire protection;
 - (b) the appropriateness of burning (and the alternatives) as a means of fuel management;
 - (c) the natural and developed values on the area being considered;
 - (d) other management objectives for the area;
 - (e) suppression methods most appropriate to the area;

- (f) the principles of environmental care;
 - (g) information contained in the DEPI's databases and, in particular, the land status, vegetation types, assets to be protected and fire history;
 - (h) weather (especially temperature, relative humidity, drought factor, and wind speed) for the district, which provides a fire danger rating and the number of suitable burning days per year;
 - (i) overall fuel hazards;
 - (j) fire spotting distance, flame height and rates of spread under various forest fire danger indices;
 - (k) experience obtained in implementing previous preparedness strategies.
132. At all relevant times, having regard to the matters referred to in the preceding paragraph, the DEPI Secretary designated various Zones to apply in the area covered by the Alexandra Fire Protection Plan and therefore the Murrindindi Fire Area Public Land including:
- (a) Zone 1 – Asset protection (includes lives, buildings, fences, stock, regenerating forest, flora and fauna values);
 - (b) Zone 2 – Strategic fuel reduced corridors;
 - (c) Zone 3 – Broad-area fuel reduced mosaic;
 - (d) Zone 4 – Specific flora and fauna management;
 - (e) Zone 5 – Exclusion of prescribed burning.

Particulars

The Alexandra Fire Protection Plan, sections 4.2.13.2 – 4.2.13.6.

133. At all material times since 2000 and prior to 7 February 2009, the DEPI Secretary through the DEPI undertook planned burning in the Murrindindi Fire Area Public Land.
134. Further, at all reasonable times the DEPI Secretary knew or ought to have known that a report was published in 2008 dealing with, inter alia, the role of planned burning in relation to bushfire risk in the State of Victoria, following the Victorian Government's establishment of an *Inquiry into the Impact of Public Land Management Practices on Bushfires in Victoria*, in which report:

- (a) the following findings of fact (inter alia) were made:
- (i) there was a need for an increase in the extent and frequency of prescribed burning in catchment areas to mitigate the risks associated with future bushfires;

Particulars

Finding 2.3 of the Inquiry.

- (ii) the scale and intensity of the 2002/03 and 2006/07 bushfires in Victoria were the result of inappropriate fire regimes, and in particular, of an insufficient level of landscape-scale planned burning;

Particulars

Finding 3.2 of the Inquiry.

- (iii) previous land management practices, in particular an insufficient level of planned burning at a landscape-scale contributed to the scale and intensity of the 2002/03 and 2006/07 bushfires;

Particulars

Finding 3.5 of the Inquiry.

- (b) as a consequence, the following recommendations, inter alia, were made:
- (i) that in order to enhance the protection of community and ecological assets, the DEPI increase its annual planned burning target from 130,000 hectares to 385,000 hectares, which should be a rolling target, and with any shortfalls to be made up in subsequent years;

Particulars

Recommendation 2.2 of the Inquiry.

- (ii) that a comprehensive review of the effectiveness of the increased [planned] burning target in meeting, inter alia, bushfire suppression needs, should be conducted every three years.

Particulars

Recommendation 2.3 of the Inquiry.

135. In or about June 2008, the DEPI Secretary developed a *Living with Fire – Victoria's Bushfire Strategy* document which recognised, inter alia, that high fuel loads due to decades of effective fire suppression had significantly raised the risk of bushfire

threat, and that a key theme in the strategy was to significantly increase the amount of planned burning across Victoria to reduce fuel loads.

Particulars

A copy of the *Living with Fire – Victoria's Bushfire Strategy* document is available for inspection at the offices of the solicitors for ~~SP AusNet~~AusNet Services.

136. Further, in or around 2008, the DEPI Secretary developed a corporate plan for 2008-11 which recognised the need for increased planned burning by prescribing an increase to the planned burning target to 4-6% of public land in contrast with the then Treasury funded measure of only 1.7% of total public land.

Particulars

The DEPI corporate plan for 2008-11. A copy of the plan is available for inspection at the offices of the solicitors for ~~SP AusNet~~AusNet Services.

137. At all material times prior to on or about 7 February 2009, the three year rolling average for area burnt of public land in Victoria as planned burning by the DEPI was less than 150,000 hectares representing less than 1.9% of the total public land across Victoria.
138. In the period which was several months prior to 7 February 2009, there were excessive fuel loads and dryness in areas within the Murrindindi Fire Area Public Land.
139. Further, at all relevant times it was reasonably foreseeable to the DEPI Secretary that:
- (a) a discharge of electricity from the powerline could cause ignition of flammable material in the vicinity of the discharge;
 - (b) such ignition could produce a fire which might spread over a wide geographic area, depending on inter alia wind direction and velocity;
 - (c) such fire could enter the Murrindindi Fire Area Public Land;
 - (d) if planned burning was not undertaken within the Murrindindi Fire Area Public Land in a timely and adequate way the risk of the fire in the Murrindindi Fire Area Public Land burning out of the Murrindindi Fire Area Public Land and into and through the Communities would be increased;

- (e) in the event of a fire the absence of proper and sufficient planned burning might cause death or injury to persons and loss of or damage to property within the fire area and consequential losses including economic losses;
- (f) such fire or its consequences could:
 - (i) disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
 - (ii) impede the use or amenity of property located in the fire area or affected areas; or
 - (iii) reduce the value of property or businesses located in the fire area or affected areas;and thereby cause economic loss to those persons or the owners of those properties or businesses.
- (g) the risks referred to in paragraphs (a) to (f) (collectively **the DEPI risks**) were greater during periods of high or extreme bushfire risk.

140. At all material times, the claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimize the DEPI risks;
- (b) were vulnerable to the impact of the DEPI risks;
- (c) consequently, were to a material degree dependent for the protection against the DEPI risks upon the DEPI Secretary to ensure, alternatively to take reasonable care to ensure, that proper and sufficient planned burning for the prevention and suppression of fire was carried out in the Murrindindi Fire Area Public Land.

141. In the premises, at all material times the DEPI Secretary owed to the claimants a duty to ensure, alternatively to take reasonable care to ensure, that proper and sufficient planned burning for the prevention and suppression of fire was carried out in a timely and/or efficient manner for the Murrindindi Fire Area Public Land (**the DEPI Duty**).

Breach of duty to the Claimants

142. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached:

- (a) the First DEPI Fire Duty; and/or
- (b) the Second DEPI Fire Duty; and/or
- (c) the DEPI Duty.

Particulars

- (i) During the period 1 January 2001 to 6 February 2009 (the **Relevant Period**), the DEPI Secretary did not carry out a sufficient quantity of planned burning, within the Murrindindi Fire Area Public Land, and thereby acted unreasonably.
- (ii) During the Relevant Period, the DEPI Secretary materially and unreasonably failed to implement the fire protection strategies detailed in the Alexandra Fire Protection Plan within the Murrindindi Fire Area Public Land.
- (iii) Further to (ii), the quantity of planned burning carried out by the DEPI Secretary within the Murrindindi Fire Area Public Land was materially and unreasonably inadequate. Notwithstanding that the average annual area specified in the Alexandra Fire Protection Plan for treatment by planned burning in relation to land classified as zone 1 (asset protection), zone 2 (strategic fuel reduced corridors) and zone 3 (broad area fuel reduced mosaic) was as follows:
 - (A) Zone 1 – approximately 20% per annum;
 - (B) Zone 2 – approximately 12.5% per annum; and
 - (C) Zone 3 – approximately 5 to 10% per annum;

in fact the quantity of planned burning carried out by the DEPI Secretary within the Murrindindi Fire Area Public Land during the Relevant Period in each of zones 1, 2 and 3 was materially and unreasonably less than the respective percentage quantity referred to.
- (iv) Further to (ii), the quantity and quality of the planned burns carried out by the DEPI Secretary was materially and unreasonably inadequate, in that the DEPI Secretary did not carry out planned burning to ensure that:
 - (A) the overall fuel hazard during the Relevant Period on land within the Murrindindi Fire Area Public Land:
 - 1) classified as zone 1, did not exceed Moderate over 90 per cent of the area;
 - 2) classified as zone 2, did not exceed High over 80 per cent of the area; and
 - 3) classified as zone 3, did not exceed High over 50 per cent of the area;

- (B) the fuel hazard rating applicable to surface fuel during the Relevant Period on land within the Murrindindi Fire Area Public Land:
- 1) classified as zone 1, did not exceed Moderate over 90 per cent of the area;
 - 2) classified as zone 2, did not exceed High over 80 per cent of the area; and
 - 3) classified as zone 3, did not exceed High over 50 per cent of the area;
- (C) the fuel hazard rating applicable to elevated fuel during the Relevant Period on land within the Murrindindi Fire Area Public Land:
- 1) classified as zone 1, did not exceed High over 90 per cent of the area;
 - 2) classified as zone 2, did not exceed High over 80 per cent of the area; and
 - 3) classified as zone 3, did not exceed High over 50 per cent of the area; and
- (D) the fuel hazard rating applicable to bark fuel during the Relevant Period on land within the Murrindindi Fire Area Public Land:
- 1) classified as zone 1, did not exceed High over 90 per cent of the area;
 - 2) classified as zone 2, did not exceed High over 80 per cent of the area; and
 - 3) classified as zone 3, did not exceed High over 50 per cent of the area.

(v) Further or alternatively, the quantity and quality of the planned burns carried out by the DEPI Secretary was materially and unreasonably inadequate in that the DEPI Secretary did not carry out planned burning to ensure that each of the overall fuel hazard, the surface fuel hazard, the near surface fuel hazard, the elevated fuel hazard and the bark fuel hazard during the Relevant Period did not exceed High throughout.

(A) in the dry forested areas in the Murrindindi Fire Area Public Land ~~did not exceed High~~;

~~(v)~~(B) further or alternatively, on the exposed aspects in the areas shaded in bright green on the map annexed to this Defence and Counterclaim and entitled 'Annexure 2' (burning coupes).

- (vi) Immediately prior to the ignition of the Murrindindi fire:
- (A) the overall fuel hazard on land within the Murrindindi Fire Area Public Land:
 - 1) classified as zone 1, exceeded Moderate over 90 per cent of the area;
 - 2) classified as zone 2, exceeded High over 80 per cent of the area; and
 - 3) classified as zone 3, exceeded High over 50 per cent of the area;
 - (B) the fuel hazard rating applicable to surface fuel on land within the Murrindindi Fire Area Public Land:
 - 1) classified as zone 1, exceeded Moderate over 90 per cent of the area;
 - 2) classified as zone 2, exceeded High over 80 per cent of the area; and
 - 3) classified as zone 3, exceeded High over 50 per cent of the area;
 - (C) the fuel hazard rating applicable to elevated fuel on land within the Murrindindi Fire Area Public Land:
 - 1) classified as zone 1, exceeded High over 90 per cent of the area;
 - 2) classified as zone 2, exceeded High over 80 per cent of the area; and
 - 3) classified as zone 3, exceeded High over 50 per cent of the area; and
 - (D) the fuel hazard rating applicable to bark fuel on land within the Murrindindi Fire Area Public Land:
 - 1) classified as zone 1, exceeded High over 90 per cent of the area;
 - 2) classified as zone 2, exceeded High over 80 per cent of the area; and
 - 3) classified as zone 3, exceeded High over 50 per cent of the area.

(vii) Further or alternatively to (vi), immediately prior to the ignition of the Murrindindi fire the fuel hazard rating applicable to each of surface fuel, near surface fuel, elevated fuel and bark fuel exceeded High during the Relevant Period throughout;

(A) in the dry forested areas in the Murrindindi Fire Area Public Land exceeded High;

(vii)(B) further or alternatively, on the exposed aspects of the burning coupes referred to in (v)(B) above.

Further particulars will be provided after discovery is complete, and before trial.

Causation

143. By reason of the breaches of:

- (a) the First DEPI Fire Duty; and/or
- (b) the Second DEPI Fire Duty; and/or
- (c) the DEPI Duty;

the Murrindindi Fire:

- (i) had very high intensity and speed; and
- (ii) spread to the places evidenced by the red shading on the map annexed to this Defence and Counterclaim entitled Annexure 1.

144. Had the DEPI Secretary not breached:

- (a) the First DEPI Fire Duty; and/or
- (b) the Second DEPI Fire Duty; and/or
- (c) the DEPI Duty,

the fire which became the Murrindindi Fire would have:

- (i) had reduced intensity and speed; and
- (ii) burnt a much smaller area.

145. The Murrindindi Fire was a natural and foreseeable consequence of the breaches of duty as aforesaid alleged by the DEPI Secretary, in the preceding paragraphs.

Damage

146. If the plaintiff and/or any claimant suffered any loss and damage as a result of the Murrindindi Fire (which is not admitted), such loss and damage was caused by the breach by the DEPI Secretary of:

- (a) the First DEPI Fire Duty; and/or

- (b) the Second DEPI Fire Duty; and/or
- (c) the DEPI Duty.

~~SP AusNet's~~ AusNet Services' liability limited pursuant to section 24A1 of the *Wrongs Act*

147. In the premises, if, which is denied, ~~SP AusNet~~ AusNet Services is liable to the plaintiffs and/or any group member in respect of the economic loss and property damage claims (which is denied) then pursuant to section 24A1 of the *Wrongs Act*, such liability is limited to an amount reflecting that proportion of the loss and damage the subject of the economic loss and property damage claims that the Court considers just having regard to the extent of ~~SP AusNet's~~ AusNet Services' responsibility for that loss and damage and judgment must not be given against ~~SP AusNet~~ AusNet Services for more than that amount in relation to the economic loss and property damage claims.

COUNTERCLAIM

RELIEF SOUGHT IN RESPECT OF PROPORTIONATE LIABILITY AND CONTRIBUTION

148. ~~SP AusNet~~ AusNet Services as plaintiff by counterclaim refers to and repeats paragraphs 1 – 147 in its defence.

As against the Plaintiff

149. Having regard to the matters set out in paragraphs 72 – 147 of its defence, ~~SP AusNet~~ AusNet Services seeks the declaratory relief set out in paragraphs ~~N-R~~ – ~~SQ~~ of the prayer for relief against the plaintiff and other claimants as the fifth defendant to counterclaim.

As against UAM

150. Having regard to the matters set out in paragraphs 73 - 97 and 147 of its defence, ~~SP AusNet~~ AusNet Services seeks the declaratory relief set out in paragraph A of the prayer for relief against UAM as the first defendant to counterclaim.

151. Further or in the alternative, if ~~SP AusNet~~ AusNet Services is held liable to the claimants in respect of any loss and damage in respect of personal injury and death (**personal injury loss and damage**) then, on the grounds pleaded in paragraphs 73 - 97 of its defence, ~~SP AusNet~~ AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from UAM in respect

of that personal injury loss and damage in such amount as may be found by the Court to be just and equitable having regard to the extent of UAM's responsibility for the personal injury loss and damage.

152. The contribution from UAM in respect of personal injury loss and damage for which ~~SP AusNet~~AusNet Services may be held liable to the claimants which would be just and equitable having regard to the extent of UAM's responsibility for the personal injury loss and damage would be such as would amount to a complete indemnity to ~~SP AusNet~~AusNet Services.

As against the DEPI Secretary

153. Having regard to the matters set out in paragraphs 98 - 146 and 147 of its defence, ~~SP AusNet~~AusNet Services seeks the declaratory relief set out in paragraph ~~K-O~~ of the prayer for relief against the DEPI Secretary as the second defendant to counterclaim.
154. Further or in the alternative, if ~~SP AusNet~~AusNet Services is held liable to the claimants in respect of any personal injury loss and damage then, on the grounds pleaded in paragraphs 98 - 146 of its defence, ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the DEPI Secretary in respect of that personal injury loss and damage in such amount as may be found by the Court to be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage.
155. The contribution from the DEPI Secretary in respect of personal injury loss and damage for which ~~SP AusNet~~AusNet Services may be held liable to the claimants which would be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage would be such as would amount to a complete indemnity to ~~SP AusNet~~AusNet Services.

FURTHER CLAIMS AGAINST UAM

Negligence Claim against UAM

156. UAM is and was at all material times a company incorporated pursuant to law and capable of being sued.
157. Throughout the term of the Powerline Contract and the UAM Contract, UAM knew or ought to have known that if the risks materialised:

(a) ~~SP AusNet~~AusNet Services may be involved in or a party to inquiries, claims and legal proceedings (**bushfire proceedings**) and be held liable in respect of:

- (i) death or injury to persons and loss of or damage to property within the fire area and consequential losses including economic losses;
- (ii) damage to property within the affected area and consequential losses including economic losses;
- (iii) economic loss suffered as a consequence of the disruption or impairment of the income-earning activities of persons residing or carrying on business in the fire area or affected areas, the impedance of the use or amenity of property located in the fire area or affected areas or the reduction in value of property or business located in the fire area or affected areas;

(bushfire proceedings liabilities);

(b) ~~SP AusNet~~AusNet Services may incur legal and other costs, expenses and liabilities in respect of bushfire proceedings (**bushfire proceedings costs**);

(collectively **~~SP AusNet~~AusNet Services liabilities and losses**).

158. ~~SP AusNet~~AusNet Services refers to and repeats paragraphs 73 - 89 hereof and says further that throughout the term of the Powerline Contract and the UAM Contract, ~~SP AusNet~~AusNet Services was dependent for protection from the risk of incurring the ~~SP AusNet~~AusNet Services liabilities and losses upon the exercise by UAM of reasonable care in the discharge of its obligations under the Powerline Contract and the UAM Contract.

159. In the premises, throughout the term of the Powerline Contract and the UAM Contract, UAM owed ~~SP AusNet~~AusNet Services a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken by agents, contractors or other persons engaged by it;

in the discharge of UAM's obligations under the Powerline Contract and the UAM Contract to ensure that any conductors and associated hardware on the Murrindindi assets were adequately inspected and that defects, faults, deterioration in condition or incorrect assembly were adequately identified, reported to ~~SP AusNet~~AusNet Services and addressed by appropriate maintenance activities (**UAM's duty to ~~SP AusNet~~AusNet Services**).

160. UAM's duty to ~~SP AusNet~~AusNet Services required UAM to:

- (a) by its officers, servants or agents, conduct asset inspections on the Murrindindi assets with due care, skill and diligence;
- (b) by its officers, servants or agents, conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi assets;
- (c) exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Line Inspection Manual or the Asset Inspection Manual as appropriate in conducting asset inspections on the Murrindindi assets;
- (d) take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (e) take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (f) take reasonable steps to report to ~~SP AusNet~~AusNet Services defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets and address them by appropriate maintenance activities.

Breach of duty to ~~SP AusNet~~AusNet Services

161. UAM failed, following the May 2008 asset inspection, or at any time prior to 7 February 2009, to identify, notify ~~SP AusNet~~AusNet Services of, or conduct maintenance necessary to rectify, any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets;
162. UAM's failure, following the May 2008 asset inspection, or at any time prior to 7 February 2009, to identify, notify ~~SP AusNet~~AusNet Services of, or conduct maintenance necessary to rectify, any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets was due to the following breaches of the UAM duty:
- (a) failure by its officers, servants or agents, to conduct asset inspections on the Murrindindi assets with due care, skill and diligence;
 - (b) failure by its officers, servants or agents, to conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi assets;
 - (c) failure to exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Asset Inspection Manual in conducting asset inspections on the Murrindindi assets;
 - (d) failure to take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
 - (e) failure to take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
 - (f) failure to take reasonable steps to report to ~~SP AusNet~~AusNet Services defects, faults deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets.

