

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

S CI 4538 of 2012

BETWEEN

RODERIC LIESFIELDKATHERINE 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)-
AND OTHERS** 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)
AND OTHERS** according to the Schedule

Defendants to Counterclaim

(by counterclaim)

**DEFENCE OF THE STATE PARTIES TO AUSNET ELECTRICITY SERVICES PTY
LTD'S DEFENCE AND COUNTERCLAIM TO SEVENTH AMENDED STATEMENT OF
CLAIM**

Date of document: 1 December
2014
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To the allegations in the Amended Defence and Counterclaim filed by ~~SP~~ AusNet Electricity Services Pty Ltd (~~SP~~-**AusNet**) and dated ~~28 June 2013~~ 21 November 2014 (~~SP~~-**AusNet Defence and Counterclaim**), the Secretary to the Department of Environment and Primary Industries (**DEPI Secretary**), the Country Fire Authority (**CFA**) and the State of Victoria (together the **State Parties**) say as follows:

1-14 They do not plead to paragraphs 1 to 14 as they contain no allegations against them.

15 As to paragraph 15:

- (a) insofar as any allegations are made against them in sub-paragraph 15(c), they deny those allegations;
- (b) otherwise they do not plead to paragraph 15 as no other allegations are made against them.

16 They do not plead to paragraph 16 as it contains no allegations against them.

17 As to paragraph 17:

- (a) insofar as any allegations are made against them in sub-paragraph 17(e), they deny those allegations;
- (b) otherwise they do not plead to paragraph 17 as no other allegations are made against them.

18 They do not plead to paragraph 18 as it contains no allegations against them.

18A. As to paragraph 18A:

- (a) they deny the allegations therein;
- (b) they say that Murrindindi fire started in the circumstances set out in paragraph 18C of the State Parties' defence to the ~~sixth~~ seventh amended statement of claim.

19-33 They do not plead to paragraphs 19 to 33 as they contain no allegations against them.

34 As to paragraph 34:

- (a) insofar as any allegations are made against them in sub-paragraph 34(b), they deny those allegations;
 - (b) otherwise they do not plead to paragraph 34 as no other allegations are made against them.
- 35 They do not plead to paragraph 35 as it contains no allegations against them.
- 36 As to paragraph 36:
- (a) insofar as any allegations are made against them in sub-paragraph 36(e), they deny those allegations;
 - (b) otherwise they do not plead to paragraph 36 as no other allegations are made against them.
- 37-41 They do not plead to paragraphs 37 to 41 as they contain no allegations against them.
- 67-71 They do not plead to paragraphs 67 to 71 as they contain no allegations against them.
- 72 As to paragraph 72:
- (a) they deny the allegations in subparagraph 72(c)(ii);
 - (b) they otherwise do not plead to the allegations therein.
- 73-97 They do not plead to paragraphs 73 to 97 as they contain no allegations against them.
- 98 They admit the allegations in paragraph 98.
- 99 As to paragraph 99:
- (a) they admit that section 62(2) of the *Forests Act 1958* (Vic) (**Forests Act**) provided that it shall be the duty of the DEPI Secretary to carry out proper and sufficient work for the prevention and suppression of fire in every State forest, State park and national park and on all protected public land;
 - (b) they say that the stated duty was subject to qualifications referred to therein and the resources available for that purpose;

- (c) they say further that the object of the stated duty –
 - (i) in relation to State forests and protected public land, was to protect and preserve the State forests and protected public land;
 - (ii) in relation to national parks and State parks, was to:
 - (A) preserve, protect and re-establish the indigenous flora and fauna;
 - (B) preserve and protect features of scenic, archaeological, ecological, geological, historic or other scientific interest;
 - (C) control exotic flora and fauna;
 - (D) promote and encourage the use and enjoyment by the public;
- (d) they otherwise deny the allegations therein

100 As to paragraph 100:

- (a) they say that, pursuant to section 20 of the Forests Act, the DEPI Secretary was required out of the moneys available for the purpose to make provision for the matters specified in subparagraphs (a) to (g) inclusive, which included the prevention and suppression of fires within fire protected areas as defined by the Forests Act;
- (b) they say further that the object of section 20 –
 - (i) in relation to State forests and protected public land, was to protect and preserve the State forests and protected public land;
 - (ii) in relation to national parks and State parks, was to:
 - (A) preserve, protect and re-establish the indigenous flora and fauna;
 - (B) preserve and protect features of scenic, archaeological, ecological, geological, historic or other scientific interest;
 - (C) control exotic flora and fauna;

(D) promote and encourage the use and enjoyment by the public;

(c) they otherwise deny the allegations therein.