162A UAM failed, following the March 2005 asset inspection, or at any time prior to 7 February 2009, to identify or notify AusNet Services of any defect, fault,

deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets;

162B UAM's failure, following the March 2005 asset inspection, or at any time prior to 7 February 2009, to identify or notify AusNet Services of any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi assets was due to the following breaches of the UAM duty:

- (a) failure by its officers, servants or agents, to conduct asset inspections on the Murrindindi assets with due care, skill and diligence;
- (b) failure by its officers, servants or agents, to conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi assets;
- (c) failure to exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Line Inspection Manual in conducting asset inspections on the Murrindindi assets;
- (d) failure to take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (e) failure to take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets;
- (f) failure to take reasonable steps to report to AusNet Services defects, faults deterioration in condition and incorrect assembly of assets forming part of the Murrindindi assets.

Causation

163. If the Murrindindi fire was associated with a failure of the conductor on the Sawmill Span (which is denied), then the Murrindindi fire was caused by the breaches by UAM of UAM's duty to ~~SP AusNet~~ AusNet Services alleged above.

164. The Murrindindi fire was a natural and foreseeable consequence of the breaches by UAM of UAM's duty to ~~SP AusNet~~ AusNet Services.

Damage

165. As a consequence of the Murrindindi fire and the breaches by UAM of UAM's duty to ~~SP AusNet~~AusNet Services, ~~SP AusNet~~AusNet Services has suffered loss and damage.

Particulars

~~SP AusNet's~~AusNet Services' loss and damage is its financial exposure to the ~~SP AusNet~~AusNet Services liabilities and losses.

Breach of contract indemnity claim against UAM*Breach of Powerline Contract*

165A. Further or in the alternative, by reason of the matters alleged in paragraphs 161A – 162A herein, UAM has breached the Powerline Contract as follows:

- (a) in breach of Clause 2 of the General Terms and Conditions – Services, UAM failed to complete the whole of an order for works to the satisfaction of AusNet Services in accordance with the Powerline Contract;
- (b) in breach of Clause 23.4 of the Powerline Agreement, UAM did not exercise due care and skill in accordance with best international practices in providing the Services and did not comply with all applicable Australian standards and/or other referenced codes and the requirements of relevant statutory authorities and the law;
- (c) in breach of the Powerline implied term, UAM failed to exercise reasonable care and skill in the provision of Services pursuant to the Powerline Contract.

(collectively **the Powerline Contract breaches**).

Breach of UAM Contract

166. Further or in the alternative, by reason of the matters alleged in paragraphs 161 - 162 herein, UAM has breached the UAM Contract as follows:

- (a) In breach of the Instrument of Agreement, Clause 2, UAM failed to complete the whole of the works described in a Works Order to the satisfaction of ~~SP AusNet~~AusNet Services in accordance with the Contract Documents;

- (b) In breach of Clause 8.1 of the Terms and Conditions, UAM's workmanship was not of the highest quality and standard and the Contract Works were not carried out by UAM competently, diligently or in accordance with best industry practice and did not comply with all applicable Australian standards and/or other referenced codes and the requirements of relevant statutory authorities and the law;
- (c) In breach of the UAM implied term, UAM failed to exercise reasonable care and skill in the provision of services pursuant to the UAM Contract.

(collectively **the UAM Contract breaches**).

Causation

167. If the Murrindindi fire was associated with a failure of the conductor on the Sawmill Span (which is denied), then the Murrindindi fire was caused by the Powerline Contract breaches, further or alternatively, the UAM Contract breaches.

Damage

168. As a consequence of the Murrindindi fire and the Powerline Contract breaches, further or alternatively, the UAM Contract breaches ~~SP AusNet~~ AusNet Services has suffered loss and damage.

Particulars

~~SP AusNet's~~ AusNet Services' loss and damage is its financial exposure to the ~~SP AusNet~~ AusNet Services liabilities and losses.

Contractual indemnity claim against UAM

Contractual indemnity under the Powerline Contract

168A. Further or in the alternative, the AusNet Services liabilities and losses constitute damage, actions, claims, proceedings, injury, loss and expenses arising as a result of acts, neglects or defaults of UAM, its officers, employees or agents incurred by AusNet Services arising out of the failure of UAM to comply with its obligations under the Powerline Contract.

165B. Further or in the alternative, the AusNet Services liabilities and losses are from claims for nuisance, damage, loss, injury to, or in respect of persons or property

which nuisance, damage, loss or injury arises out of, or is in respect of UAM's act or neglect or the act or neglect of an agent or servant of UAM in the course of the performance of the Powerline Contract.

165C. In the premises, UAM is liable to AusNet Services for the AusNet Services liability and losses pursuant to Cl 8 of the General Terms and Conditions – Services, further or in the alternative UAM is obliged to indemnify and keep indemnified AusNet Services and its officers, employees and agents as against the AusNet Services liabilities and losses pursuant to Cl 9 of the General Terms and Conditions – Services.

Contractual indemnity under the UAM Contract

169. Further or in the alternative, the ~~SP AusNet~~AusNet Services liabilities and losses constitute claims, demands, proceedings, liabilities, costs, charges and expenses arising as a result of acts, neglects or defaults of UAM, its officers, employees or agents related to its execution of the Contract Works.

170. In the premises, UAM is obliged to indemnify and keep indemnified ~~SP AusNet~~AusNet Services and its officers, employees and agents as against the ~~SP AusNet~~AusNet Services liabilities and losses pursuant to Clause 5 of the Terms and Conditions.

FAILURE TO WARN

Contribution Claim against the State of Victoria

Bases upon which State is Sued

171. The State of Victoria ("**the State**"):

- (a) pursuant to section 23(1)(b) of the *Crown Proceedings Act 1958 (Vic)* is liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him; and
- (b) pursuant to section 123(2) of the *Police Regulation Act 1958 (Vic)* is liable for anything necessarily or reasonably done or omitted to be done in good faith by a member of the force as defined in section 3 of the *Police Regulation Act*

1958 (Vic) (“**Victoria Police**”) in the course of his or her duty as a member of the Victoria Police.

Statutory Powers, Functions and Duties of State Servants and Agents

172. At all relevant times, pursuant to section 5 of the *Police Regulation Act*, the Chief Commissioner of Police (“**the Chief Commissioner**”) had the superintendence and control of the Victoria Police and all officers of police had superintendence and control of that portion of the Victoria Police which was placed under their charge subject to the authority conferred upon the Chief Commissioner.
173. At all relevant times, pursuant to section 6 of the *Police Regulation Act*, anything which the Chief Commissioner was authorised or required to do could be done by a Deputy Commissioner.
174. At all relevant times, the *Emergency Management Act 1986* (Vic) (“**the EMA**”) was in force in Victoria and, pursuant to section 4A of the EMA, the objectives of the EMA were ensuring that the following components of emergency management (defined in section 4 as the organisation and management of resources for dealing with all aspects of emergencies) were organised within a structure which facilitated planning, preparedness, operational co-ordination and community participation:
- (a) prevention, being the elimination or reduction of the incidence or severity of emergencies and the mitigation of their effects; and
 - (b) response, being the combating of emergencies and the provision of rescue and immediate relief services.
175. At all relevant times, section 4 of the EMA defined an “emergency” as an emergency due to the actual or imminent occurrence of an event which in any way endangered or threatened to endanger the safety or health of any person in Victoria or which destroyed or damaged, or threatened to destroy or damage, any property in Victoria or endangered or threatened to endanger the environment or an element of the environment in Victoria, including a fire.
176. At all relevant times, pursuant to section 5 of the EMA, the Minister for Police and Emergency Services was the Co-ordinator in Chief of Emergency Management for the purposes of the EMA and was required to appoint a Deputy Co-ordinator in Chief of Emergency Management who was required to be the Chief Commissioner.

177. At all relevant times, pursuant to section 6 of the EMA, the role of the Co-ordinator in Chief was to ensure that adequate emergency management measures were taken by government agencies and co-ordinate the activities of government agencies carrying out their statutory functions, powers, duties and responsibilities in taking such measures.
178. At all relevant times, pursuant to section 4 of the EMA, “emergency management” meant the organisation and management of resources for dealing with all aspects of emergencies.
179. At all relevant times, pursuant to section 10(1) of the EMA, the Co-ordinator in Chief was required to arrange for the preparation and review from time to time of a state emergency response plan, to be called DISPLAN, for the co-ordinated response to emergencies by all agencies having roles or responsibilities in relation to the response to emergencies.
180. At all relevant times, pursuant to section 11 of the EMA:
- (a) the State Co-ordinator of DISPLAN (“***the State Co-ordinator***”) was to be the Chief Commissioner who was to be responsible under DISPLAN for the co-ordination of the activities of agencies having roles or responsibilities in relation to the response to emergencies; and
 - (b) the State Co-ordinator was required to appoint a member of Victoria Police to be a Deputy State Co-ordinator of DISPLAN to assist the State Co-ordinator (“***the Deputy Co-ordinator***”).
181. At all material times, pursuant to section 13 of the EMA, the State Co-ordinator was required to appoint a member of Victoria Police to be a Co-ordinator of DISPLAN for each region and municipal district.
182. At all material times, pursuant to section 15 of the EMA, DISPLAN was required to contain provisions:
- (a) identifying, in relation to each form of emergency specified, the agency primarily responsible for responding to the emergency;
 - (b) relating to the co-ordination of the activities of other agencies in support of a responsible agency in the event of an emergency;
 - (c) specifying the roles and responsibilities of co-ordinators appointed under section 13; and

- (d) defining regions for the purposes of section 13.
183. At all material times, pursuant to section 17 of the EMA, as soon as practicable after DISPLAN was prepared or reviewed, the Co-ordinator in Chief was required to publish DISPLAN or details of the results of the review (as the case required) in such manner as the Co-ordinator in Chief determined and to provide a copy of DISPLAN or the results of the review (as the case required) to every agency to which DISPLAN applied.
184. At all relevant times, the agencies to which DISPLAN applied included the CFA and the DEPI, which government agencies were “agencies” within the meaning of section 4(1) of the EMA.

Emergency Management Manual and DISPLAN

185. In about January 2005 the Minister for Police and Emergency Services in his capacity as Co-ordinator in Chief of Emergency Management published the Emergency Management Manual of the State of Victoria (“***the EM Manual***”).
186. Part 3 of the EM Manual comprised DISPLAN and was published pursuant to section 10 of the EMA.
187. Pursuant to DISPLAN, each of the emergency response co-ordinators referred to in DISPLAN (which included those appointees required under section 13 of the EMA) (“***Emergency Response Co-ordinators***”) were responsible for ensuring the co-ordination of the activities of agencies having roles or responsibilities in response to emergencies, including the CFA and the DEPI.

Particulars

EM Manual Page 3-5.

188. Pursuant to DISPLAN, each of the Emergency Response Co-ordinators had principal roles which included ensuring that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency directly or through the media.

Particulars

EM Manual Page 3-5.

189. Pursuant to DISPLAN, Emergency Response Co-ordinators included a municipal emergency response co-ordinator (“**MERC**”) appointed by the State Co-ordinator for each municipal district.

Particulars

EM Manual, Page 3-6.

190. Pursuant to DISPLAN, Emergency Response Co-ordinators included a divisional emergency response co-ordinator (“**DERC**”), being a commissioned officer of police appointed by the State Co-ordinator for each municipal district.

Particulars

EM Manual, Page 3-6.

191. Pursuant to DISPLAN, the roles, responsibilities and duties of each MERC included obtaining and forwarding regular advice to the DERC regarding the potential of an emergency which was not under substantial control by the relevant control agency.

Particulars

EM Manual, Page 3-6.

192. Pursuant to DISPLAN, the roles, responsibilities and duties of each DERC included to obtain and forward regular advice regarding the potential of an emergency which was not under substantial control by the relevant control agency and to ensure that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency, the need for evacuation and other public information.

Particulars

EM Manual, Page 3-7.

193. Pursuant to DISPLAN, each Emergency Response Co-ordinator was required, in order to ensure that their role was properly performed, to consider objectives which included bringing relevant matters to the notice of appropriate agencies for action.

Particulars

EM Manual, Page 3-8.

194. Pursuant to DISPLAN, State Emergency Response Co-ordination Centres (“**SERCC**”), Divisional Emergency Response Co-ordination Centres (“**DERCC**”) and Municipal Emergency Response Co-ordination Centres (“**MERCC**”) were to be the locations at which Emergency Response Co-ordinators received, collated and disseminated intelligence and co-ordinated the provision of resources and conducted operations ancillary to an emergency operations centre.

Particulars

EM Manual, Page 3-8.

195. Pursuant to DISPLAN, SERCC was responsible for information collection, analysis of and dissemination of intelligence to emergency response agencies and dissemination of information to the media and general public.

Particulars

EM Manual, Page 3-10.

196. Pursuant to DISPLAN:
- (a) warnings were required to be issued where community action was necessary to protect lives, property or the environment;
 - (b) upon the request of a control agency to issue a warning it was the responsibility of an Emergency Response Co-ordinator to ensure that a warning was issued both to agencies and to the potentially affected community;
 - (c) the content and format of the warning was required to be simple, arresting, brief, suited to the needs of the affected community and be worded in accordance with advice from the control agency;
 - (d) warning methods could include loud hailers, telephones, door knocks, radio or television announcements or local community networks;
 - (e) for emergencies of major community significance, the warning should be authorised by an Emergency Response Co-ordinator in consultation with the control agency.

Particulars

EM Manual, Page 3-10.

197. Pursuant to DISPLAN, the principles required to be kept in mind by Emergency Response Co-ordinators when managing the flow of information to participating agencies, person affected and the wider community during emergency response activities were:
- (a) get information to the people who need it;
 - (b) get the right information to the right people; and
 - (c) make sure the information is timely, user-friendly, accurate, compatible and useful.

Particulars

EM Manual, Page 3-11.

198. In accordance with section 15 of the EMA, Parts 7 and 8 of the EM Manual specified the agencies primarily responsible for responding to specified emergencies, provided for the co-ordination of agencies' activities in support of responsible agencies and specified the roles of agencies in the emergency response.
199. Pursuant to Part 7 of the EM Manual:
- (a) a "control agency" was an agency identified in a table therein that was assigned to control the response activities to a specified type of emergency and a "support agency" was an agency which was to provide essential services, personnel or material to assist a control agency or affected persons;
 - (b) in respect of fire, the identified control agencies included the CFA and the DEPI;
 - (c) in addition to control agencies and support agencies there were a range of generic support services for responses to emergencies identified in a table therein which also identified the agency to which each support service was assigned;
 - (d) the primary agency assigned responsibility for the "public warnings" support service was Victoria Police;
 - (e) Victoria Police was identified as the agency responsible for the effective co-ordination of resources or services in response to emergencies, the

provision of media co-ordination where no other facility existed and the provision of support to other agencies in dissemination of public information.

Particulars

EM Manual, Page 7-4; 7-72.

Relevant Servants and Agents of the State

200. On 7 February 2009 the State Co-ordinator, pursuant to section 11 of the EMA, was the Chief Commissioner of Police, Christine Nixon.
201. On 7 February 2009 the Deputy Co-ordinators appointed by the State Co-ordinator pursuant to section 11(2) of the EMA, were the members of Victoria Police for the time being holding, acting in or performing the duties of the Deputy Commissioner of Police.

Particulars

Instrument of Appointment of Deputy State Co-ordinators of DISPLAN dated 1 August 2005. A copy of the instrument is in the possession of the solicitors for ~~SP AusNet~~AusNet Services and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0095-R.

202. On 7 February 2009 the member of Victoria Police holding, acting in and performing the duties of Deputy Commissioner of Police and who was, accordingly, the Deputy Co-ordinator was Mr Kieran Walshe, Deputy Commissioner of Police.

Particulars

Deputy Commissioner Walshe was appointed by Order in Council from 2 July 2006 until 1 July 2009. A copy of the Order in Council is in the possession of the solicitors for ~~SP AusNet~~AusNet Services and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0127.

203. By 7 February 2009, all of the powers and functions vested in the State Co-ordinator under the EMA had, pursuant to section 12 of the EMA, been delegated to, and were exercisable by, the Deputy Co-ordinator.

Particulars

Instrument of Delegation dated 1 August 2005. A copy of the instrument is in the possession of the solicitors for ~~SP AusNet~~AusNet Services and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0096-R.

204. On 7 February 2009, Stephen Fontana, Assistant Commissioner, Counter Terrorism Co-ordination and Emergency Management Department, was the member of Victoria Police:
- (a) acting in or performing the duties of Deputy Commissioner of Police together with Mr Kieran Walshe and was, accordingly, Deputy Co-ordinator; and/or
 - (b) who assumed and performed the duties and responsibilities of the State Co-ordinator under the EM Manual, which duties and responsibilities had purportedly been informally delegated to him.
205. In the premises, on 7 February 2009, the members of Victoria Police responsible for exercising the powers and functions of:
- (a) the State Co-ordinator under the EMA and the EM Manual were:
 - (i) Commissioner of Police, Christine Nixon;
 - (ii) Deputy Commissioner of Police, Kieran Walshe; and
 - (iii) Assistant Commissioner of Police, Stephen Fontana;
 - (b) the Deputy Co-ordinator under the EMA and the EM Manual were:
 - (i) Deputy Commissioner of Police, Kieran Walshe; and
 - (ii) Assistant Commissioner of Police, Stephen Fontana.

Hereafter, any reference to “State Co-ordinator” or “Deputy Co-ordinator” is a reference to the persons exercising the responsibilities of those positions on 7 February 2009.

206. On 7 February 2009 senior members of the Victoria Police were assigned, or assumed responsibility for discharging, the responsibilities, duties and functions imposed upon the SERCC under the EM Manual including:
- (a) the responsibility referred to in paragraph 195 above for information collection, analysis and dissemination of intelligence to emergency response agencies and dissemination of information to the media and general public; and
 - (b) the responsibility referred to in paragraph 188 above of ensuring that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency directly or through the media.

(“the SER personnel”)

Particulars

The SER personnel were:

- (a) Superintendent Rod Collins, the State Emergency Response Officer with responsibility for the State Emergency Response Co-ordination Unit within Victoria Police. He was the senior Victoria Police liaison officer in the Integrated Emergency Co-ordination Centre ("**IECC**") on 7 February 2009 until about 5pm when he moved to the SERCC. Superintendent Collins in that capacity co-ordinated and chaired most of the meetings of the State Emergency Strategy Team, which took place at 9am, 11am, 1pm, 2pm, 3pm, 5pm, 7pm, and 8pm. Although in attendance at the IECC through most of 7 February 2009, Superintendent Collins maintained functional control of the SERCC.
- (b) Superintendent Ross McNeil, the acting Chair of the Emergency Management Joint Public Information Committee, who was in attendance at the IECC throughout most of 7 February 2009 and was responsible for monitoring information provided to the public by agencies with responsibilities under the EM Manual.
- (c) Inspector Doug Hocking, the Deputy State Emergency Response Officer on 7 February 2009. Inspector Hocking assumed management of the SERCC under the ultimate control and supervision of Superintendent Collins, who was primarily in the IECC.
- (d) Inspector Bruce Knight who was in attendance at the IECC from about 3pm and formally took over the responsibilities of Superintendent Collins at about 5pm.

207. On 7 February 2009 the members of Victoria Police with responsibilities, functions and duties under the EM Manual referred to above in relation to the area over which the Murrindindi fire spread ("**the Murrindindi fire area**") were:

- (a) the DERC for the Seymour division; and
- (b) the MERC for the municipal district of Murrindindi.

(collectively "**the Murrindindi Fire Emergency Response Co-ordinators**").

Particulars

- (i) the DERC for the Seymour division was Peter Billing;
- (ii) the MERC for the municipal district within the Seymour division which included the Murrindindi bushfire area was David Rowles (Murrindindi MERC).

Reasonable foreseeability

208. Further, prior to on or about 7 February 2009 the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators each knew or ought to have known that fire agencies (the CFA and DEPI) had made key announcements about the high risk faced by Victoria for the 2008-9 fire season and had advised on 5 and 6 February 2009 that Victoria was at a very serious risk of wildfire breakouts over the coming days.

Particulars

The announcements included the following:

- (i) On 27 October 2008 the Premier, the Minister for Police and Emergency Services, and the Chief Fire Officers of each of the CFA, the DEPI and the Metropolitan Fire and Services Board announced the beginning of the 2008-9 fire season, emphasising the need for preparedness, the significant investment of the State in fire response, and the high risk outlook for the 2008-9 fire season.
 - (ii) Further announcements in the week leading up to 7 February 2009 including a prediction for 7 February 2009 that the landscape was pre-disposed to a catastrophic event.
209. Further, at all material times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfires, rather than generalised warnings addressed and referring to the general public, were necessary to enable persons in those areas to take steps to avoid the risk of personal injury and death.
210. Further, at all relevant times the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that:
- (a) if a fire started in an area near Murrindindi, with northerly and/or north westerly winds and high temperatures the fire might head south or south east quickly and spread over a wide geographic area, depending on, inter alia, wind speed and direction and any changes in wind direction and velocity, including the Murrindindi bushfire area;
 - (b) a large proportion of the fire area comprised state forests, national parks and/or protected public land (the **“forested area”**) and townships and/or

communities and/or residential homes adjacent or proximate to the forested area;

- (c) such fire may cause personal injury and death to persons who were present in the fire area (“persons **at risk**”);
- (d) such personal injury and death to persons at risk could cause personal injury loss and damage to the claimants (including, but not limited to, persons at risk) (“the **personal injury claimants**”);
- (e) the risks referred to in paragraphs (a) to (d) (collectively “the **Murrindindi fire risks**”) were greater during periods of high or extreme bushfire risk.

211. Further, at all relevant times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that the provision of warnings of the risk that a bushfire might or would be likely to reach a particular place by a particular time (including within the fire area) was necessary to enable members of the public endangered by such risk (including persons at risk) to take steps to avoid the risk so as to avoid personal injury and death.

Particulars

- (i) The State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known of the establishment by the CFA DEPI of the Alexandra ICC prior to 7 February 2009.
- (ii) In relation to the wind change risk referred to in paragraph 210(a) hereof, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire becomes its front after the change. The State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.
- (iii) If so warned, the persons at risk would be able to act so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

Vulnerability of Personal Injury Claimants

212. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimize the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do; and
- (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators to ensure, alternatively to take reasonable steps to ensure, that persons at risk would be provided with bushfire warnings.

Duty of Care

213. In the premises, at all material times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators owed the personal injury claimants a duty to take reasonable care to ensure, that bushfire warnings were given to persons at risk so as to enable the persons at risk to take steps to avoid personal injury loss and damage to themselves and/or their dependants (“the **Victoria Police Duty to Warn**”).

Particulars

The warnings required to be given included where appropriate the provision of the following information:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.
- (viii) Information as to the approximate time (using reasonable estimates) the fire might or would be likely to impact particular communities.

- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.
- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

Commencement and Progress of the Murrindindi Fire

214. On the afternoon of 7 February 2009 the Murrindindi bushfire commenced near the Murrindindi Sawmill on Wilhemina Falls Road at Murrindindi.
215. At all relevant times, the commencement, course and conduct of the Murrindindi bushfire and the associated weather conditions included the following:
- (a) fanned by a strong north to north westerly wind, the Murrindindi bushfire spread quickly in a south easterly direction through grass paddocks, a privately owned blue gum plantation and into the Toollangi State Forest where it crowned almost immediately;
 - (b) at this stage, the Murrindindi bushfire was moving at a speed of approximately 11 kilometres per hour and was intense with flames up to 20 metres high;
 - (c) the Murrindindi bushfire burned up the Western flanks of the Black Range, between the Melba and the Maroondah Highways, reaching the top of the Black Range at approximately 4:15pm;
 - (d) from approximately 4:15pm, the Murrindindi bushfire created spot fires and ember attacks up to 15 kilometres ahead of the main head of the fire;
 - (e) from approximately 4:30pm, spot fires ignited in and around Granton, Narbethong, St Fillans, Mt Gordon and the Maroondah Highway;
 - (f) the weather conditions on 7 February 2009 were extreme and included strong north/north westerly winds and temperatures across much of the State of Victoria in excess of 40 degrees with low humidity;
 - (g) during the course of mid to late afternoon a significant wind change occurred across the State of Victoria with the effect that strong winds which had been travelling from a north westerly direction travelled from a south westerly direction;

- (h) the wind change moved through Narbethong between 6:15pm and 6:45pm and through Marysville between 6:35pm and 7:05pm;
- (i) at the time that the wind change referred to in sub-paragraph (h) moved through Marysville, the Murrindindi bushfire had travelled a distance of approximately 40 kilometres;
- (j) the wind change referred to in sub-paragraph (h) caused the north east flank of the Murrindindi bushfire (approximately 40 kilometres long) to become the main fire front;
- (k) the Murrindindi bushfire began impacting the communities in and around Narbethong at approximately 4:30pm, in and around Marysville at approximately 6:35pm, in and around Buxton at approximately 7:30pm and in and around Taggerty soon after 10:00pm.

Breach of Duty

216. At all relevant times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known of the matters in paragraphs 214-215 hereof, or their likelihood of occurring, by virtue of information available from the CFA and/or the DEPI, information available at each relevant MERCC, DERCC, the SERCC, from the information available at the IECC and from information available from police officers present in the Murrindindi fire area.

Particulars

- (i) Such information included the specific information available to the CFA and the DEPI in relation to the Murrindindi bushfire, its path, its intensity, its spread and its speed, during the course of the afternoon of 7 February 2009 and thereafter, including the information referred to in paragraphs 236, 255, 273 and 289 below.
- (ii) On 5 February 2009 an email was circulated within Victoria Police (including to the Murrindindi Fire Emergency Response Co-ordinators) advising Victoria Police members that Saturday 7 February 2009 would be a day of extreme fire danger.
- (iii) On 6 February 2009 Sergeant David Rowles spoke to Mr Ian Ellett, the Municipal Emergency Response Officer ("MERO") for the Murrindindi Shire Council about the need to have the Murrindindi MERCC activated on 7 February 2009 if required. Sergeant David Rowles was the designated MERC in the event that the Murrindindi MERCC was activated.

- (iv) On 7 February 2009 at 3.00pm, Assistant Commissioner Stephen Fontana chaired, and Deputy Commissioner Kieran Walshe and Superintendent Ross McNeil dialled into, a State Emergency Strategy Team meeting at which a briefing was provided in relation to the weather forecast and the predicted wind change, among other things.
- (v) At 3:35pm, Senior Constable Gavin Skerritt, who had called into the Alexandra CFA Group headquarters, was informed by Mr Peter Rice that he was concerned about how the Murrindindi bushfire was developing, that it may impact on “townships down towards Narbethong” and that he should quickly communicate this to Sergeant David Rowles (the MERC).
- (vi) At 4:00pm, the MERCC for the Murrindindi bushfire was activated by Sergeant Rowles upon the direction of Inspector Ross Smith and, at this time, Sergeant Rowles asked Mr Mark Leitinger, one of the Deputy Municipal Emergency Response Officers, to open the Murrindindi MERCC.
- (vii) Throughout 7 February 2009 Sergeant David Rowles obtained information regarding the movement and direction of the Murrindindi fire from David Butterworth, the CFA Liaison Officer at the Murrindindi MERCC.
- (viii) At around 4:00pm Acting Sergeant Ian Thompson requested Leading Senior Constable Brett Tanian to form a road block on the Marysville-Narbethong Road to prevent vehicles from travelling in the direction of the area that the Murrindindi fire was impacting or expected to impact.
- (ix) By 4:10pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the Murrindindi fire had the potential to impact Kinglake and/or Warrandyte.
- (x) By 4:15pm Senior Constable Thompson was aware of a report of the Murrindindi fire and had contacted his wife to ask that she begin preparations to leave their home in Marysville if that became necessary. At approximately 4:15pm the report of the fire was confirmed to Senior Constable Thompson by a Wangaratta D24 operator and separately by Sergeant David Rowles.
- (xi) From at least 4:15pm, Senior Constable Ian Thompson was in the Murrindindi fire area, was aware of the Murrindindi bushfire and communicated with Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, regarding a spot fire at Granton.
- (xii) At around 4:30pm Senior Constable Thompson:
 - (A) was informed by Sergeant David Rowles that the Murrindindi fire was spotting at a farm in Narbethong; and
 - (B) formed the view that the fire posed a serious risk to Marysville given its proximity to Narbethong, the worsening weather conditions and the high fuel loads in the State forest and that he should attempt to warn local residents after attending the spot fire.

- (xiii) At around 4:40pm Sergeant David Rowles informed Leading Senior Constable Ian Hamill of the Alexandra Police Station that there was a spot fire at Narbethong.
- (xiv) By 5:00pm:
- (A) Senior Constable Collyer made the decision that it was unsafe to stay in Buxton and made arrangements for the evacuation of his family from Buxton to Alexandra.
 - (B) Senior Constable Harvey was directing traffic from the direction of Marysville and Narbethong to Alexandra.
 - (C) Senior Constable Harvey received reports about the fire south of his location from a number of motorists travelling north along Maroondah Highway from the direction of Narbethong.
- (xv) At around 5:00pm:
- (A) Senior Constable Thompson was advised by DEPI members that the fire had crossed Maroondah Highway and into the State forest.
 - (B) Leading Senior Constable Ken Dwight of the Woods Point Police Station was informed that the wind at Matlock Hill was blowing ninety-five kilometres an hour from the north, north-west.
- (xvi) At around 5:20pm Leading Senior Constable Ian Hamill and Acting Sergeant Bruce Colville of the Eildon Police Station had established a road block at Taggerty to prevent traffic from going towards Marysville.
- (xvii) At some time after 5:20pm Sergeant David Rowles:
- (A) informed Senior Constable Hamill that a large bushfire had jumped the Maroondah Highway at Narbethong and was approaching Marysville; and
 - (B) directed Senior Constable Hamill to go to Marysville to find Senior Constable Thompson as Sergeant Rowles had lost contact with him.
- (xviii) At around 5:25pm Senior Constable Collyer observed that there were extremely strong gusts of wind and extremely high temperatures at Alexandra and believed that Marysville was at risk from the fire.
- (xix) By 5:30pm Senior Constable Thompson at Marysville had observed heavy smoke being carried by strong northerly winds.
- (xx) By 5:50pm Sergeant David Rowles had received information that the fire was spotting in Marysville.
- (xxi) At 5:55pm, Sergeant Rowles rang Mr Andrew Miller of DEPI who was at the Alexandra Incident Control Centre ("ICC") and asked about the evacuation of Marysville.
- (xxii) From at least 6:15pm, Senior Constables Hamill, Walker and Collyer were in the Murrindindi fire area and were travelling in one or more police vehicles that were equipped with radios that could be used to contact the D24 dispatch operator in Wangaratta.

- (xxiii) At around 6:30pm Senior Constable Hamill saw that the fire had crested the ranges and was travelling at great speed towards Marysville.
- (xxiv) At around 6:30pm Senior Constable Collyer, Leading Senior Constable Walker and Senior Constable Hamill arrived at Marysville with the intent of warning residents of the fire which they believed was travelling towards Marysville.
- (xxv) At 6:33pm Senior Constable Collyer called Senior Constable Ian Thompson and had a conversation about the fire during which Senior Constable Collyer agreed to immediately evacuate Senior Constable Thompson's family from Marysville. Shortly after this conversation Senior Constable Collyer drove to Senior Constable Thompson's house and directed Senior Constable Thompson's wife to leave Marysville immediately because of the risk posed by the approaching fire.
- (xxvi) Between 6:30pm and 6:40pm Senior Constable Collyer, Leading Senior Constable Walker and Senior Constable Hamill drove through the streets of Marysville in a police vehicle with the police lights flashing and siren sounding with the intent of warning residents that the fire was approaching and that residents should immediately leave the town.
- (xxvii) From approximately 6:30pm, while in the Murrindindi fire area, including Marysville, Buxton and Taggerty, Senior Constable Collyer, Senior Constable Hamill, Leading Senior Constable Walker and Leading Senior Constable Dwight each directed a number of persons they came into contact with to travel north towards Buxton and/or Alexandra because of the risk from the fire.
- (xxviii) By 7:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the wind change was going through the centre of the State.
- (xxix) By 7:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the Murrindindi fire was impacting on Melbourne Water catchments.
- (xxx) By 7:50pm, Sergeant Rowles was aware that Buxton Hotel was on fire and that Taggerty was under threat.
- (xxxi) At approximately 8:00pm Sergeant Rowles spoke to Senior Constable Andrew Walker regarding the evacuation of Taggerty to Alexandra.
- (xxxii) By 8:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information about the Murrindindi fire and that Marysville was 'still a concern'.
- (xxxiii) Throughout the afternoon and evening of 7 February 2009, Sergeant Rowles was in frequent communication with Superintendent Peter Billing (the relevant DERC), and provided verbal situation reports.

- (xxxiv) Throughout the afternoon and evening of 7 February 2009 Superintendent Billing was in contact with, or was able to contact, the SERCC.
- (xxxv) On 7 February 2009:
- (A) Chief Commissioner of Police Christine Nixon was at the IECC from approximately 3pm to 5.55pm;
 - (B) Assistant Commissioner of Police Stephen Fontana was at the IECC from approximately 2:35pm to 6pm;
 - (C) Superintendent Rod Collins was at the IECC until approximately 5pm;
 - (D) Superintendent Ross McNeil was at the IECC from approximately 7.30pm;
 - (E) Superintendent Bruce Knight was at the IECC from approximately 3pm; and
 - (F) Superintendent Rod Collins was at the SERCC from approximately 5:00pm.
- (xxxvi) Throughout the afternoon and evening of 7 February 2009 Superintendent Rod Collins and Superintendent Ross McNeil participated (either in person or via telephone conference) in State Emergency Strategy Team meetings, including meetings at 5pm, 7pm and 8pm, which were also attended (either in person or via telephone conference) by senior members of the CFA and/or DEPI.
- (xxxvii) Throughout the afternoon and evening of 7 February 2009 Superintendent Ross McNeil participated in Emergency Management Joint Public Information Committee ("EMJPIC") meetings (either in person or via telephone conference) which were also attended by senior members of the CFA and/or DEPI.
- (xxxviii) On 7 February 2009 Victoria Police Liaison Officers were present at the Alexandra Incident Control Centre (the ICC in control of the Murrindindi fire) and/or the Seymour Regional Emergency Co-ordination Centre.
- (xxxix) The EM Manual provides that:
- (A) the response roles, responsibilities and duties of a MERC include obtaining and forwarding regular advice to the DERC regarding the potential of an emergency which is not under substantial control by the control agency;
 - (B) the response, roles, responsibilities and duties of the DERC include obtaining and forwarding regular advice regarding the potential of an emergency which is not under substantial control by the control agency;
 - (C) the SERCC, DERCC and MERCC are the locations where emergency response co-ordinators and liaison officers of control

and support agencies receive, collate and disseminate intelligence; and

- (D) when activated, the SERCC is responsible for information collection, analysis of, and dissemination of intelligence to emergency response agencies.
- (xl) By reason of the facts, matters, circumstances and things set out in subparagraphs (i) to (xxxix) above, it is to be inferred that the State Co-ordinator, Deputy Co-ordinator, SER personnel and Murrindindi Fire Emergency Response Co-ordinators knew of the matters in paragraphs 214 – 215.
- (xli) By reason of the facts, matters, circumstances and things out in subparagraphs (i) to (xxxix) above, and the matters set out in paragraphs 189 – 195, the State Co-ordinator, Deputy Co-ordinator, SER personnel and Murrindindi Fire Emergency Response Co-ordinators ought to have known of the matters in paragraphs 214 – 215.

Further particulars may be provided following the completion of discovery and inspection.

217. Before and on 7 February 2009 the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators breached the Victoria Police Duty to Warn in that they failed to take reasonable care to ensure that bushfire warnings were given to persons at risk so as to enable the persons at risk to take steps to avoid personal injury loss and damage to themselves and/or their dependants by reason of the Murrindindi bushfire.

Particulars

- (i) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning of the kind required as set out in the particulars to paragraph 213.
- (ii) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning that the Murrindindi bushfire would be affected by the wind change forecast to occur mid to late afternoon on 7 February 2009 and this would place communities east and north east of the fire front at serious risk of personal injury or death.
- (iii) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning that the Murrindindi bushfire had reached the top of the Black Range at about 4:15pm and was out of control with spotting and ember attack many kilometres ahead of the fire front.
- (iv) Failing to co-ordinate and supervise the activities of the CFA and/or the DEPI so as to ensure that those agencies disseminated or caused to be disseminated to persons at risk the information, advice or warnings referred to in paragraphs (i)-(iii) above.

Causation and damage

218. If the personal injury claimants suffered personal injury loss and damage as a consequence of the Murrindindi fire (which is not admitted) such personal injury loss and damage was caused by the breaches by the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators of the Victoria Police Duty to Warn during the Murrindindi fire.

Particulars

But for the breaches of duty referred to above, the persons at risk would have taken steps to avoid injury or death.

219. The personal injury loss and damage was a natural and foreseeable consequence of the breaches of the Victoria Police Duty to Warn alleged against the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators.

Duties not delegated

220. Further:

- (a) the statutory and/or common law duties of the CFA in relation to warnings to the public as referred to below; and/or
- (b) the common law duties of the DEPI in relation to warnings to the public as referred to below; and/or
- (c) the agreement reached between Victoria Police, CFA and DEPI as referred to below that the CFA and/or the DEPI would in lieu of the Victoria Police undertake warnings to the public about bushfire risk,

did not abrogate, discharge or delegate the responsibilities of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators pursuant to the Victoria Police Duty to Warn.

221. In the premises, at all relevant times the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators remained liable to the personal injury claimants irrespective of the acts or omissions of CFA and/or DEPI as alleged in the following paragraphs.