101 As to paragraph 101:

(a) they admit that, at all material times, north north east, east and south east of Murrindindi there were:

(i) State forests as defined by the Forests Act, including State forests known as the Toolangi State forest, the Black Range State forest, the Marysville State forest and the Big River State forest;

(ii) national parks as defined by the *National Parks Act 1975 (Vic)* (**National Parks Act**) and referred to in section 62(2) of the Forests Act, known as the Yarra Ranges National Park and the Lake Eildon National Park;

(iii) a State park as defined by the National Parks Act known as the Cathedral Range State Park;

(referred to together as the State forests and national parks);

(b) they do not admit that at all material times, north north east, east and south east of Murrindindi, there was protected public land as defined by the Forests Act;

(c) they admit further that, at all material times, there were townships and/or communities set out in subparagraph (iii) of the particulars subjoined to paragraph 101 of the ~~SP~~ AusNet Defence and Counterclaim adjacent to or in the vicinity of some of the State forests and national parks;

(d) they otherwise deny the allegations therein.

102 As to paragraph 102:

(a) they repeat paragraphs 99 and 101 above;

(b) they otherwise deny the allegations therein.

103 As to paragraph 103:

- (a) they repeat paragraphs 99 and 119(a);
- (b) they say further that the purpose and effect of section 62(2) of the Forests Act is not to impose upon the DEPI Secretary a duty enforceable at the suit of individuals, or any class of individuals, including the claimants to undertake the tasks, measures or activities, have or apply its resources or otherwise act in the manner alleged therein;
- (c) they otherwise deny the allegations therein.

104 As to paragraph 104:

- (a) they repeat paragraphs 99 and 103 above;
- (b) they otherwise deny the allegations therein;
- (c) they say further that section 62(2) of the Forests Act:
 - (i) does not impose any statutory duty upon the DEPI Secretary in favour of the claimants or any other class of persons;
 - (ii) does not give rise to or create any private right or cause of action for the benefit of the claimants or any other class of persons;
 - (iii) is not directed towards protection of the private interests of any individual, or any class of individuals, including the claimants.

105 As to paragraph 105:

- (a) they say that, pursuant to section 17(2)(b) of the National Parks, the DEPI Secretary had responsibility, subject to the National Parks Act, to ensure that appropriate and sufficient measures were taken to protect national parks referred to in Schedule Two of that Act, including the Yarra Ranges National Park and the Lake Eildon National Park, and State parks referred to in Schedule Two B of that Act, including the Cathedral Range State Park, from injury by fire;

- (b) the object of section 17(2)(b) was to:
 - (i) preserve, protect and re-establish the indigenous flora and fauna;
 - (ii) preserve and protect features of scenic, archaeological, ecological, geological, historic or other scientific interest;
 - (iii) control exotic flora and fauna;
 - (iv) promote and encourage the use and enjoyment by the public;
- (c) they otherwise deny the allegations therein.

106 As to paragraph 106:

- (a) they repeat paragraphs 105 and 119(a);
- (b) they say further that the purpose and effect of section 17(2)(b) of the National Parks Act is not to impose upon the DEPI Secretary a duty enforceable at the suit of individuals, or any class of individuals, including the claimants to undertake the tasks, measures or activities, have or apply its resources or otherwise act in the manner alleged therein;
- (c) they otherwise deny the allegations therein.

107 As to paragraph 107:

- (a) they repeat paragraphs 105 and 106 above;
- (b) they otherwise deny the allegations therein;
- (c) they say further that section 17(2)(b) of the National Parks Act –
 - (i) does not impose any statutory duty upon the DEPI Secretary in favour of the claimants or any other class of persons;
 - (ii) does not give rise to or create any private right or cause of action for the benefit of the claimants or any other class of persons;
 - (iii) is not directed towards protection of the private interests of any individual, or any class of individuals, including the claimants.