Relief sought against State

222. The State is liable for the negligent acts and omissions of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and each of the Murrindindi Fire Emergency Response Co-ordinators alleged above pursuant to:

- (a) section 23(1)(b) of the *Crown Proceedings Act* 1958 (Vic);
- (b) section 123(2) of the *Police Regulation Act* 1958 (Vic).

223. In the premises, if ~~SP AusNet~~AusNet Services is held liable to the personal injury claimants in respect of any personal injury loss and damage then, on the grounds pleaded in paragraphs 171 - 222 herein, ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the State in respect of that personal injury loss and damage in such amount as may be found by the Court to be just and equitable having regard to the extent of the State's responsibility for the personal injury loss and damage.

224. The contribution from the State in respect of personal injury loss and damage for which ~~SP AusNet~~AusNet Services may be held liable to the personal injury claimants which would be just and equitable having regard to the extent of the State's responsibility for the personal injury loss and damage would be such as would amount to a complete indemnity to ~~SP AusNet~~AusNet Services.

Contribution Claim against CFA*First statutory duty to personal injury claimants*

225. Further, at all material times, the CFA was a body corporate capable of suing and being sued.

Particulars

Sub-section 6(2) of the CFA Act.

226. At all relevant times, the CFA was established for the more effective control of the prevention and suppression of fires in the country area of Victoria.

Particulars

Sub-section 6(1) of the CFA Act.

227. At all relevant times, it was the responsibility of the CFA to provide factual and timely advice and information to members of the Victoria Police with responsibilities in respect of bushfire, namely the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Emergency Response Co-ordinators, so as to enable those members of the Victoria Police to issue or cause to be issued warnings to the public in relation to bushfires for the protection of life and property in accordance with DISPLAN and/or the EM Manual (the **First CFA statutory warnings duty**).

Particulars

Part 8, page 20 within Appendix 5 of the EM Manual.

228. The First CFA statutory warnings duty was owed by the CFA to the personal injury claimants.

Particulars

The object of protecting the persons at risk is to be inferred from a proper construction of the EM Manual.

First common law duty to the personal injury claimants

229. Further, at all relevant times, the CFA was aware or ought to have been aware of:

- (a) the duties owed by the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators to the personal injury claimants;
- (b) the dependency of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators in giving bushfire warnings on the CFA complying with the EM Manual.

Particulars

At all material times the CFA was aware of the terms of DISPLAN and the EM Manual.

230. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the CFA.

Particulars

- (i) Prior to 7 February 2009, the CFA had available “all available IMT staff” to be allocated to an ICC when a fire incident demanded.
 - (ii) In relation to the wind change risk within the Murrindindi fire risks, the CFA knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire becomes its front after the change. The CFA knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.
231. Further, at all relevant times, the CFA knew or ought to have known that if the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators gave or caused to be given bushfire warnings to the public, the public would be likely to regard those warnings and their content as a principal source of information on which to act in order to protect themselves from the risk or danger of a bushfire.
232. At all material times the personal injury claimants:
- (a) had no ability, or no practical and effective ability, to prevent or minimize the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
 - (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
 - (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the CFA to ensure, alternatively to take reasonable steps to ensure, that the CFA would provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators to enable those members of Victoria Police to provide or cause to be provided bushfire warnings to persons at risk.
233. At all relevant times, the CFA knew or ought reasonably to have known that if it provided factual and timely advice and information about a bushfire to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire

Emergency Response Co-ordinators, this would enable those members of the Victoria Police to provide or cause to be provided bushfire warnings of the risk that a bushfire might or would be likely to reach a particular place by a particular time and would thereby enable persons at risk to take steps to avoid personal injury or death.

Particulars

If so warned, persons at risk would be able to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

234. In the premises, at all material times, the CFA owed to the personal injury claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,

to ensure, alternatively to take reasonable steps to ensure, that the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators were provided with factual and timely advice and information to enable those members of the Victoria Police to provide or cause to be provided bushfire warnings to persons at risk of the risk that a bushfire might or would be likely to arrive at a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (**the First CFA common law warnings duty**).

235. The CFA was required by:

- (a) the First CFA statutory warnings duty; and/or
- (b) the First CFA common law warnings duty,

to provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators so that those members of the Victoria Police could provide or cause to be provided bushfire warnings to persons at risk that a bushfire might or would be likely to reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

Particulars

The factual and timely advice and information required to be given to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators included advice which would enable those members of the Victoria Police to issue or cause to be provided timely and adequate warnings containing, depending on the particular fire circumstances and risk, where appropriate the provision of the following or parts of the following information to the public:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.
- (viii) Information as to the approximate time (using reasonable estimates) the fire might or would be likely to impact particular communities.
- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.
- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

Breach of duty to personal injury claimants

236. At all relevant times during the afternoon of 7 February 2009, the CFA was aware of the likely direction, path, and spread of the Murrindindi fire, taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.

Particulars

- (i) The DEPI Secretary and the CFA were in partnership as aforesaid so as to ensure a close working relationship for the management of bushfire emergencies.
- (ii) The State Fire Emergency Coordination Plan of 3-6 February 2009 provided a risk management assessment and strategies for the next four days in response to the extreme weather forecasted to occur, and identified the high risk area in the arc from the Otways, Macedon, Kinglake, Marysville, to the Dandenong Ranges.
- (iii) The DEPI Secretary and the CFA had established in consultation with the Victoria Police and other agencies the IECC.
- (iv) At all relevant times, personnel from the CFA, including the Chief Fire Officer, Mr Russell Rees, the CFA State Coordinator, Mr Geoffrey

Conway, the CFA State Duty Officer, Mr Gregory Paterson, and a Strategic Planning Officer, Mr Steven Warrington, were present and active participants in the affairs of the IECC in the management of the fire emergencies on 7 February 2009 including in relation to the Murrindindi bushfire.

- (v) By reason of the above matters, the CFA knew or ought to have known what the DEPI knew about the Murrindindi bushfire and its likely direction, path, intensity and spread taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.
- (vi) The Murrindindi bushfire was reported to the CFA at 2:55pm. The fire was observed at the Mt Despair fire tower and the CFA was told by the fire operator Colin Hind to “get everything you’ve got to throw at this”.
- (vii) CFA resources were deployed and arrived at the scene of the Murrindindi bushfire at approximately 3:08pm. From that time, Mr Neil Beer, Yea Group Officer, received reports from the CFA crew attending to the Murrindindi bushfire.
- (viii) Fanned by a strong north to north westerly wind, the Murrindindi bushfire spread quickly in a south easterly direction through grass paddocks, a privately owned blue gum plantation and into the Toolangi State Forest where it crowned almost immediately.
- (ix) At this stage, the Murrindindi bushfire moved at a speed of approximately 11 kilometres per hour and was “very, very intense” with flames up to 20 metres high.
- (x) At approximately 3:30pm the Mt Gordon fire tower operator, Mr Andy Willans, told Ms Pauline Harrow, Communications Officer for the Marysville CFA, that “(t)his fire was huge”, Marysville was under urgent threat and that she should get to the fire station and alert as many people to get out of Marysville as soon as possible.
- (xi) At 3:35pm, Mr Peter Rice of CFA’s Alexandra Group, advised Senior Constable Gavin Skerritt at the Alexandra CFA headquarters that he had concerns about how the Murrindindi bushfire was developing and that it may well impact on “townships down towards Narbethong”.
- (xii) The Murrindindi bushfire burned up the Western flanks of the Black Range reaching the top of the Black range at approximately 4:15pm.
- (xiii) From approximately 4:15pm, the Murrindindi bushfire created spot fires and ember attacks up to 10-15 kilometres ahead of the main head of the fire.
- (xiv) By approximately 4:00pm, the Murrindindi bushfire was out of control.
- (xv) The CFA was aware that DEPI was monitoring the Murrindindi bushfire from the air from approximately 4:20pm.
- (xvi) From approximately 4:20pm, the communities of Narbethong and Buxton were affected by ember attacks from the Murrindindi bushfire.
- (xvii) At 4:40pm Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, made observations about the location of spot fires and the behaviour

of the main fire including that there were numerous spot fires burning in the triangle between Marysville, Buxton and Narbethong and he communicated these to Mr Greg Williamson, Divisional Commander, of the CFA.

- (xviii) Sometime between 5:00pm and 5:30pm, the CFA State Coordinator at the IECC, Mr Geoffrey Conway, advised the CFA Chief Fire Officer, Mr Russell Rees and the DEPI Chief Officer, Mr Ewan Waller, that concerns existed that the Murrindindi fire would impact on Marysville.
- (xix) At 5:20pm, the CFA State Duty Officer at the IECC, Mr Gregory Paterson was told by Mr Andrew Graystone, the DEPI State Duty Officer at the IECC, that the Murrindindi mill fire had crossed the Maroondah Highway at Narbethong.
- (xx) At 6:20pm, the CFA was aware that there was a spot fire burning near the intersection of Kings Road and Martin Road in Marysville and by 6:30pm that it was burning approximately 100m from houses.
- (xxi) The weather conditions on 7 February 2009 were extreme and included strong north/north westerly winds and temperatures across much of the State of Victoria in excess of 40 degrees with low humidity.
- (xxii) At all relevant times the CFA knew that after the wind change the north eastern flank of the fire would become its head and therefore the potential of the fire to cause loss and damage would be significantly increased.
- (xxiii) At all relevant times during the afternoon of 7 February 2009, the CFA had access to information stored on the DEPI's fire management and prediction product called 'FireWeb' which was able to inform CFA of the speed, direction, spread, and extent of the Murrindindi bushfire including its forward spotting into communities.
- (xxiv) To the CFA's knowledge, there was a material risk that there would be a wind change which would affect the Murrindindi bushfire causing the north eastern flank of the bushfire to become its front, thereby putting communities east of the bushfire at substantial risk and danger.
- (xxv) The CFA's knowledge as aforesaid included a weather briefing given to it within the IECC on 3 February 2009, which included an 'extended outlook' forecast identified for 7 February 2009 as a day of particular concern. The briefing note stated that "the cold front developing in the Southern Ocean will catch up (sic) will impact on the western half (of) the State during the afternoon. Ahead of the frontal passage strong hot dry north westerly winds will impact on the State, including the east, with central and elevated areas seeing winds above 40km/hr – possibly up to 60-80km/hr, in the morning to early afternoon, before cooler fresh to strong south westerly winds push through, with scattered showers and thunderstorms behind. Fire danger will be extreme in both forest and grass due to the strong winds, low RH and temps again in the 40s. Timing of the change may vary, so areas impacted the most may differ depending on the change timing."

- (xxvi) In the premises, the CFA had not less than four days advance notice of the likely weather conditions on 7 February 2009 and of the likelihood and timing of a change in wind direction.
- (xxvii) Further, on Wednesday, 4 February 2009, the CFA was further briefed by BoM about the likely weather conditions, and the wind change, which would occur on 7 February 2009. The briefing described the weather on that day as an 'Absolute Extreme Fire Weather spike day' and indicated that the wind change would come through across Melbourne at approximately 5:00pm.
- (xxviii) The CFA was further aware of the likely wind change and the timing of it from information provided to it by the BoM from on or about 12:00pm on 7 February 2009. The CFA works in conjunction with the BoM to capture and assess fire weather information, which is provided to the CFA by BoM according to the Australian Government Bureau of Meteorology Fire Weather Directive (January 2006). It was at all material times the practice of the BoM that during a fire season the BoM would provide staffing to operate a routine fire weather forecasting shift, with real time fire weather matters being communicated between the Victorian Severe Weather section of BoM on the one hand, and, inter alia, the State Duty Officers of CFA on the other. At all relevant times, the BoM also administered a registered user web page which provided current data for fire management personnel within the CFA. On days when a significant wind change is being forecast, a wind change chart displaying the current and forecast positions of the change would be and was prepared by the BoM, updated every three hours, and made available electronically to the CFA.
- (xxix) To support the CFA, for the 2007-08 fire season, the BoM had placed a meteorologist in the then emergency co-ordination centre for that fire season, and again in 2008-09 in the IECC, who provided information to the CFA during the afternoon of 7 February 2009 in relation to weather conditions, including wind direction and the likely changes in wind and the timing of such change.
- (xxx) Further, during the afternoon of 7 February 2009, the CFA received advice from the South Australian Country Fire Service about weather conditions and the progress of the wind change in South Australia, and the movement of the front was continually monitored by the CFA.
- (xxxii) In the premises, at all material times after 12:00pm on 7 February 2009, the CFA was aware from the information it had received from the BoM and other sources that the predominant north/north westerly wind blowing across Victoria would swing to become a south westerly sometime between 3:00pm – 6:00pm.
- (xxxiii) Wind change forecasts were issued to the CFA (within the IECC) at 12:00pm, 1:50pm, 4:30pm and 6:30pm on 7 February 2009.
- (xxxiii) The potential effect of the south westerly change on fires was appreciated by the CFA at the IECC including as to the dangers posed by the change to communities. A proposed media release was prepared within the IECC and signed by Russell Rees the then Chief

Fire Officer of the CFA at 6:09pm. It referred to erratic winds accompanying the change and the potential for unpredictable fire behaviour. The media release was never released to the public.

- (xxxiv) In the premises, the CFA knew that accurately tracking and monitoring of the fire, forecasting/predicting its movement, and assessing the likely timing of the wind change, was vital in being able to assess the potential impact of the fire and the risk and danger posed by it to persons at risk.

237. At all relevant times prior to and on 7 February 2009, the CFA breached:

- (a) the First CFA statutory warnings duty; and/or
- (b) the First CFA common law warnings duty,

by not providing factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators to enable those members of Victoria Police to issue or cause to be issued bushfire warnings to persons at risk.

Particulars

The vast majority of the information known to the CFA referred to in the preceding paragraph was not provided by the CFA to the members of Victoria Police at the SERCC or within the IECC in a timely manner or at all.

238. If the personal injury claimants suffered personal injury loss and damage as a consequence of the Murrindindi fire (which is not admitted) such personal injury loss and damage was caused by the breach by CFA of:

- (a) the First CFA statutory warnings duty; and/or
- (b) the First CFA common law warnings duty,

during the Murrindindi fire.

Particulars

But for the breaches of the duties as aforesaid and/or any of them, persons at risk would have been provided with timely and adequate warnings and would have taken steps to avoid injury or death.

239. The personal injury loss and damage resulting from the Murrindindi fire was a natural and foreseeable consequence of the breaches of the duties as aforesaid alleged against the CFA in the preceding paragraphs.

Second statutory duty to the personal injury claimants

240. Further, at all relevant times, the CFA was under a duty, inter alia, to take superintend and enforce all necessary steps for the prevention and suppression of fires and for the protection of life and property in case of fire in the country area of Victoria (the **Second CFA statutory warnings duty**).

Particulars

Section 20 of the CFA Act.

241. The Second CFA statutory warnings duty, inter alia, imposed on the CFA an obligation:

- (a) to prepare emergency warnings to be given to the public containing relevant information in a timely, clear and adequate manner;
- (b) to disseminate those warnings to those members of the public who needed it where community action would be necessary to protect lives and property (**CFA bushfire warnings**).

Particulars

- (i) The obligation arising from the duty as aforesaid is inferred from a proper construction of section 20 of the CFA Act.
- (ii) The CFA was obliged to include within the warnings the information referred to in the particulars sub-joined to paragraph 235 hereof.

242. The Second CFA statutory warnings duty was owed by the CFA to the personal injury claimants.

Particulars

The object of protecting the personal injury claimants is to be inferred from the proper construction of the CFA Act.

Second common law duty to the personal injury claimants

243. Further, at all relevant times, the CFA had knowledge and expertise in relation to bushfire risks and in relation to the need to warn the public of such risks in order to protect the public from personal injury loss and damage.

Particulars

- (i) At all relevant times the CFA was under the Second CFA Statutory Duty.

- (ii) In the CFA's submission to the Victorian Bushfire Inquiry of 2002/03, the CFA stated:

"CFA considers provision of information to the community before and during a major incident as one of its core responsibilities. Research following the Ash Wednesday fires found that residents reported having 'little or no warning or information about where the fire was, the rate at which it was moving and the predicted wind change' [Lazarus and Elley 1984: 22]. Krusel and Petris [998] found that twelve of the Ash Wednesday civilian deaths occurred because the victims did not appear to recognise the real threat to their safety in time to implement an effective survival strategy... since the events of Ash Wednesday coronial reports and fire investigations have repeatedly encouraged the development of an information flow strategy that meets community needs to information during wildfire."

- (iii) The CFA was aware that the Report of Inquiry into the 2002-03 Victorian Bushfires (paragraph 23.21) had recommended that the CFA (and DEPI) ensure in relation to the provision of information to communities affected by fires that, among other things, incident management teams understood that one of their primary responsibilities was to keep the community informed as to where the fire was, its likely path, what was being done to combat the fire, and any preparations the community should undertake, and that information units were effectively integrated into incident management teams.
- (iv) In 2005, the Australasian Fire Authorities Council, of which the CFA is a member, published a position paper on bushfires and community safety which stated that "access to accurate and timely information during periods of high fire danger and fire events is crucial to enable people to make appropriate decisions concerning their safety."
- (v) The CFA was at all relevant times aware of the content of DISPLAN.
- (vi) Further, in or about 2006, the CFA, jointly with the DEPI, undertook a review of the effectiveness of information flow to communities and the media during fire incidents, which review recognised, inter alia, the value of providing timely and accurate information to the public during times of crisis, including natural disasters such as fires. The findings of the review are contained in a document entitled "Joint CFA/DEPI Review of Effectiveness of Information Flow to Communities and Media During Fire Incidents", prepared by John Schauble, July 2006. A copy of the report is available for inspection at the offices of the solicitors for ~~SP AusNet~~AusNet Services by appointment.

244. Further, at all material times, the CFA knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfire, rather than generalised warnings addressed and referring to the general public, were necessary to enable people in such areas to take steps to avoid the risk of personal injury and death.

245. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the CFA.
246. Further, the CFA knew that the EM Manual prescribed that the ultimate goal of emergency management was to ensure a “safer more sustainable community.”
247. Further, at all relevant times, the CFA knew or ought to have known that if the CFA gave CFA bushfire warnings about the risks and dangers of bushfires (including via its website), the public would be likely to regard those warnings and their content as a reliable and principal source of information on which to act in order to protect themselves from risk or danger of bushfire.
248. At all material times the personal injury claimants:
- (a) had no ability, or no practical and effective ability, to prevent or minimize the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
 - (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
 - (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the CFA to ensure, alternatively to take reasonable steps to ensure, that CFA bushfire warnings were issued to persons at risk.
249. Further, at all relevant times, the CFA knew or ought reasonably to have known that CFA bushfire warnings would enable persons at risk to take steps to avoid personal injury and death.

Particulars

- (i) If so warned, persons at risk would be able to consider acting so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.
- (ii) If so warned, persons at risk would be able to consider staying and if staying taking protective action to ameliorate the impact of the fire should it arrive and thereby improving the chances of them remaining safe and free from injury and/or death despite the fire’s presence.