- 108 As to paragraph 108 they repeat paragraphs 99, 100, 103 and 104 hereof and otherwise deny the allegations therein.
- 109 As to paragraph 109:
- (a) they admit that, pursuant to section 3 of the *Electricity Safety Act 1998* (Vic) (**ES Act**) and for the purposes of that Act, the DEPI Secretary was designated as the fire control authority for fire protected areas under the Forests Act, which included any State forests, State parks, national parks and protected public land;
 - (b) they admit that, pursuant to section 80(a) of the ES Act, as the fire control authority for the State forests, State parks, national parks and protected public land, the DEPI Secretary could assign a fire hazard rating of 'low' or 'high' to any State forests, national parks and protected public land for the purposes of that Act or the regulations made thereunder;
 - (c) they otherwise deny the allegations therein.
- 110 As to paragraph 110:
- (a) they say that, at all material times, the State forests and national parks were fire protected areas within the meaning of the Forests Act;
 - (b) they otherwise do not admit the allegations therein.
- 111 They admit the allegations in paragraph 111.
- 112 As to paragraph 112:
- (a) they say that in 1995 the Department of Conservation and Natural Resources published a Code of Practice for Fire Management on Public Land (**1995 Code**);
 - (b) they say that in January 2006 the Department of Sustainability and Environment published a Code of Practice for Fire Management on Public Land (**2006 Code**) which replaced the 1995 Code;
 - (c) they otherwise deny the allegations therein.

113 As to paragraph 113:

- (a) they admit that the DEPI Secretary had knowledge in relation to the prevention and suppression of bushfires, and their risks and dangers, in the State forests and national parks as indicated by the 2006 Code;
- (b) they otherwise do not admit the allegations therein.

114 As to paragraph 114

- (a) they say that the DEPI Secretary knew or ought reasonably to have known that fuel conditions together with other factors including drought, dryness and extreme weather conditions, including temperature, wind speed and direction, humidity, and variability in such weather conditions, gave rise to a bushfire risk;
- (b) they otherwise deny the allegations therein.

115 As to paragraph 115:

- (a) they admit that the DEPI Secretary knew or ought reasonably to have known that:
 - (i) fire intensity is affected by topography, fuel conditions and weather conditions, including temperature, wind speed and direction, humidity and variability in such weather conditions;
 - (ii) of the matters identified in subparagraph (i) hereof, fuel is the only factor over which the land manager is able to exercise control;
 - (iii) the management of fuel in strategic areas may reduce the potential for spotting from an advancing bushfire;
 - (iv) fuel management burning is a method of reducing fuel;
 - (v) in some cases the management of fuel may allow bushfire damage to be moderated and may increase the chance of successful bushfire control activities;
- (b) they otherwise deny the allegations therein.

116 As to paragraph 116:

- (a) they admit that the claimants had no authority to carry out planned burning in any State forest, State park, national park or on protected public land;
- (b) they otherwise do not admit the allegations therein.

117 As to paragraph 117:

- (a) they deny the allegations therein;
- (b) they say that:
 - (i) the claimants constituted an indeterminate class of persons;
 - (ii) it was known or ought to have been known to the public, including the claimants, that they could undertake fire protection measures to protect persons in the Communities, themselves, their property and their economic interests from injury;
 - (iii) it was known or ought to have been known to the public, including the claimants, that the DEPI Secretary was constrained in carrying out planned burning by reason of the matters alleged in paragraphs 141(d), 141(e), 141(i) below and subparagraph (iii) of the particulars subjoined to paragraph 142 below;
 - (iv) it was known or ought to have been known to the public, including the claimants, that planned burning in State forests, State parks, national parks and protected public land could not provide guaranteed protection to the claimants, their property or economic interests from bushfires and could not and would not protect the claimants, their property or economic interests from bushfires such as those that ignited on 7 February 2009 in the Murrindindi area;
 - (v) it was known or ought to have been known to the public including the claimants that planned burning could not address bushfire risks in relation to forest areas and fuel on private land;
 - (vi) in any event, the DEPI Secretary was not legally responsible for any vulnerability to which the claimants might be exposed;

- (c) they reserve the right to plead further to this paragraph if further details are provided of the loss or damage alleged by the claimants.

118 As to paragraph 118:

- (a) they admit that the DEPI Secretary and the Department of Environment and Primary Industries (**DEPI**) had knowledge of planned burning, as indicated by the 2006 Code and the DEPI Fire Management Manual - Prescribed Burning (Version 10.1), February 2008 (**DEPI Fire Management Manual**);
- (b) they admit that the DEPI Secretary had planned burning experience and refer to paragraph 133 below;
- (c) they otherwise do not admit the allegations therein.