250. Further, as at and on 7 February 2009, the CFA:

(a) had control of:

- (i) systems, procedures and means to obtain information and predictions about the progress and impact of bushfires;
- (ii) systems, procedures and means to formulate and disseminate bushfire warnings via ABC Radio, the CFA website and the Victorian Bushfire Information Line, based on the information and predictions referred to in sub-paragraph (i); and

(b) assumed responsibility to issue CFA bushfire warnings.

Particulars

- (i) In 2005, the CFA and DEPI, amongst other parties, entered into a memorandum of understanding with the Australian Broadcasting Corporation (**ABC**) Radio pursuant to which the ABC undertook that ABC Radio would broadcast emergency messages as requested by Victoria's emergency services (including the CFA and DEPI) in order to notify listeners that a significant emergency was occurring in their area – the memorandum is in writing and is referred to in Part 7, p10 of the EM Manual.
 - (ii) In or about 2008, the CFA and DEPI sought to establish the IECC for the management of bushfire emergencies.
 - (iii) The establishment of the IECC was based on an earlier decision to merge the CFA and DEPI bushfire operations for the 2008/9 fire season.
 - (iv) The IECC was initially intended to include the Victoria Police as a further emergency agency but in March 2008 the Victoria Police formally informed the CFA and the DEPI that the Police Operation Centre and the SERCC would remain within the Victoria Police Centre.
 - (v) As a consequence, the Victoria Police's core operations continued to be conducted within its own headquarters at the SERCC and not within the IECC.
 - (vi) At all relevant times prior to and on 7 February 2009, the CFA had established a dedicated page on its website on which warnings would be posted so as to warn the public of the risk and danger of bushfire. The warnings were to be called, inter alia, 'awareness' messages and 'urgent threat' messages.
- (via) At all relevant times prior to and on 7 February 2009, the CFA had control of systems, procedures and means to obtain information and predictions about the progress and impact of bushfires from a range of sources including fire tower personnel, fire ground personnel, personnel in Incident Control Centres and other emergency response and co-ordination centres and the CFA's Incident Management System, and DSE's FireWeb system.

- (vib) At all relevant times prior to and on 7 February 2009, the CFA had control of Information Units staffed by personnel trained and equipped for the formulation and dissemination of bushfire warnings.
- (vii) At all relevant times prior to and on 7 February 2009, the CFA had established a fire prediction programme called CFA Emergency Information Management System to enable it to predict the path of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (viii) At all relevant times on 7 February 2009, the CFA had access to the expertise of the DEPI, including persons retained by the DEPI in fire prediction and modelling, for the purposes, inter alia, of predicting the path and spread of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (ix) At all relevant times prior to and on 7 February 2009, the CFA had established, with the DEPI, the Victorian Bushfire Information Line (**VBIL**). The VBIL was established as a joint initiative of the DEPI and CFA and operated from the DEPI Customer Service Centre in Ballarat, established to provide one point of contact for the community needing information on bushfire activity in Victoria. The VBIL was a means, inter alia, of the CFA providing information to the public to warn them of bushfire risk and danger. According to a CFA publication, 'Advice to Community Before and During Wildfire – Guide for CFA Personnel', the VBIL was set up by the CFA and DEPI to provide information to the community before and during bushfires, with VBIL frequently responding to questions from the community about, inter alia, information for people who need to respond to a wild fire. According to the publication, during significant wild fires, CFA will activate the Information Unit within CFA as part of its incident management structure, the Information Unit being responsible for the delivery of accurate and timely messages from the relevant incident management team to the community. Further, according to the publication, the threat messages provided to the community are significantly more detailed than a simple alerting system as they aim to provide information to enable people to make appropriate decisions and respond to the threat more safely. According to the publication, the messages are sent out to the community through the media, with particular emphasis on regional and local radio, with ABC radio being the official broadcaster for Victoria during an emergency, and information also being available through the CFA website. According to the publication, CFA personnel should advise residents to seek information about wild fires through: ABC statewide and regional radio or an appropriate local radio; the CFA public website (www.cfa.vic.gov.au), and VBIL.
- (x) Further, on 5 February 2009, the CFA issued a media release (with the DEPI) headed 'Fire Services Warn of Continuing Fire Threat'. In the release, the CFA stated that "Important steps to take to avoid the threat of fire include: ... if travelling, listen to ABC Local Radio or community radio station; For bushfire information, check the CFA and DEPI websites or call the [VBIL]". The same message was contained in a further media release published by the CFA on 6 February 2009.

(xi) In the premises, the CFA had control of and assumed responsibility for the issue of warnings to the public from the IECC and/or relevant control centres or divisional headquarters about bushfire risk.

(xii) CFA personnel were deployed to the Alexandra ICC being operated by the DEPI to take up roles including Deputy Incident Controller, Deputy Operations Officer, and Information Officers.

251. By (inter alia) its media releases on 5 and 6 February 2009 the CFA represented to the public that in order to obtain bushfire information and avoid the threat of bushfires members of the public should check the CFA website or call the VBIL.

252. The CFA knew and intended that members of the public including members of the public in the country area of Victoria and persons at risk would rely on the CFA website and the VBIL in order to obtain bushfire information and avoid the threat of bushfires.

253. In the premises, and having regard to the statutory duties of the CFA as aforesaid, at all material times, the CFA owed to the personal injury claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,

to ensure, alternatively to take reasonable steps to ensure, the issue of CFA bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (the **Second CFA common law warnings duty**).

254. The CFA was required by:

- (a) the Second CFA statutory warnings duty; and/or
- (b) the Second CFA common law warnings duty,

to issue CFA bushfire warnings to members of the public in the country area of Victoria including persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

Particulars

~~SP AusNet~~ AusNet Services refers to and repeats the particulars to paragraph ~~67-213~~ above.

Breach of duty to the personal injury claimants

255. At all relevant times prior to and on 7 February 2009, the CFA breached:

- (a) the Second CFA statutory warnings duty; and/or
- (b) the Second CFA common law warnings duty,

by not issuing CFA bushfire warnings to the persons at risk which were timely or adequate.

Particulars

- (i) The following warnings were posted on the CFA website by the CFA and read out on ABC radio as a result of “Urgent Threat Messages” issued by DEPI, or jointly by the CFA and DEPI, but they were untimely, inadequate, and information poor, and did not adequately warn persons at risk of the risks posed to those persons by the Murrindindi bushfire and/or provide any real opportunity for persons at risk to avoid the risks.
- (ii) An “Urgent Threat Message” was issued at 4.45pm, broadcast on ABC 774 at approximately 4.47pm (not in full), 5.10pm and 6.00pm and posted to the CFA website at 4:55pm stating that the Murrindindi bushfire in the Mount Despair State Forest was burning in a south easterly direction with spotting well ahead of the fire and that the community of Narbethong could expect to come under direct ember attack from this fire.
- (iii) Another “Urgent Threat Message” was issued at approximately 5.15pm, broadcast on ABC 774 (not in full) at approximately 5.34pm (not in full) and 5.40pm and posted to the CFA website by no later than 5.52pm stating that the Murrindindi bushfire in the Mount Despair State Forest was burning in a south easterly direction with spotting well ahead of the fire and that the communities of Narbethong, Marysville and Buxton could expect to come under direct attack from this fire.
- (iv) Another “Urgent Threat Message” was issued at 5.45 pm, read out on ABC 774 at 6.10pm, 6.15pm and 6.50pm, and posted on the CFA website at 6:35pm stating that the Murrindindi bushfire was burning in a south easterly direction with spotting well ahead of the fire, the fire was now directly impacting on Narbethong, and that the communities of Marysville and Buxton could expect to come under direct attack.
- (v) Another “Urgent Threat Message” was issued at 6.45pm, referred to on ABC 774 at 7.07pm and posted to the CFA website at 7.50pm stating that the Murrindindi bushfire was burning in a north easterly direction with spotting well ahead of the fire, the fire had directly impacted on

Narbethong and Marysville, and that the community of Buxton could expect to come under direct attack from this fire.

- (vi) Another “Urgent Threat Message” was issued at 7.35pm, read out on ABC 774 at 8.19pm and posted on the CFA website at 8.00pm stating that the Murrindindi bushfire was burning in a north easterly direction and was spotting well ahead of the fire, the fire had directly impacted on Narbethong and Marysville, Marysville residents were encouraged to assemble at the muster point at the town oval and the community of Buxton could expect to come under direct attack from the fire.
- (vii) An “Urgent Threat Message” was issued at 8.15pm, posted to the CFA website at 8.33pm and at 9.00 pm and read out on ABC 774 at 8.48pm, 9.00pm and 9.19pm stating that the Murrindindi bushfire was still burning in a south easterly direction with spotting well ahead of the fire, the fire was now directly impacting on Narbethong and that residents around Murrindindi and Limestone were in the direct path of the fire, needed to prepare for imminent impact and could expect to come under heavy ember attack.
- (viii) Another “Urgent Threat Message” was issued at 9.49- 9.51pm and posted to the CFA website at 10.05pm advising that residents of Alexandra should have fire plans in place.
- (ix) Another “Urgent Threat Message” was issued at 10.02- 10.04pm, read on ABC 774 at 10.32pm, 10.52pm and 11.05pm and posted to the CFA website at 10.40pm stating that the Murrindindi bushfire was now burning in a north easterly direction, and that the communities of Taggerty, Acheron, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and Molesworth could expect thick smoke and ember attack and were advised to implement fire plans.
- (x) In addition, an “Awareness Message” was issued by the Benalla IFACC which was read on ABC 774 at 4:07pm which stated that a fire was burning two kilometres south east of Murrindindi in a south easterly direction. It was made clear that this was not a threat message.
- (xi) The above information and warnings were not timely and did not accurately reflect the fire information available to the CFA and the predictions the CFA had made, or were aware of, for the path, intensity, spread and timing of the movement of the Murrindindi bushfire during the course of the afternoon of 7 February 2009.
- (xii) The first warning to Narbethong was when ember attacks had already reached the community.
- (xiii) The first warning to Taggerty was after the Murrindindi bushfire was on the southern edge of the town.
- (xiv) The first warning that Marysville would come under attack was only approximately one hour before spot fires began burning on and ember attacks had reached the edge of the town.
- (xv) From approximately 3:30pm on 7 February 2009, the CFA was aware that Marysville was at serious risk of being impacted by the Murrindindi bushfire but this was not communicated in any warnings until 5:34pm.

- (xvi) From 3:35pm on 7 February 2009, the CFA was aware that the Murrindindi bushfire may impact on Narbethong, but this was not communicated until 4:45pm.
- (xvii) At 4:07pm the CFA caused an "Awareness Warning" to be announced on ABC 774 which indicated that the Murrindindi bushfire was not currently posing a threat to communities, when it had information that Marysville was clearly under threat.
- (xviii) From at least 4:15pm on 7 February 2009, the CFA was aware that the Murrindindi bushfire had reached the top of the Black Range, that it was burning out of control, and that there was a high potential that life and property in communities forward of the path of the fire would be endangered by the fire.
- (xix) The "Urgent Threat Message" that was posted on the CFA website at 8:33pm and at 9.00 pm and read out on ABC 774 at 8.48pm, 9.00pm and 9.19pm was inaccurate as the wind change had already occurred and the Murrindindi bushfire was then moving in a north easterly direction.
- (xx) No warnings issued by the CFA conveyed the size, intensity, ferocity, speed or destructive capacity of the Murrindindi bushfire or, after 4:00pm, that it was completely out of control.
- (xxi) No warnings issued by the CFA gave an indication as to the arrival time of the fire in any location.
- (xxii) No warnings issued by the CFA concerning the Murrindindi bushfire included information as to the anticipated impact of the south westerly change on the behaviour and direction of the fire even though the CFA was aware of the impending wind change and its likely impact.
- (xxiii) No warnings issued by the CFA included any information that after the wind change the north eastern flank of the Murrindindi bushfire would become its head and that therefore and thereafter the potential for the Murrindindi bushfire to cause loss and damage would be significantly increased.
- (xxiv) Further, the warnings issued by the CFA did not satisfy best practice requirements for warnings.
- (xxv) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to eliminate or minimise the risk that members of the public might not take action to avoid injury or death.

256. The CFA should have issued timely and adequate bushfire warnings to persons at risk which specified not less than the following information:

- (a) that the Murrindindi fire was likely to reach a particular place or places at a particular time or times;
- (b) that the wind change forecast to occur mid to late afternoon on 7 February 2009 would have a profound effect upon the Murrindindi fire and this would

put communities east/north east of the fire front at a serious and material risk and danger and that those communities should take heed that the risk posed by the effects of that wind change on the fire was life threatening.

Causation and damage

257. If the personal injury claimants suffered personal injury loss and damage during the Murrindindi fire (which is not admitted) such death and/or injury was caused by the breach by CFA of:

(c) the Second CFA statutory warnings duty; and/or

(d) the Second CFA common law warnings duty,

during the Murrindindi fire.

Particulars

(i) The warnings as aforesaid were untimely and inadequate and did not enable persons at risk to take steps to avoid or minimise the risk of personal injury loss and damage.

(ii) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to enable persons at risk to take steps to avoid injury or death.

258. The personal injury loss and damage caused by the Murrindindi fire was a natural and foreseeable consequence of the breaches of duty as aforesaid alleged against the CFA in the preceding paragraphs.

CFA duties not delegated

259. Further:

(a) the common law duties of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators as referred to above; and/or

(b) the statutory and/or common law duties of the DEPI to issue warnings as referred to below; and/or

(c) any agreement reached between Victoria Police, CFA and DEPI that CFA and/or DEPI would undertake warnings to the public about bushfire risk as referred to above,

did not abrogate, discharge or delegate the responsibilities of the CFA so as to satisfy:

- (d) the First CFA statutory warnings duty; and/or
- (e) the Second CFA statutory warnings duty; and/or
- (f) the First CFA common law warnings duty; and/or
- (g) the Second CFA common law warnings duty.

Relief sought in respect of CFA breaches of duty

260. In the premises, if ~~SP AusNet~~AusNet Services is held liable to the personal injury claimants in respect of any personal injury loss and damage then, on the grounds pleaded in paragraphs 225 - 259 herein, ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the CFA arising from the acts or omissions of the CFA in respect of that personal injury loss and damage in such amount as may be found by the Court to be just and equitable having regard to the extent of the CFA's responsibility for the personal injury loss and damage.

261. The contribution from the CFA in respect of personal injury loss and damage for which ~~SP AusNet~~AusNet Services may be held liable to the personal injury claimants which would be just and equitable having regard to the extent of the CFA's responsibility for the personal injury loss and damage would be such as would amount to a complete indemnity to ~~SP AusNet~~AusNet Services.

Contribution Claim against DEPI Secretary

First common law duty to the personal injury claimants

262. At all relevant times the DEPI Secretary was a body corporate capable of being sued in its corporate name.

Particulars

- (i) Under section 3 of the *Forests Act 1958* (Vic) (the **Forests Act**), "Secretary" means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987* (Vic) (the **Conservation, Forests and Lands Act**).
- (ii) Under sub-section 6(1) of that Part, the person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004* (Vic)) of the DEPI and the successors in office of that person are a

body corporate under the name “Secretary to the Department of Sustainability and Environment.”

- (iii) Further, under sub-section 6(2) of that Part (inter alia), the Secretary may sue and be sued in its corporate name.
- (iv) Under Schedule 1 of the *Public Sector Reform (Miscellaneous Amendments) Act 1998* (Vic), in section 6 of the Conservation, Forests and Lands Act for “Department of Conservation and Natural Resources” (wherever occurring) was substituted “Department of Sustainability and Environment”.
- (v) By notice published in the Victoria Government Gazette on 9 April 2013, the Department of Sustainability and Environment changed its name to the Department of Environment and Primary Industries (**DEPI**).

263. At all relevant times, the DEPI Secretary was statutorily required to carry out proper and sufficient work for the prevention and suppression of fire in, inter alia, State forests and national parks.

Particulars

- (i) Sub-section 62(2) of the Forests Act.
- (ii) A statutory duty in substantially the same terms was initially imposed on the Forests Commission after the extensive and devastating wildfires in Victoria in 1939. The DEPI Secretary subsequently assumed the duty, by operation of the provision referred to in sub-paragraph (i) above.
- (iii) Recognition of the Statutory duty is referred to on p.1-2 of the DEPI’s Fire Management Manual (version 8.1) – Fire Suppression (the **DEPI Fire Management Manual**) published by the DEPI in 2006, a copy of which may be inspected at the offices of the plaintiff’s solicitors by appointment.

264. At all relevant times, the DEPI Secretary and the CFA had partnership arrangements to provide seamless and effective services to the Victorian community in relation to bushfires.

Particulars

The arrangements are detailed in section 3.2 of the DEPI Fire Management Manual: DEPI-CFA Partnership Arrangements.

264A At all relevant times, the DEPI Secretary was required by the 2006 Code of Practice alleged in paragraph 112 above to participate in interagency coordination in accordance with relevant legislation, arrangements put in place under the state

emergency response plan (DISPLAN), and arrangements agreed between agencies.

Particulars

- (i) The 2006 Code of Practice (DSE.HDD.0012.1267) was made in accordance with sub-section 31(1) of the Conservation, Forests and Lands Act.
- (ii) Sub-section 67(1) of the Conservation, Forest and Lands Act provided among other things that a public authority must not take action contrary to a Code of Practice unless (a) the authority is satisfied that there is no feasible and prudent alternative, and (b) all measures that can reasonably be taken to minimize the adverse effect of the action are taken.
- (iii) Sub-section 3(1) of the Conservation, Forests and Lands Act defined a “public authority” to mean a body corporate created for a public purpose by or under an Act. The DEPI Secretary fell within this definition.
- (iv) Paragraph 320 in section 4.2.10 of the 2006 Code of Practice provided that the DEPI “must participate in interagency coordination in accordance with relevant legislation and arrangements put in place under the State Emergency Response Plan, and interagency arrangements.”
- (v) Paragraph 389 in section 4.3.5 of the 2006 Code of Practice provided that interagency coordination “must be in accordance with relevant legislation, agreements, the State Emergency Response Plan and agreed reciprocal arrangements.”
- (vi) Part 7 of the 2006 Code of Practice relevantly defined “State Emergency Response Plan” as the plan formerly known as DISPLAN which is incorporated in the Emergency Management Manual Victoria and identifies organisational arrangements for managing the response to emergencies in Victoria.

265. At all relevant times, the DEPI Secretary and the DEPI maintained ‘FireWeb’ which was the primary system of the department for storing and sourcing all data and fire suppression information.

Particulars

FireWeb was and is an intranet controlled and operated within the DEPI.

266. At all relevant times, the DEPI Secretary was aware or ought to have been aware of:
- (a) the obligation on the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators to give or cause to be given bushfire warnings;
 - (b) the dependency of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators in giving or causing to be given bushfire warnings on the DEPI Secretary (through the DEPI) providing relevant information known to the DEPI Secretary's department about a bushfire.
267. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the DEPI Secretary.