119 As to paragraph 119:

- (a) they say that the effectiveness of planned burning in lowering the impact of a bushfire depends upon a range of factors including:
 - (i) the fuel moisture content;
 - (ii) the burn size and coverage although hectares burnt are not a reliable indicator of the effectiveness of planned burning;
 - (iii) the ecosystem or vegetation types;
 - (iv) the time since last burn (including planned and unplanned burning);
 - (v) the intensity of the burn;
 - (vi) the topography of the area subject to the burn;
 - (vii) the location of the burn with respect to the bushfire;
 - (viii) steps taken to manage fuel on surrounding private land;
 - (ix) the bushfire conditions;
 - (x) the size, intensity and behaviour of the bushfire;

- (xi) the impact of drought and heatwave conditions in the period leading up to the bushfire;
 - (xii) the degree to which fuels have been modified having regard to the limited ability of planned burning to remove all fuels including candlebark in the upper canopy;
- (b) they say that planned burning in the Murrindindi Fire Area Public Land would not have lowered the impact of the Murrindindi fire and reduced the risk of the fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities in bushfire conditions such as those that prevailed on 7 February 2009 in the Murrindindi area;
- (c) they say that planned burning may have a number of disadvantages and adverse consequences;

Particulars

The DEPI Secretary refers to subparagraph (iii) of the particulars subjoined to paragraph 142 below.

- (d) they say further that, on and before 7 February 2009, the DEPI Secretary knew the matters referred to in subparagraphs (a) and (c) inclusive hereof;
- (e) they otherwise deny the allegations therein.

120 They deny the allegations in paragraph 120.

121 As to paragraph 121:

- (a) save that they will refer at trial to the whole of the 1995 and 2006 Codes, they admit that the purpose referred to in paragraph 121 is set out in paragraph 18 of the 2006 Code;
- (b) they say further that the goals of the 2006 Code were set as Fire Management Principles, and included principles relating to risk management, prescribed burning operations, fire protection, environmental management and community partnership;

Particulars

Paragraphs 50 to 80 of the 2006 Code.

(c) they otherwise deny the allegations therein.

122 As to paragraph 122:

(a) they say that the matters referred to in subparagraphs (a) to (c) inclusive were set out in paragraphs 19 to 21 of the 2006 Code;

(b) they say further paragraph 17 of the 1995 Code stated that the Code supports the discharge of the Department's legislative responsibilities which included the matters referred to in paragraphs 18 to 21 inclusive of the 1995 Code;

(c) they say further that paragraph 26 of the 2006 Code stated that the Code supports the discharge of the DEPI's legislative responsibilities which included the matters referred to in paragraphs 27 to 34 inclusive of the 2006 Code, including the duty referred to in paragraph 99 above;

(d) they otherwise deny the allegations therein.

123 Save to say that paragraph 372 of the 1995 Code and section 2.2 of the 2006 Code contained provisions relating to fire management plans, they deny the allegations in paragraph 123.

124 They admit the allegations in paragraph 124 in relation to the 2006 Code but otherwise deny the allegations therein.

125 As to paragraph 125:

(a) they say that paragraph 403 of the 1995 Code and paragraph 197 of the 2006 Code stated that prescribed burning may be conducted only in accordance with an approved Burn Plan, within the meaning of each Code;

(b) they otherwise deny the allegations therein.

126 As to paragraph 126:

- (a) they say that paragraphs 262 and 263 of the 2006 Code stated that the DEPI must consider fuel management on and around sites of known high hazard and/or risk to human life and property on public land, such as rubbish tips, recreational areas or sawmills on or adjacent to public land, and where appropriate implement measures to reduce the possibility of bushfire ignitions;
- (b) they say that paragraph 109 of the 1995 Code stated, inter alia, that the Department must consider fuel management on and around sites of known high hazard and/or risk on public land and where appropriate implement measures to reduce the possibility of wildfire ignition;
- (c) they otherwise deny the allegations therein.

127 As to paragraph 127:

- (a) they say that in May 1998 the Department of Natural Resources and Environment (now the DEPI) issued a Central Highlands Forest Management Plan (**Central Highlands FMP**);
- (b) the Murrindindi Fire Area Public Land is within the Central Highlands FMP;
- (c) they say further that they will refer to the whole of the Central Highlands FMP at trial;
- (d) they otherwise deny the allegations therein.

128 As to paragraph 128:

- (a) they repeat paragraphs 101, 115 and 119;
- (b) they otherwise deny the allegations.

129 As to paragraph 129:

- (a) they repeat paragraphs 121(a) and 121(b) above;
- (b) they say that in 2005 the Broadford and Alexandra fire districts were amalgamated and became known as the Murrindindi land and fire district.

The Murrindindi land and fire district included, but was not limited to, the lands or a portion of the lands known on the geographic names register as the:

- (i) Toolangi State forest;
 - (ii) Black Range State forest;
 - (iii) Marysville State forest;
 - (iv) Big River State forest;
 - (v) Rubicon State forest;
 - (vi) Yarra Ranges National Park;
 - (vii) Cathedral Range State Park;
 - (viii) Lake Eildon National Park;
 - (ix) Murrindindi Scenic Reserve;
- (c) they admit that the North East Region Fire Protection Plan (Alexandra and Broadford Districts) 1999 (**Fire Protection Plan**), which applied to the Murrindindi land and fire district, recognised the objectives referred to in subparagraph (a), other objectives as referred to in Chapter 3 and that fuel management burning to achieve such objectives was subject to logistical considerations such as suitable opportunities for burning and the availability of appropriate resources;
- (d) they say that they will refer to the whole of the Fire Protection Plan at trial;
- (e) they otherwise deny the allegations therein.

130 As to paragraph 130:

- (a) they say that, at all material times, there were approved burn plans for the State forests and national parks within the meaning of the 1995 and 2006 Codes and/or the Fire Protection Plan;
- (b) they otherwise deny the allegations therein.

131 As to paragraph 131:

- (a) they admit that public land within the area covered by the Fire Protection Plan, including the State forests and national parks, was classified into the five fuel management zones described in paragraphs 4.2.13.2 to 4.2.13.6 of the Fire Protection Plan, as set out in Appendix 8;
- (b) they say that the classifications referred to in subparagraph (a) hereof followed the consideration of the matters set out in paragraph 4.2.13 of the Fire Protection Plan;
- (c) they otherwise deny the allegations therein.

132 As to paragraph 132:

- (a) they repeat paragraph 131 above;
- (b) they otherwise deny the allegations therein.

133 As to paragraph 133:

- (a) they admit that, during the period from 1 July 2000 to 6 February 2009, the DEPI Secretary undertook planned burning in the Murrindindi Fire Area Public Land;
- (b) they say further that, during the period from 1 July 2000 to 6 February 2009, the DEPI Secretary undertook planned burning in other parts of:
 - (i) the Broadford Fire District;
 - (ii) the Alexandra Fire District;
 - (iii) following the amalgamation of the Broadford and Alexandra Fire Districts as pleaded in paragraph 103(b) above, the Murrindindi Fire District; and
 - (iv) the East Port Phillip Fire District

outside of the Murrindindi Fire Area Public Land.

Particulars

The fuel reduction and ecological burns conducted within the Broadford Fire District for the period from 2000/01 to 2004/05 included, but were not limited to, the burns set out in **Table A** attached hereto.

The fuel reduction and ecological burns conducted within the Alexandra Fire District for the period from 2000/01 to 2004/05 included, but were not limited to, the burns set out in **Table B** attached hereto.

The fuel reduction and ecological burns conducted within the Murrindindi Fire District for the period from 2005/06 to 2008/09 included, but were not limited to, the burns set out in **Table C** attached hereto.

The fuel reduction and ecological burns conducted within the East Port Phillip Fire District for the period from 2000/01 to 2008/09 included, but were not limited to, the burns set out in **Table D** attached hereto.

The regeneration burns (including heap row and windrow burns) conducted within the Broadford Fire District, the Alexandra Fire District and, following the amalgamation of those districts as pleaded in paragraph 103(b) above, the Murrindindi Fire District, during the period from 2000/01 to 2008/09 included, but were not limited to the burns set out in **Table E** attached hereto.

Further particulars will be provided as soon as practicable.

134 As to paragraph 134:

- (a) they admit that the DEPI Secretary had knowledge of the report by the Environment and Natural Resources Committee (the Committee), Inquiry into the Impact of Public Land Management Practices on Bushfires in

Victoria (June 2008), and the findings and recommendations as set out in that report;

- (b) they admit that the Committee made the findings alleged in paragraphs 134(a)(i), (ii) and (iii);
- (c) they admit that the Committee made the recommendations alleged in paragraph 134(b)(i) and (ii);
- (d) subject to the constraints of parliamentary privilege, they say that they will refer to the whole of the said report at trial;
- (e) they otherwise deny the allegations therein.