Particulars

- (i) At all relevant times, the DEPI Secretary knew or ought to have known that prior to 7 February 2009, the ~~CFA~~ DEPI had established an ICC at Alexandra.
 - (ii) In relation to the wind change risk within the Murrindindi fire risks, the DEPI Secretary knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire becomes its front after the change. The DEPI Secretary knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.
 - (iii) The DEPI Secretary knew or ought to have known that a bushfire as referred to in paragraph (ii) hereof might reach into public lands such as State forests and/or national parks in respect of which the DEPI Secretary had fire prevention and suppression obligations as referred to in paragraphs 99 - 100 hereof and would have or ought to have knowledge about the fire risks.
268. Further, at all relevant times, the DEPI Secretary knew or ought to have known that if the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators gave or caused to be given bushfire warnings to the public (including via any relevant website), the public would be likely to regard those warnings and their content as a reliable and principal

source of information on which to act in order to protect themselves from the risk or danger of a bushfire.

269. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimize the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
- (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the DEPI Secretary to ensure, alternatively to take reasonable steps to ensure, that the DEPI Secretary would provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators to enable those members of the Victoria Police to provide or cause to be provided bushfire warnings.

270. At all relevant times, the DEPI Secretary knew or ought to have known that if it provided factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators about a bushfire, this would enable those members of Victoria Police to provide or cause to be provided bushfire warnings of the risk that a bushfire might or would be likely to reach a particular place by a particular time and would thereby enable persons at risk to take steps to avoid personal injury and death.

Particulars

If so warned, persons at risk would be able to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

271. In the premises, at all material times, the DEPI Secretary owed to the personal injury claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,

to ensure, alternatively to take reasonable steps to ensure, that the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators were provided with factual and timely advice and information to enable those members of Victoria Police to provide or cause to be provided bushfire warnings to persons of risk of the risk that a bushfire might or would be likely to arrive at a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (**the First DEPI warnings duty**).

272. The DEPI Secretary was required by the First DEPI warnings duty to provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators so that those members of Victoria Police could provide or cause to be provided bushfire warnings to persons at risk of the risk that a bushfire might or would be likely to reach a particular place by a particular time so as to enable persons at risk to take steps to avoid the risk so as to minimise or avoid personal injury and death.

Particulars

The factual and timely advice and information required to be given to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators included advice and information which would enable those members of the Victoria Police to issue or cause to be provided timely and adequate warnings containing, depending on the particular fire circumstances and risk, where appropriate the provision of the following or parts of the following information to the public:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.

- (viii) Information as to the approximate time (using reasonable estimates) the fire might or would be likely to impact particular communities.
- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.
- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

Breach of duty to the personal injury claimants

273. At all relevant times during the afternoon of 7 February 2009, the DEPI Secretary was aware of the likely direction, path, and spread of the Murrindindi fire, taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.

Particulars

- (i) The DEPI Secretary and the CFA were in partnership as aforesaid so as to ensure a close working relationship for the management of bushfire emergencies.
- (ii) The State Fire Emergency Coordination Plan of 3-6 February 2009 provided a risk management assessment and strategies for the next four days in response to the extreme weather forecasted to occur, and identified the high risk area in the arc from the Otways, Macedon, Kinglake, Marysville, to the Dandenong Ranges.
- (iii) The DEPI Secretary and the CFA had established in consultation with the Victoria Police and other agencies the IECC.
- (iv) At all relevant times, personnel from the DEPI Secretary's Department, including the DEPI Chief Officer, Fire and Emergency Management, Mr Ewan Waller, the DEPI State Duty Officer, Mr Andrew Graystone, and the DEPI Chief Officer Contact, Mr Alen Slijepcevic, were present and active participants in the affairs of the IECC in the management of the fire emergencies on 7 February 2009 including in relation to the Murrindindi bushfire. Personnel from the DEPI Secretary's Department at the IECC took the lead role in the management of the Murrindindi bushfire.
- (v) On 7 February 2009, the Alexandra ICC was based at a DEPI facility and was staffed by DEPI officers. The DEPI Incident Management Team took control of the Murrindindi bushfire at approximately 4:15pm. Mr Andrew Miller of Parks Victoria assumed the role of Incident Controller when the fire started. Mr Tony Lovick of DEPI subsequently assumed the role of Incident Controller.
- (vi) DEPI resources were deployed and arrived at the scene of the Murrindindi bushfire at approximately 3:15pm, although the DEPI Division Commander for the fire, Dale Young, arrived shortly after 3.45pm.

- (vii) By reason of the above matters, the DEPI knew or ought to have known what the CFA knew about the Murrindindi bushfire and its likely direction, path, intensity and spread taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.
- (viii) In this regard the first defendant refers to and repeats the particulars sub-joined to paragraph 236 hereof as to what the CFA knew and in turn the DEPI knew or ought to have known about the Murrindindi bushfire in the above regard and, in addition, refers to the matters below.
- (ix) At 2:55pm, Mr Colin Hind, DEPI fire tower operator at Mt Despair, reported the Murrindindi bushfire to the DEPI. Shortly after reporting the bushfire he advised the DEPI to “throw everything they have at it because it was nearly in the Toolangi State Forest ...”
- (x) At 3:51pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr David Hayse, the DEPI North East Regional Duty Officer, advising that the Murrindindi bushfire was building south of Murrindindi Scenic Reserve.
- (xi) At approximately 4:00pm, Mr Andy Willans, DEPI fire tower operator at Mt Gordon, communicated with Mr Bowdern, Alexandra ICC Operations Officer, of DEPI regarding the location and spread of the fire, the location of spot fires and the potential for the fire to reach Narbethong and Marysville.
- (xii) At 4:00pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr Stuart McDonald, of the Toolangi DEPI office, advising that the DEPI team fighting the Murrindindi bushfire was assisting campers to protect themselves from that fire in the Murrindindi River. Mr Graystone passed this information to Mr Stephen Smith, the Planning Officer at the Alexandra ICC.
- (xiii) DEPI was monitoring the Murrindindi bushfire from the air from approximately 4:50pm on 7 February 2009 and DEPI aircraft arrived at the fire from approximately 4.20pm.
- (xiv) By approximately 4:30pm, when Mr Willans left the Gordon tower for his own safety, Mr Willans had observed that the Murrindindi bushfire was “massive”, “huge, absolutely huge” and unlike anything he had seen before.
- (xv) Between 4:00-5:00pm, Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, made observations about the location of spot fires and the behaviour of the main fire including that there were numerous spot fires burning in the triangle between Marysville, Buxton and Narbethong.
- (xvi) At 5:10pm, Mr Shaun Lawlor, a DEPI Air Attack Supervisor, told Mr William Twitchett, Deputy Operations Officer, Alexandra ICC, of DEPI that Narbethong was under direct attack and that “Marysville and Buxton were not being impacted” but that “if the predicted south west

wind change occurred, they would be directly in the path of the new fire front”.

- (xvii) Sometime between 5:00pm and 5:30pm, the CFA State Coordinator at the IECC, Mr Geoffrey Conway, advised the CFA Chief Fire Officer, Mr Russell Rees, and the DEPI Chief Officer, Mr Ewan Waller, that concerns existed that the Murrindindi fire would impact on Marysville.
- (xviii) At 5:20pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr David Hayse, the DEPI North East Regional Duty Officer, advising that the Murrindindi bushfire had crossed the Maroondah Highway at Narbethong. He relayed this information to the IECC Planning Officer and the DEPI Chief Officer Contact, Mr Alen Slijepcevic.
- (xix) At 5:25pm, Ms Robyn Rattray-Wood, DEPI Information Officer at the Alexandra ICC, and Mr Alex Konrad, DEPI Information Officer at the Benalla Integrated Fire Agency Coordination centre (“**IFACC**”) discussed the wind change and the fact that Marysville was under urgent threat.
- (xx) At 5:36pm, DEPI Incident Controller at the Alexandra ICC, Mr Tony Lovick knew that the south west change was already in Melbourne.
- (xxi) At 5:55pm, Sergeant Rowles (MERC) rang Mr Andrew Miller, who was at the DEPI Alexandra ICC, to discuss contingency plans to evacuate Marysville.
- (xxii) At 6:10pm, a hand drawn map entitled the “Murrindindi Fire Prediction Map, as of 1800 hrs, 7 Feb 2009” (the “**Hand Drawn Fire Prediction Map**”) was prepared by fire behaviour analysts at the IECC and shown shortly thereafter to the DEPI State Duty Officer at the IECC, Mr Andrew Graystone. This map predicted the direction and spread of the Murrindindi bushfire based on a predicted wind change at 6:00pm and showed that the communities likely to be impacted by the Murrindindi bushfire included Marysville, Buxton and just south of Taggerty.
- (xxiii) At approximately 6:10pm, Mr Andrew Graystone participated in a meeting with Mr Mike Sutton, Team Leader of the Fire Behaviour Analysis Unit, Mr Alen Slijepcevic and others. The Hand Drawn Fire Prediction Map was then approved by Mr Slijepcevic for distribution to DEPI Regional Duty Officers.
- (xxiv) At 7:25pm, DEPI had information that Taggerty, Acheron, Molesworth, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and nearby communities between Murrindindi and Yea were under threat.
- (xxv) At 8:43pm, a digital map entitled the “Murrindindi Predicted Fire Spread Map, 1800hrs to 2300hrs, 7 February 2009” was completed by the IECC and, at 8:51pm, a digital map entitled the “Murrindindi Potential Fire Impact Zone, 1745hrs to 2300hrs, 7 February 2009” was completed by the IECC (collectively the “**Fire Prediction Maps**”). The Fire Prediction Maps predicted the direction and spread of the Murrindindi bushfire based on a predicted wind change at 6:00pm and

showed that the communities likely to be impacted by the Murrindindi bushfire included Marysville, Buxton and Taggerty.

- (xxvi) At 9:19pm, the Fire Prediction Maps and a Fire Spread Prediction Report for the Murrindindi mill fire (entitled the "Fire Spread Prediction Report for Kilmore Saunders Road Fire") were emailed from the IECC to DEPI staff at the Benalla IFACC. The Fire Spread Prediction Report stated on page 2 that "[f]ire behaviour will increase in intensity with the wind change".
- (xxvii) At 10:09pm, this email, the Fire Predictive Maps and the Fire Spread Prediction Report were forwarded by Mr Peter Farrell, DEPI's Land and Fire Manager for the North East Region, to Mr Tony Lovick, the Incident Controller at the Alexandra ICC and Mr John Steer, the Situation Officer at the Alexandra ICC.
- (xxviii) The DEPI Secretary was aware of the weather information and forecasting which the BoM had provided to the CFA as set out in the particulars sub-joined to paragraph 236 hereof.
- (xxix) Further, at all relevant times during the afternoon of 7 February 2009, the DEPI Secretary had personnel with access to the information on the DEPI's 'FireWeb' as aforesaid, which enabled it to and did inform the DEPI Secretary's personnel of the speed, direction, spread, and extent of the Murrindindi bushfire including its forward spotting into communities.
- (xxx) To the DEPI Secretary's knowledge, there was a material risk that there would be a wind change which would affect the Murrindindi bushfire causing the north eastern flank of the fire to become its front and thereby putting communities east of the Murrindindi bushfire at substantial risk and danger.
- (xxxi) Further, during the afternoon of 7 February 2009, the DEPI Secretary through the IECC received advice from the South Australian Country Fire Service about weather conditions and the progress of the wind change in South Australia, and the movement of the front was continually monitored by the DEPI Secretary's personnel at the IECC.
- (xxxii) In the premises, at all material times after 3:00pm on 7 February 2009, the DEPI Secretary was aware from information it had received from the BoM and other sources that the predominant northerly wind blowing across Victoria would swing to become a south westerly sometime between 3:00-6:00pm.
- (xxxiii) Wind change forecasts were issued to the DEPI Secretary's personnel (within the IECC) at 12:00pm, 1:50pm, 4:30pm and 6:30pm on 7 February 2009.
- (xxxiv) At all relevant times during the afternoon of 7 February 2009, DEPI and personnel at the ICC had access on request to Spot Fire Weather Forecasts which provide highly detailed fire weather information for specific locations where a fire is burning, including the time of any wind changes.
- (xxxv) At all relevant times during the afternoon of 7 February 2009, DEPI had access to automated weather station information including an

automated weather station at Coldstream (40 kilometres south west of Marysville) which recorded a south west change at 5:48pm.

- (xxxvi) The potential effect of the south westerly change on fires was appreciated by the personnel of the DEPI Secretary at the IECC including as to the dangers posed by the change to communities. To the knowledge of personnel of the DEPI Secretary, a proposed media release was prepared within the IECC and signed by Russell Rees the then Chief Fire Officer of the CFA at 6:09pm. It referred to erratic winds accompanying the change and the potential for unpredictable fire behaviour. The media release was never released to the public.
- (xxxvii) In the premises, the DEPI Secretary's personnel knew that accurately tracking and monitoring of the Murrindindi bushfire, forecasting/predicting its movement, and assessing the likely timing of the wind change, was vital in being able to assess the potential impact of the Murrindindi bushfire and the risk and danger posed by it to the public.

274. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached the First DEPI warnings duty by not providing factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators to enable those members of the Victoria Police to issue or cause to be provided bushfire warnings to persons at risk.

Particulars

The vast majority of the information known to the DEPI Secretary's personnel referred to in the preceding paragraph was not provided by the DEPI to the members of the Victoria Police at the SERCC or within the IECC in a timely manner or at all. Further particulars will be provided after discovery and prior to trial.

275. If the personal injury claimants suffered personal injury loss and damage as a consequence of the Murrindindi fire (which is not admitted) such personal injury loss and damage was caused by the breach by DEPI Secretary of the First DEPI warnings duty during the Murrindindi fire.

Particulars

But for the breaches of the duties as aforesaid and/or any of them, the persons at risk would have been provided with timely and adequate warnings and would have taken steps to avoid injury or death.

276. The personal injury loss and damage caused by the Murrindindi fire was a natural and foreseeable consequence of the breach of the First DEPI warnings duty.

Second common law duty to personal injury claimants

277. Further, at all relevant times, the DEPI Secretary had knowledge and expertise in relation to bushfire risks and in relation to the need to warn the public of such risks in order to protect the public from personal injury loss and damage.

Particulars

- (i) The DEPI was aware that the Report of Inquiry into the 2002-03 Victorian Bushfires (paragraph 23.21) had recommended that the DEPI (and CFA) ensure in relation to the provision of information to communities affected by fires that, among other things, incident management teams understood that one of their primary responsibilities was to keep the community informed as to where the fire was, its likely path, what was being done to combat the fire, and any preparations the community should undertake, and that information units were effectively integrated into incident management teams.
- (ii) The DEPI was at all relevant times aware of the content of DISPLAN.

278. Further, at all material times, the DEPI Secretary knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfire, rather than generalised warnings addressed and referring to the general public, were necessary to enable those persons in those areas to take steps to avoid the risk of personal injury and death.

279. Further, at all relevant times the DEPI Secretary knew or ought to have known of the Murrindindi fire risks.

280. Further, at all relevant times, the DEPI Secretary knew or ought to have known that if the DEPI gave bushfire warnings to the public (including via any relevant website), the public would be likely to regard those warnings and their content as a reliable and principal source of information on which to act in order to protect themselves from the risk or danger of a bushfire.

281. Further, the DEPI Secretary knew that the EM Manual prescribed that the ultimate goal of emergency management was to ensure a “safer more sustainable community.”

282. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimize the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
- (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the DEPI Secretary to ensure, alternatively to take reasonable steps to ensure, that bushfire warnings would be issued to persons at risk.

283. Further, at all relevant times, the DEPI Secretary knew or ought reasonably to have known that bushfire warnings would enable persons at risk to take steps to avoid personal injury and death.

Particulars

If so warned, persons at risk would act so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

284. Further, as at and on 7 February 2009, the DEPI Secretary;

(a) had control of:

- (i) systems, procedures and means to obtain information and predictions about the progress and impact of bushfires;
- (ii) systems, procedures and means to formulate and disseminate bushfire warnings via ABC Radio, the DEPI website and the Victorian Bushfire Information Line, based on the information and predictions referred to in sub-paragraph (i); and

(b) assumed responsibility for the provision of bushfire warnings.

Particulars

- (i) During the fires of 2002-03, extensive use was made of the DEPI website to provide incident information to the community to assist their personal decision making.

- (ii) In 2005, the CFA and DEPI entered into the memorandum with the ABC referred to in paragraph 250 above.
- (iii) The DEPI Fire Suppression Manual stated that the relevant incident controller in relation to a fire is responsible for ensuring that members of the general public, particularly people in potentially affected local communities, are properly informed of the wildfire situation and the support effort, and that local communities under direct threat or potentially under direct threat of fire will require specific up-to-date information at regular intervals: Chapter 7.1 of the Manual.
- (iv) In or about 2008, the DEPI and CFA sought to establish the IECC for the management of bushfire emergencies, and did so thereafter.
- (v) The establishment of the IECC was based on an earlier decision to merge the DEPI and CFA bushfire operations for the 2008/9 fire season.
- (vi) The IECC was initially intended to include the Victoria Police as a further emergency agency however in March 2008 the Victoria Police formally informed the DEPI and the CFA that the Police Operation Centre and the SERCC would remain within the Victoria Police Centre.
- (vii) As a consequence, the Victoria Police's core operations continued to be conducted within its own headquarters at the SERCC and not within the IECC.
- (viii) At all relevant times, the DEPI had prepared a North East Area Readiness and Response Plan, setting out the desirable levels of readiness of personnel, systems and equipment and their location and availability for the detection and control of wildfire.
- (ix) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established a dedicated page on its website on which warnings would be posted so as to warn the public of the risk and danger of bushfire. The warnings were to be called, inter alia, 'awareness' messages and 'urgent threat' messages.
- (x) According to the DEPI Fire Suppression Manual, the DEPI website, at www.dse.vic.gov.au/fires provides up-to-date information on the current fire situation, with the DEPI State Duty Officer, through the ECC Information Officer (the Emergency Coordination Centre, the precursor to the IECC) being responsible for ensuring that current, accurate information is provided on the DEPI website: Chapter 7.1 of the DEPI Fire Suppression Manual.
- (xa) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had control of systems, procedures and means to obtain information and predictions about the progress and impact of bushfires from a range of sources including fire tower personnel, fire ground personnel, personnel in Incident Control Centres and other emergency response and co-ordination centres, the CFA's Incident Management System, and DSE's FireWeb system.
- (xb) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had control of Information Units staffed by personnel trained and equipped for the formulation and dissemination of bushfire warnings.

- (xi) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established a fire prediction programme to enable it to predict the path of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (xii) At all relevant times on 7 February 2009, the DEPI Secretary had access to the expertise of fire prediction experts, including Dr Tolhurst, for the purposes, inter alia, of predicting the path and spread of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (xiii) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established, with the CFA, the VBIL. The VBIL was a means, inter alia, of the DEPI Secretary providing information to the public to warn them of bushfire risk and danger. The VBIL was established as a joint initiative of the DEPI and CFA and operated from the DEPI Customer Service Centre in Ballarat, established to provide one point of contact for the community needing information on bushfire activity in Victoria.
- (xiv) Further, on 5 February 2009, the DEPI Secretary issued a media release with the CFA headed 'Fire Services Warn of Continuing Fire Threat'. In the release, the DEPI stated that "Important steps to take to avoid the threat of fire include: ... if travelling, listen to ABC Local Radio or community radio station; For bushfire information, check the CFA and DEPI websites or call the [VBIL]". The same message was contained in a further media release published by the DEPI on 6 February 2009.
- (xv) In the premises, the DEPI Secretary had control of and assumed responsibility for the issue of warnings to the public from the IECC and/or relevant control centres or divisional headquarters about bushfire risk ~~by way of a complement to the warnings to be issued by the CFA.~~
- (xvi) DEPI personnel were deployed to the Alexandra ICC being operated by the ~~CFA~~DEPI to take up roles including Incident Controller and Information Officer, and roles in resources, situation, air operations, liaison and recovery.