135 As to paragraph 135:

- (a) they admit that the DEPI Secretary, in partnership with others, developed Living with Fire – Victoria's Bushfire Strategy in June 2008;
- (b) they say that:
 - (i) the document recognised, among other things, that successful fire suppression had removed natural fire from the landscape, indirectly resulting in increased fuel;
 - (ii) one of the strategy directions set out in the document was to increase planned burning on public and private land;
 - (iii) they will refer to the whole of the said document at trial;
- (c) they otherwise deny the allegations therein.

136 As to paragraph 136:

- (a) they admit that the DEPI Secretary developed a corporate plan for 2008-2011;
- (b) they say that the corporate plan refers to the development of a new strategy increasing planned burning from an estimated 4 to 6%;
- (c) they say that they will refer to the whole of the said corporate plan at trial;

(d) they otherwise deny the allegations therein.

137 As to paragraph 137:

(a) they say that the three year rolling average for the area of planned burning in Victoria at the end of 2008/9 was 146,141 hectares and that this represented less than 1.9% of the total public land area across Victoria;

(b) they repeat paragraphs 119(a), 119(b) and 119(c) above;

(c) they say further that hectares burnt are not a reliable indicator of the effectiveness of planned burning;

(d) they otherwise deny the allegations therein.

138 As to paragraph 138:

(a) they admit there was extreme dryness in areas within the Murrindindi Fire Area Public Land as at 7 February 2009;

(b) they otherwise deny the allegations therein.

139 As to paragraph 139:

(a) they say that the sources of fire risk in the Murrindindi land and fire district were many and varied;

Particulars

They refer to paragraph 4.1.1 and Appendix 6.1 of the Fire Protection Plan.

(b) they say that the probability of the risk of fire occurring as a result of a discharge of electricity from the powerline causing ignition of flammable material in the vicinity was extremely low relative to other causes;

Particulars

They refer to paragraph 4.1.1 and Appendix 6.1 of the Fire Protection Plan. They refer also to the matters alleged by SP Aus Net in paragraph 14(b)(i) of the SP AusNet Defence and Counterclaim.

- (c) they admit that the DEPI Secretary knew or ought to have known that a discharge of electricity from the powerline may give rise to a minor risk of fire;
 - (d) they repeat paragraphs 117, 119(a), 119(b) and 119(c) above;
 - (e) they otherwise deny the allegations therein.
- 140 They deny the allegations in paragraph 140 and repeat paragraph 117 and 119 above.
- 141 They deny the allegations in paragraph 141 and say further that no duty of care of the kind alleged existed by reason of, inter alia, the following matters:
- (a) it was not reasonably foreseeable that the claimants would suffer loss and damage of the kind alleged or any kind by reason of any failure on the part of the DEPI Secretary to take the steps alleged in paragraph 141;
 - (b) the alleged duty of care would expose the DEPI Secretary to liability of an indeterminate amount to an indeterminate class;
 - (c) the alleged duty of care would expose the DEPI Secretary to liability out of all proportion to the nature of the failings alleged against it in paragraph 142 of the ~~SP~~ AusNet Defence and Counterclaim;
 - (d) the alleged duty of care would or could potentially conflict with the statutory duties and functions of the DEPI Secretary under the:
 - (i) National Parks Act, to protect and preserve the natural environment in national parks and State parks, including indigenous flora and fauna and features of ecological, geological, historic, scenic or other scientific interest;
 - (ii) National Parks Act, with respect to designated water supply catchment areas, to regard the protection of such areas and the maintenance of water quality and the protection of the water resources of such areas, as a paramount obligation;
 - (iii) Forests Act, to protect State forests;

- (iv) *Flora and Fauna Guarantee Act 1988* (Vic), to promote flora and fauna conservation and retain potential for evolutionary development;
 - (v) *Catchment and Land Protection Act 1994* (Vic);
 - (vi) *Heritage Rivers Act 1992* (Vic);
- (e) the alleged duty of care would or could potentially conflict with other legislation or would not be coherent with other legislation;

Particulars

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Crown Land (Reserves) Act 1978 (Vic)

Conservation, Forests and Lands Act 1987 (Vic)

Road Management Act 2004 (Vic)

Occupational Health and Safety Act 2004 (Vic)

Heritage Act 1995 (Vic)

Reference Areas Act 1978 (Vic)