285. By (inter alia) its media releases on 5 and 6 February 2009 the DEPI represented to the public that in order to obtain bushfire information and avoid the threat of bushfires members of the public should check the DEPI website or call the VBIL.

286. The DEPI Secretary knew and intended that the members of the public including the persons at risk would rely on the DEPI website and the VBIL in order to obtain bushfire information and avoid the threat of bushfires.

287. In the premises, and having regard to the statutory duties owed by the DEPI Secretary as aforesaid, at all material times, the DEPI Secretary owed to the personal injury claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and

- (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,

to ensure, alternatively to take reasonable steps to ensure, the issue of bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (the **Second DEPI warnings duty**).

288. The DEPI Secretary was required by the Second DEPI warnings duty to issue bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

Particulars

~~SP AusNet~~ AusNet Services refers to and repeats the particulars to paragraph 213 above.

Breach of duty to the personal injury claimants

289. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached the Second DEPI warnings duty by not issuing bushfire warnings to the persons at risk which were timely or adequate.

Particulars

- (i) The warnings referred to in particulars (ii) to (ix) to paragraph 255 were as a result of "Urgent Threat Messages" issued by DEPI, or jointly by DEPI and the CFA.
- (ii) In addition, an "Awareness Message" was issued by the Benalla IFACC which was read on ABC 774 at 4:07pm which stated that a fire was burning two kilometres south east of Murrindindi in a south easterly direction. It was made clear that this was not a threat message.
- (iii) At 7:07pm, Mr Alex Konrad, DEPI Information Officer at the Benalla IFACC, was interviewed on ABC 774. He provided an urgent threat message for Marysville, where he said the Murrindindi bushfire was already on the edge of the township, although he could not say which edge, and Buxton.
- (iv) At 8:30pm, Ms Robyn Rattray-Wood, DEPI Information Officer at the Alexandra ICC, prepared a correction to the most recent DEPI "Urgent Threat Message" (being the message that was read on ABC 774 at 8:48pm, 9:00pm and 9:19pm) stating that the Murrindindi bushfire was now burning in a north easterly direction, and that the communities of Taggerty, Acheron, Thornton, Rubicon, Snobs Creek, Alexandra and

Molesworth could expect thick smoke and ember attack and were advised to implement fire plans. This message was not distributed by the Benalla IFACC.

- (v) The above information and warnings were not timely and did not accurately reflect the fire information available to the DEPI and the predictions the DEPI had made, or were aware of, for the path, intensity, spread and timing of the movement of the Murrindindi bushfire during the course of the afternoon of 7 February 2009.
- (vi) The first warning to Narbethong was when ember attacks had already reached the community.
- (vii) The first warning to Taggerty was after the Murrindindi bushfire was on the southern edge of the town.
- (viii) The first warning that Marysville would come under attack was only approximately one hour before spot fires began burning on and ember attacks had reached the edge of the town.
- (ix) The "Urgent Threat Message" that was posted on the CFA website at 8:33pm and at 9.00 pm and read out on ABC 774 at 8.48pm, 9.00pm and 9.19pm was inaccurate as the wind change had already and the Murrindindi bushfire was then moving in a north easterly direction.
- (x) By 4pm on 7 February 2009, the DEPI was aware that Marysville was at risk of being seriously impacted by the Murrindindi bushfire but this was not communicated in any official warnings until 5:34pm.
- (xi) At 4:07pm DEPI caused an "Awareness Warning" to be announced on ABC 774 which indicated that the Murrindindi bushfire was not currently posing a threat to communities, when it had information that Marysville was clearly under threat.
- (xii) At 7:25pm DEPI knew that new "Urgent Threat Messages" were needed for Taggerty, Acheron, Molesworth, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and nearby communities between Murrindindi and Yea but such alerts were not included in the threat message issued at 7:35pm which was posted on the CFA website at 8.00pm and read on radio at 8:19pm.
- (xiii) The correction to the "Urgent Threat Message" issued at 8:30pm was not distributed.
- (xiv) No warnings issued by the DEPI conveyed the size, intensity, ferocity, speed or destructive capacity of the Murrindindi bushfire.
- (xv) No warnings issued by the DEPI gave an indication as to the arrival time of the Murrindindi bushfire in any location.(xvi) No warnings issued by the DEPI concerning the Murrindindi bushfire included information as to the anticipated impact of the south westerly change on the intensity, behaviour and direction of the fire even though the DEPI was aware of the impending wind change and its likely impact.
- (xvii) No warnings issued by the DEPI included any information that after the wind change the north eastern flank of the Murrindindi bushfire would become its head and that therefore and thereafter the potential of the fire to cause loss and damage would be significantly increased.

(xviii) Further, the warnings issued by the DEPI did not satisfy best practice requirements for warnings.

(xix) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to eliminate or minimise the risk that members of the public might not take action to avoid injury or death.

290. The DEPI Secretary should have issued timely and adequate bushfire warnings to persons at risk which specified not less than the following information:

- (a) that the Murrindindi fire was likely to reach a particular place or places at a particular time or times;
- (b) that the wind change forecast to occur mid to late afternoon on 7 February 2009 would have a profound effect upon the Murrindindi fire and this would put communities east/north east of the fire front at a serious and material risk and danger and that those communities should take heed that the risk posed by the effects of that wind change on the fire was life threatening.

Causation and damage

291. If the personal injury claimants suffered personal injury loss and damage as a consequence of the Murrindindi fire (which is not admitted) such death and/or injury was caused by the breach by the DEPI Secretary of the Second DEPI warnings duty during the Murrindindi fire.

Particulars

- (i) The warnings as aforesaid were untimely and inadequate and did not enable persons at risk to take steps to avoid or minimise the risk of personal injury and death.
- (ii) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to enable persons at risk to take steps to avoid injury or death.

292. The personal injury loss and damage caused by the Murrindindi fire was a natural and foreseeable consequence of the breaches of duty alleged against the DEPI Secretary in the preceding paragraphs.

DEPI duties were not delegated

293. Further:

- (a) the common law duties of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators to warn the public (including persons at risk) referred to above; and/or
- (b) the statutory and/or common law duties of the CFA in relation to warnings to the public (including persons at risk) referred to above; and/or
- (c) the agreement reached between Victoria Police, CFA and DEPI and/or the DEPI Secretary that CFA and/or DEPI would undertake warnings to the public about bushfire risk referred to above,

did not abrogate, discharge or delegate the responsibilities of the DEPI Secretary so as to satisfy:

- (d) the First DEPI warnings duty; and/or
- (e) the Second DEPI warnings duty.

Relief sought in respect of DEPI Secretary breaches of duty

294. In the premises, if ~~SP AusNet~~AusNet Services is held liable to the personal injury claimants in respect of any personal injury loss and damage then, on the grounds pleaded in paragraphs 262 - 293 herein, ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the DEPI Secretary arising from the acts or omissions of the DEPI Secretary in respect of that personal injury loss and damage in such amount as may be found by the Court to be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage.

295. The contribution from the DEPI Secretary in respect of personal injury loss and damage for which ~~SP AusNet~~AusNet Services may be held liable to the personal injury claimants which would be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage would be such as would amount to a complete indemnity to ~~SP AusNet~~AusNet Services.

Joint tortfeasance by CFA and DEPI Secretary

296. Further. at all relevant times. there was an agreement. alternatively a concurrence, alternatively a common design. alternatively a common end. between the CFA and the DEPI Secretary:

- (a) to provide bushfire warnings to persons at risk of personal injury and death from a bushfire:
- (b) alternatively, to provide advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Response Co-ordinators to enable those members of Victoria Police to provide or cause to be provided bushfire warnings to persons at risk of personal injury and death from a bushfire.

Particulars

- (i) On or about 25 October 2006 the CFA and DEPI Secretary agreed on *Heads of Agreement: Partnership and Joint Service Delivery* (CFA.008.502.0092) which provided among other things that the agencies:
 - (1) were committed to conducting integrated emergency management activities, including the sharing of knowledge, resources and systems between agencies (Principle A);
 - (2) would establish and maintain a series of protocols and planning documents that detailed operating procedures for service delivery, including the DEPI-CFA Partnership Guidelines and the Joint Standard Operating Procedures (Principle B);
 - (3) would present a united front to the community at all times, reflecting the principles of seamless service delivery for emergency management activities (Principle C); and
 - (4) agreed that emergency management activities would be conducted in accordance with the Australasian Inter-Service Incident Management System (AIIMS), and would operate within Victoria's Emergency Management Arrangements, agreed Partnership Guidelines and associated documentation (Principle D).
- (ii) On or about 25 October 2006, the CFA and DEPI agreed on *Partnership Guidelines* (CFA.505.002.0007) which provided among other things that:
 - (1) CFA and DEPI will provide timely, accurate, relevant and consistent information to communities, agencies and other stakeholders to enable appropriate response to an incident (Principle – Community Information);
 - (2) for jointly attended incidents, all publicly released incident information must reflect a joint agency incident management approach (Guideline (b) – Community Information);
 - (3) information to the community must be a priority for the Incident Controller, and will be disseminated in a timely manner (in cooperation with the Municipal Emergency Response Coordinator, as required) based on the actual or perceived risk to the community (Guideline (d) – Community Information);

- (4) the Victorian Bushfire Information Line (VBIL) is the jointly operated bushfire information services (Guideline (i) – Community Information).
- (iii) On or about 19 September 2008, the CFA and DEPI agreed on *Standard Operating Procedure – Incident Information Unit Management* (CFA.0718.0011.0011) which provided among other things that:
- (1) it applies to all CFA and DEPI members working in the Information Unit established for a multi-agency incident (Scope), being an incident where more than one agency has suppression responsibilities or when both agencies' areas of responsibility are threatened or included within the operational area of a fire incident (Definitions);
 - (2) information released during an incident, shall be issued by the control agency on behalf of all agencies and must reflect multi-agency involvement. In addition, all information for distribution must carry both agencies' identification (Procedure, 1.4);
 - (3) the Information Unit also has responsibilities to disseminate information relating to the incident to the Division Emergency Response Coordinator (DERC)/Municipal Emergency Response Coordinator (MERC) (Procedure, 1.9);
 - (4) once information is authorised by the Incident Controller, a range of dissemination tools must be used, following the CFA-DEPI Information Unit Guidelines (Procedure, 2.1), including the ABC (Procedure, 2.1.1.1), VBIL via iECC Information Unit (Procedure, 2.1.2.1), and the agencies' websites via the iECC Information Unit (Procedure, 2.1.3.1);
 - (5) when providing information to websites during joint incidents, website links should be provided to the Information Unit of the support agency (2.1.3.1).
- (iv) On or about 28 September 2007, the CFA and DEPI agreed on a *Standard Operating Procedure – Planning for Joint Incident Management Teams* (DSE.USB9.0035.1602) which provided among other things that:
- (1) it applies to all CFA and DEPI members engaged in integrated responses to fire and other emergencies (Scope);
 - (2) its objective is to ensure that fires and incidents are managed by CFA and DEPI members who possess the appropriate competencies, endorsements and experience (Objective);
 - (3) the positions of Incident Controller and Deputy Incident Controller should be selected, one from each agency, so that they can interchange according to the need to change the designated control agency (Procedure, 1.4);
 - (4) every effort should be made to balance the Incident Management Team from both DEPI and CFA (Procedure, 2.1.2).
- (v) On or about 28 September 2007, the CFA and DEPI agreed on a *Standard Operating Procedure - Integrated Fire Agency Co-ordination Centres (IFACC)* (DSE.HDD.0032.0148) which provided among other things that:

- (1) it applies to all CFA and DEPI members engaged in integrated responses to fire and other emergencies (Scope);
 - (2) where normal business arrangements are unable to provide the level of coordination required to manage the fire activity in a region/area, an IFACC will be established (Procedure, 2) as the location from which agency representatives provide multi-agency coordination under the guidance of the IFACC Manager (Definitions);
 - (3) an IFACC is responsible for providing coordination of information management as required and assisting as necessary the flow of information depending on the situation prevailing at each fire or fire complex (Procedure, 4.4.1);
 - (4) the IFACC is responsible for liaising with the Division Emergency Response Coordinator (DERC) at a strategic level where coordination is required across incidents (Procedure, 4.5, 5.1);
 - (5) each Incident Management Team is responsible for informing the communities being impacted by the incident and liaison with the Municipal Emergency Response Coordinator (MERC) specific to their incident (Procedure, 4.4 & 4.5 Notes, 5.2);
 - (6) both the DERC and MERC should be encouraged to have a representative located at the IFACC and ICC respectively so that they have real time access to information on the incident and in the case of the MERC, be able to inform and report to the MECC (Procedure, 5.4).
- (vi) In or about August 2008, the CFA and DEPI agreed on *Guidelines for AIIMS Information Unit* (DSE 0200.0001.2431) which among other things:
- (1) stated that the background to the Guidelines was a 2006 joint project, guided by a joint CFA/DEPI Steering Committee, to develop systems, tools and processes to enable the provision of relevant, timely and accurate information to communities and stakeholders during fire-related emergency events (Background);
 - (2) stated that expected outcomes of this joint project included:
 - (I) the development of best practice guidelines, procedures, templates and information dissemination tools to support the functioning of the Information Unit under the AIIMS structure in a coordinated and integrated way between agencies;
 - (II) a multi-agency pool of trained staff;
 - (III) the integration of CFA and DEPI Information Units with both agencies' State Emergency Co-ordination facilities to create one operating unit (Background);
 - (3) provided guidelines and information for the operation of Information Units, including duties, roles and responsibilities, structures, sources of information, tools, processes and dissemination methods;
 - (4) provided that the objectives of the Information Unit include gathering and delivering accurate, timely, relevant, consistent and

authorised messages to communities directly impacted, or likely to be directly impacted by an incident, that support and encourage appropriate response and proactive measures (Section 3);

- (5) provided that priority must be given to providing information to communities that are near the incident, who are or may come under direct threat, and who require specific detail on the incident at a local level, how it is likely to impact them and what they should be considering for the protection of their lives and property (Section 4 Part 1);
 - (6) provided that the sources of information relevant to an incident available to the Information Unit included: (I) the CFA's Incident Management System (IMS), (II) DEPI's FireWeb system, (III) the CFA or DEPI Regional Duty Officer, (IV) other ICC Information Units (V) IMT briefings, (VI) the IMT Planning Section, (VII) the IMT Situation Unit (Section 4 Part 2);
 - (7) provided a set of templates and tools, available on the CFA/DEPI Online IMT Toolbox or IMT Toolbox CD, including a set of Fire Information Release templates (Section 4 Part 3);
 - (8) provided information dissemination methods including ABC Radio, the CFA and DEPI websites and VBIL (Section 4 Part 4);
 - (9) stated that a project was underway, due to be completed by the 2008/09 fire season, which would result in one website for the display of emergency information, but until that project was completed, both CFA and DEPI needed to continue to work together to ensure that website content is consistent (Section 4 Part 4);
 - (10) stated that the VBIL is a joint initiative of CFA and DEPI utilising the DEPI Customer Service Centre (CSC) to provide one point of contact for people needing information on bushfire activity in Victoria (Section 4 Part 4);
 - (11) stated that the Municipal Emergency Coordination Centre (MECC) needs to be provided with copies of all information releases sent out and there needs to be a link between information the MECC may need to provide to stakeholders affected by an incident so there can be a coordinated approach to information dissemination from a variety of sources (Section 3, 'Functional Levels in Information Flow').
- (vii) The joint project referred to in sub-paragraphs (vi)(1) and (vi)(2) above was the subject of a July 2006 report by John Schauble titled *Joint CFA/DSE Review of Effectiveness of Information Flow to Communities and Media During Fire Incidents* (DSE.HDD.0010.5977) which was jointly commissioned by the CFA and DEPI and which, among other things:
- (1) reproduced terms of reference provided to Mr Schauble by the CFA and DEPI which stated among other things that:
 - (I) the CFA and DEPI have a commitment to informing the community of impending danger during fire incidents and that

- the provision of timely information is regarded by both agencies as integral to the management of the incident; and
- (II) a joint DEPI/CFA Group would review the report at its draft to ensure relevance of recommendations;
- (2) further stated among other things that:
- (I) the general public cares little about whose 'turf' the fire is on or which agency 'owns' it;
- (II) in reality fire events often cross borders between public and private lands and almost invariably threaten communities in which both agencies necessarily are stakeholders;
- (III) it is crucial that information provided to communities during wildfires is accurate, useful, timely and consistent.
- (viii) On or about 4 February 2004, the CFA and DEPI together with other Victorian Emergency Services Organisations, agreed on the *ABC Victoria and Victorian Emergency Services Organisations Memorandum of Understanding* (CFA.007.505.0049) under which, among other things, ABC Local Radio Victoria provided a telephone 'hotline', accessible 24/7 by any person authorised by the Emergency Services, and undertook to broadcast emergency messages.
- (ix) On or about 30 October 2008, the CFA and DEPI agreed on the *Victorian Bushfire Information Line Service Level Agreement 2008/2009* (DSE.USB9.0055.0001) which provided among other things that:
- (1) CFA and DEPI work in partnership to provide emergency information via VBIL;
- (2) CFA and DEPI are to provide authorised, accurate and up-to-date information to the Customer Service Centre as soon as it becomes available;
- (3) CFA and DEPI are to ensure that information is consistent and current on both the CFA and DEPI external fire websites.
- (x) In or about 2008, the CFA in partnership with the DEPI published a guide for residents of the bush titled *Living in the Bush: Bushfire Survival Plan Workbook* (CFA.019.502.0177) which stated among other things that:
- (1) CFA and DEPI have developed Information Units that can provide up to date information to the community during major fires;
- (2) the Information Units work closely with the incident's fire management team to provide information to the community through a number of channels including radio web sites and through a statewide call centre;
- (3) radio stations such as ABC Radio and local radio regularly broadcast accurate and up to date messages straight from CFA/DEPI fire management teams;
- (4) the CFA and DEPI websites provide information about major bushfires burning in Victoria; and the sites are regularly updated during a fire, to provide accurate information as quickly as possible to residents in fire-affected areas;

- (5) the VBIL is a call centre established by DEPI and CFA; trained staff provide residents with incident updates as well as advice on appropriate actions to take during a bushfire.
- (xa) At all relevant times, the DEPI Secretary was required by the 2006 Code of Practice to participate in interagency coordination in accordance with relevant legislation, arrangements put in place under the state emergency response plan (DISPLAN), and arrangements agreed between agencies, alleged in paragraph 264A above.
- (xi) In the days preceding 7 February 2009, the CFA and DEPI issued joint media releases including:
- (1) a joint media release on or about 4 or 5 February 2009 titled "Fire Services Warn of Continuing Fire Threat" VP0.6000.0010.0707);
 - (2) a joint media release on 6 February 2009 titled "Avoid all unnecessary travel tomorrow" (DSE.1005.0001.0005);
which stated among other things that important steps to avoid the threat of fire included, if travelling, listening to ABC Local Radio or community radio stations, and for bushfire information, checking the CFA and DEPI websites or calling the VBIL.
- (xii) On 7 February 2009, the CFA and DEPI jointly staffed the Integrated Emergency Coordination Centre (iECC) which included:
- (1) the CFA Chief Fire Officer Russell Rees and the DEPI Chief Officer Ewan Waller;
 - (2) the CFA State Coordinator Geoffrey Conway and DEPI Chief Officer Contact Alen Slijepcevic;
 - (3) the CFA State Duty Officer Gregory Paterson and the DEPI State Duty Officer Andrew Graystone;
 - (4) the DEPI Fire Behaviour Analysis Unit; and
 - (5) the CFA and DEPI Information Units;
and which, among other things:
 - (6) monitored and predicted the progress of bushfires;
 - (7) monitored and contributed to bushfire warnings provided by the CFA and DEPI to the community; and
 - (8) published Fire Information Releases on the CFA and DEPI websites.
- (xiii) On 7 February 2009, the CFA and DEPI jointly staffed the Incident Management Team (IMT) at the Alexandra Incident Control Centre (ICC), which included:
- (1) DEPI Incident Controllers Andrew Miller and Tony Lovick, and CFA Deputy Incident Controller Graeme Fergus;
 - (2) DEPI Information Officer Robyn Rattray-Wood and CFA Information Officers Mark Williams and Sue Sheldrick;
and which, among other things:

- (3) monitored and predicted the progress of the Murrindindi fire; and
- (4) prepared and issued Fire Information Releases in relation to the Murrindindi fire.
- (xiv) On or around 7 February 2009, the DEPI and CFA jointly established the Benalla Integrated Fire Agency Co-ordination Centre (IFACC) which included DEPI Information Officers Alex Konrad and Darren Skelton, and which, among other things:
- (1) monitored and predicted the progress of the Murrindindi fire; and
- (2) prepared and issued Fire Information Releases in relation to the Murrindindi fire.
297. The acts and omissions of the CFA alleged in paragraphs 236, 237 and 255 above were engaged in in furtherance of the agreement, alternatively, in furtherance of the concurrence, alternatively, in furtherance of the common design, alternatively, in concert with the DEPI Secretary towards the common end, alleged in paragraph 296 above.
298. The acts and omissions of the DEPI Secretary alleged in paragraphs 273, 274 and 289 above were engaged in in furtherance of the agreement, alternatively, in furtherance of the concurrence, alternatively, in furtherance of the common design, alternatively, in concert with the CFA towards the common end, alleged in paragraph 296 above.
299. In the premises, by engaging in those alleged acts and omissions, the CFA and DEPI Secretary were joint tortfeasors.

AND THE PLAINTIFF BY COUNTERCLAIM CLAIMS:

AS AGAINST UAM:

- A. In respect of the economic loss and property damage claims, a declaration that UAM is a concurrent wrongdoer within the meaning of section 24AH of the *Wrongs Act*.
- B. Further or in the alternative, in respect of the personal injury loss and damage (if any) for which ~~SP AusNet~~ AusNet Services is held liable to the plaintiff and/or any other group member:
- (1) a declaration that ~~SP AusNet~~ AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from UAM in such amount as may be found by the Court to be just and equitable having

regard to the extent of UAM's responsibility for the personal injury loss and damage; and

(2) contribution from UAM which would be just and equitable having regard to the extent of UAM's responsibility for the personal injury loss and damage to the extent of a complete indemnity to ~~SP AusNet~~AusNet Services.

- C. A declaration that UAM breached UAM's Duty to ~~SP AusNet~~AusNet Services.
- D. A declaration that the Murrindindi Fire was caused by UAM's Breaches of UAM's Duty to ~~SP AusNet~~AusNet Services.
- E. Damages in negligence.
- F. A declaration that UAM committed the Powerline Contract Breaches.
- G. A declaration that UAM committed the UAM Contract Breaches.
- ~~G~~H. A declaration that the Murrindindi Fire was caused by the Powerline Contract Breaches.
- I. A declaration that the Murrindindi Fire was caused by the UAM Contract Breaches.
- ~~H~~J. Damages for breach of contract.
- K. A declaration that UAM is liable to AusNet Services in respect of the AusNet Services liabilities and losses pursuant to clause 8 of the General Terms and Conditions – Services of the Powerline Contract.
- L. A declaration that UAM is liable to indemnify AusNet Services in respect of the AusNet Services liabilities and losses pursuant to clause 9 of the General Terms and Conditions – Services of the Powerline Contract.
- ~~M~~. A declaration that UAM is liable to indemnify ~~SP AusNet~~AusNet Services in respect of the ~~SP AusNet~~AusNet Services liabilities and losses pursuant to clause 5 of the Terms and Conditions of the UAM Contract.

AS AGAINST THE STATE OF VICTORIA:

- ~~J~~N. In respect of the personal injury loss and damage (if any) for which ~~SP AusNet~~AusNet Services is held liable to the plaintiffs and/or any other group member:

- (1) a declaration that ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the State of Victoria in such amount as may be found by the Court to be just and equitable having regard to the extent of the responsibility of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators for the personal injury loss and damage; and
- (2) contribution from the State of Victoria which would be just and equitable having regard to the extent of the responsibility of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators for the personal injury loss and damage to the extent of a complete indemnity to ~~SP AusNet~~AusNet Services.

AS AGAINST THE DEPI SECRETARY:

KO. In respect of the economic loss and property damage claims, a declaration that the DEPI Secretary is a concurrent wrongdoer within the meaning of section 24AH of the *Wrongs Act*.

LP. Further or in the alternative, in respect of the personal injury loss and damage (if any) for which ~~SP AusNet~~AusNet Services is held liable to the plaintiffs and/or any other group member:

- (1) a declaration that ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the *Wrongs Act* to recover contribution from the DEPI Secretary in such amount as may be found by the Court to be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage; and

- (2) contribution from the DEPI Secretary which would be just and equitable having regard to the extent of the DEPI Secretary's responsibility for the personal injury loss and damage to the extent of a complete indemnity to ~~SP AusNet~~AusNet Services.

AS AGAINST THE CFA:

QM. In respect of the personal injury loss and damage (if any) for which ~~SP AusNet~~AusNet Services is held liable to the plaintiffs and/or any other group member:

- (1) a declaration that ~~SP AusNet~~AusNet Services is entitled pursuant to the provisions of Part IV of the Wrongs Act to recover contribution from the CFA in such amount as may be found by the Court to be just and equitable having regard to the extent of the CFA's responsibility for the personal injury loss and damage; and
- (2) contribution from the CFA which would be just and equitable having regard to the extent of the CFA's responsibility for the personal injury loss and damage to the extent of a complete indemnity to ~~SP AusNet~~AusNet Services.

AS AGAINST THE PLAINTIFF AND OTHER GROUP MEMBERS:

NR. In respect of the economic loss and property damage claims, a declaration that UAM is a concurrent wrongdoer within the meaning of section 24AH of the *Wrongs Act*.

OS. In respect of the economic loss and property damage claims, a declaration that the DSE Secretary is a concurrent wrongdoer within the meaning of section 24AH of the *Wrongs Act*.

AS AGAINST ALL DEFENDANTS TO COUNTERCLAIM:

PT. Costs.

QU. Such further or other relief as the Court deems fit.

Dated: 8 May 2014 21 November 2014

Philip Solomon

B Quinn

P Wallis

COH Parkinson

J Kirkwood



Herbert Smith Freehills
Solicitors for the first defendant

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No S CI 2012 4538

SCHEDULE OF PARTIES

BETWEEN

KATHERINE ROWER~~RODERIC LIESFIELD~~ Plaintiff

and

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (FORMERLY SPI
ELECTRICITY PTY LTD) (~~ACN 064 651 118~~)** First Defendant

**ACN 060 674 580 PTY LTD
(ACN 060 674 580)** Second Defendant

**SECRETARY TO THE DEPARTMENT
OF SUSTAINABILITY AND ENVIRONMENT** Third Defendant

COUNTRY FIRE AUTHORITY Fourth Defendant

STATE OF VICTORIA Fifth Defendant

and

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (FORMERLY SPI
ELECTRICITY PTY LTD) (~~ACN 064 651 118~~)** Plaintiff by Counterclaim

and

**ACN 060 674 580 PTY LTD
(ACN 060 674 580)** First defendant to Counterclaim

**SECRETARY TO THE DEPARTMENT
OF ENVIRONMENT AND PRIMARY INDUSTRY** Second Defendant to Counterclaim

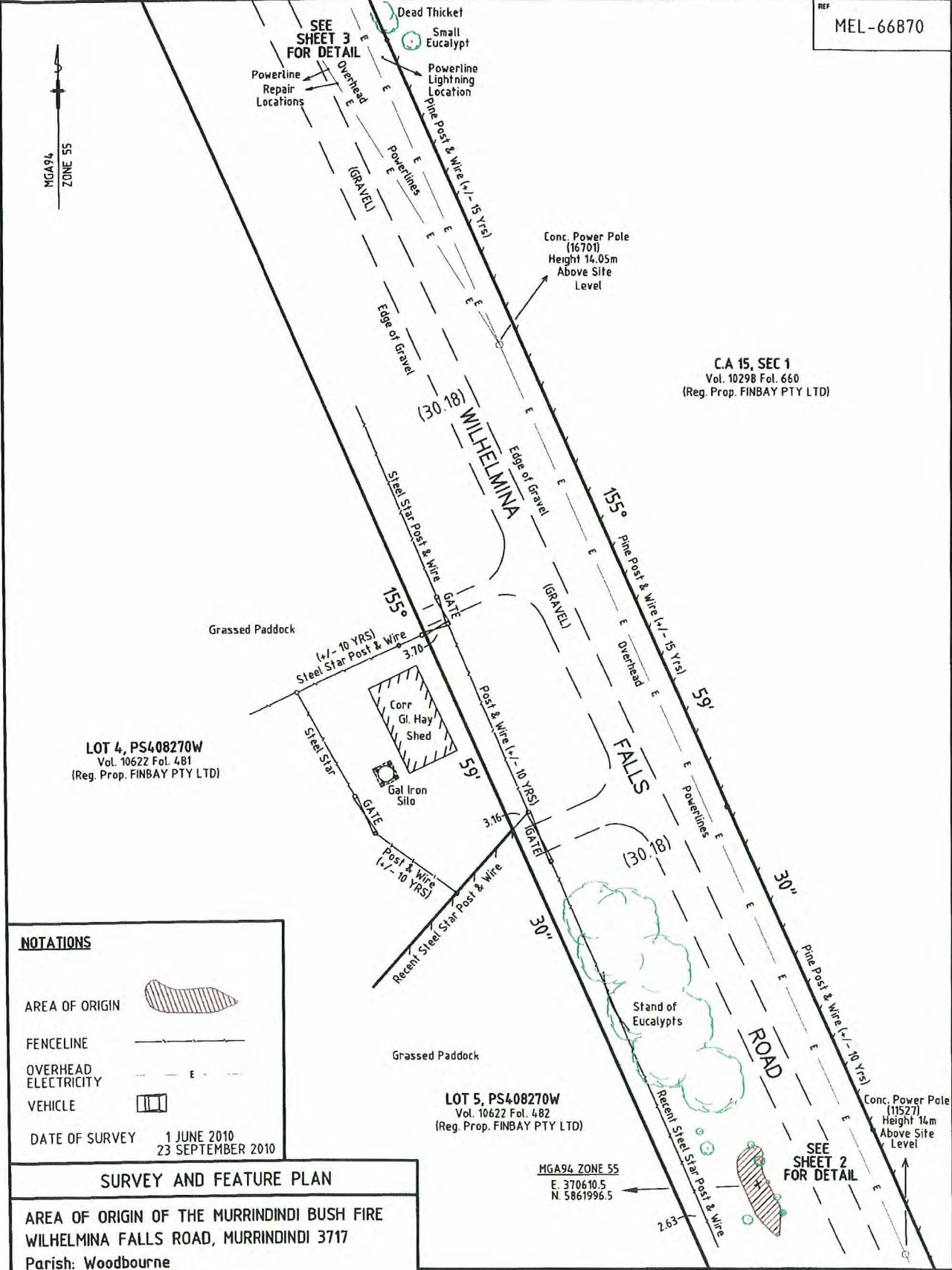
COUNTRY FIRE AUTHORITY Third Defendant to Counterclaim

STATE OF VICTORIA Fourth Defendant to Counterclaim

KATHERINE ROWER~~RODERIC LIESFIELD~~ Fifth Defendant to Counterclaim

"Annexure 1A"

REF
MEL-66870



NOTATIONS

- AREA OF ORIGIN
- FENCELINE
- OVERHEAD ELECTRICITY
- VEHICLE
- DATE OF SURVEY 1 JUNE 2010
23 SEPTEMBER 2010

SURVEY AND FEATURE PLAN

AREA OF ORIGIN OF THE MURRINDINDI BUSH FIRE
WILHELMINA FALLS ROAD, MURRINDINDI 3717
Parish: Woodbourne
Municipality: MURRINDINDI

Eddie S. Cichocki L.S. Date

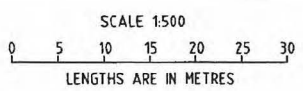
PLAN No.
W/01.06.10A

LOT 5, PS408270W
Vol. 10622 Fol. 482
(Reg. Prop. FINBAY PTY LTD)

LOT 4, PS408270W
Vol. 10622 Fol. 481
(Reg. Prop. FINBAY PTY LTD)

C.A 15, SEC 1
Vol. 10298 Fol. 660
(Reg. Prop. FINBAY PTY LTD)

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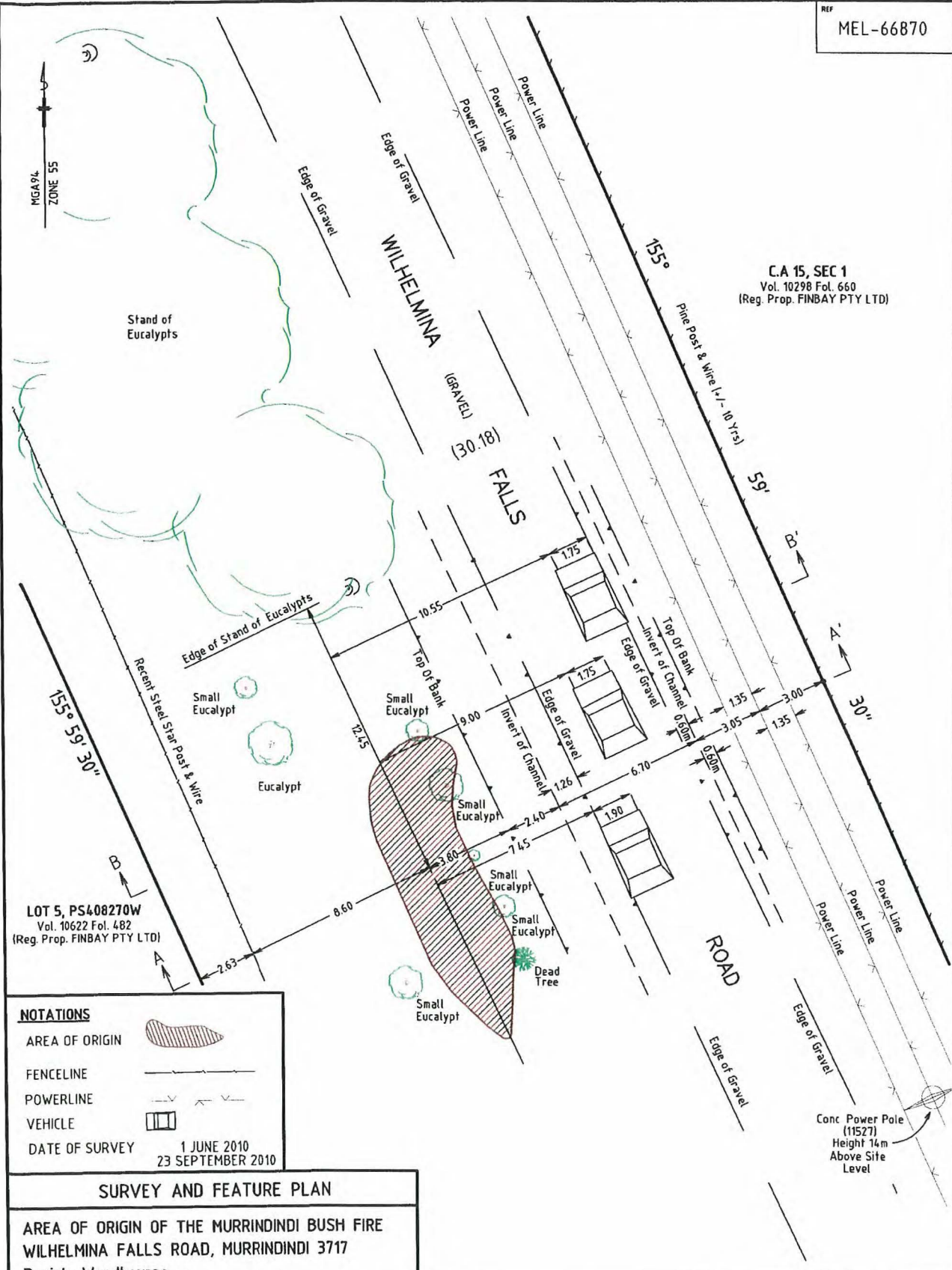


SHEET 1 OF 5 SHEETS
OFFICE OF SURVEYOR-GENERAL VICTORIA
DEPARTMENT OF SUSTAINABILITY & ENVIRONMENT

SEE SHEET 2 FOR DETAIL

SEE SHEET 3 FOR DETAIL

REF
MEL-66870



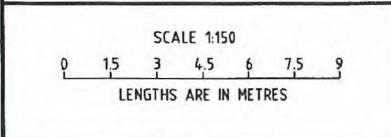
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(Reg. Prop. FINBAY PTY LTD)

LOT 5, PS408270W
Vol. 10622 Fol. 482
(Reg. Prop. FINBAY PTY LTD)

NOTATIONS	
AREA OF ORIGIN	
FENCELINE	
POWERLINE	
VEHICLE	
DATE OF SURVEY	1 JUNE 2010 23 SEPTEMBER 2010

SURVEY AND FEATURE PLAN

AREA OF ORIGIN OF THE MURRINDINDI BUSH FIRE
WILHELMINA FALLS ROAD, MURRINDINDI 3717
Parish: Woodbourne
Municipality: MURRINDINDI



SHEET 2 OF 5 SHEETS

OFFICE OF
SURVEYOR-GENERAL VICTORIA
DEPARTMENT OF
SUSTAINABILITY & ENVIRONMENT

Eddie S. Cichocki L.S. Date

PLAN No.
W/01.06.10A

Annexure 2