Archaeological & Aboriginal Relics Preservation Act 1972
(Vic)

Aboriginal Heritage Act 2006 (Vic)

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

- (f) the matters alleged in paragraph 117 above;
- (g) the DEPI Secretary did not have or exercise the necessary degree of control over the risk of harm of the kind allegedly suffered by the claimants;

- (h) the DEPI Secretary was not vested with any relevant statutory responsibility for the safety of the physical and mental wellbeing, property and economic interests of the claimants and members of the public (including the claimants) who lived in the vicinity of State forests, State parks, national parks or protected public land;
- (i) the alleged duty of care would be impractical and/or unduly burdensome having regard to:
 - (i) the vast area of public land in the State of Victoria constituted by State forests, State parks, national parks and protected public land;
 - (ii) the vast areas of State forests, State parks, national parks and protected public land managed by the DEPI Secretary in the State of Victoria;
 - (iii) the range of statutory functions of the DEPI Secretary with respect to the management of State forests, State parks, national parks and protected public land;
 - (iv) the risks and constraints associated with planned burning set out in subparagraph (iii) of the particulars subjoined to paragraph 142(b) below;
 - (v) the resources of the DEPI Secretary;
 - (vi) the existence of factors, beyond the control of the DEPI Secretary, with a critical bearing on the size, spread, predictability and controllability of bushfires, including:
 - (A) weather conditions, including atmospheric instability, temperature, wind speed and direction, humidity, and variability in such weather conditions, and the topography of the area in which the bushfire is burning;
 - (B) the extent and nature of fuel, including its moisture content, in the path of the fire before the fire reaches State forests, State parks, national parks or protected public land;

- (C) the occurrence and extent of 'spotting', causing the outbreak of new fires in unpredictable locations, large distances from the existing fire front;
 - (D) the location of the fire;
 - (E) the intensity of the fire;
 - (F) the speed, direction and spread of the fire;
 - (G) the existence, nature and location of other fires;
 - (H) considerations of firefighter safety;
 - (I) the availability of resources;
- (vii) the matters alleged in paragraphs 119(a), 119(b) and 119(c) hereof;
- (j) decisions in relation to the management of the State forests, State parks, national parks and protected public land, and proper and sufficient work for the prevention and suppression of fire in State forests, State parks, national parks and protected public land including undertaking planned burning, involve environmental, catchment, financial, economic, social and policy considerations which are not properly the subject of the alleged duty of care;
- (k) the alleged duty of care would conflict or otherwise compromise the allocation of statutory responsibility to electricity distributors under the regulatory framework referred to in paragraph 8(b) of the *SP AusNet Defence and Counterclaim* and under the *Electricity Industry Act 2000 (Vic)* to prevent injury to the public, including the claimants, from fires caused by electrical assets;
- (l) the broad discretion conferred upon the DEPI Secretary by section 62(2) of the *Forests Act* with respect to the measures which it could undertake for the prevention and suppression of fire in State forests, State parks, national parks and protected public land;
- (m) the alleged duty of care would unreasonably interfere with the autonomy of the DEPI Secretary in performing its functions;

They will rely on sections 83 and 85 of the *Wrongs Act 1958* (Vic) (**Wrongs Act**) at trial.

142 As to paragraph 142:

- (a) they repeat paragraphs 104, 105 and 141 above;
- (b) they say further, and in the alternative, that if the DEPI Secretary did owe the First DEPI Fire Duty and/or the Second DEPI Fire Duty and/or the DEPI Duty (which is denied) it did not breach the alleged duties or any of them.

Particulars

The DEPI Secretary did not breach the alleged duties having regard to:

- (i) the probability that fires of the type and intensity which occurred on 7 February 2009 in the Murrindindi land and fire district would occur;
- (ii) the fact that planned burning, including the planned burning alleged in the particulars to paragraph 142 of the SP AusNet Defence and Counterclaim, would not have provided benefits in the bushfire conditions that prevailed on 7 February 2009 in the Murrindindi land and fire district and they repeat paragraph 119(b) above;
- (iii) the constraints associated with planned burning activities (**constraints**) including:
 - (A) cost;
 - (B) resources;
 - (C) the legislative considerations set out in paragraph 115(d) and (e) above;
 - (D) community consultation and objections from stakeholders including private landowners in the vicinity;
 - (E) the limited window in which planned burning may be conducted;

- (F) the need to protect ecosystems and particularly threatened species;
 - (G) the negative impacts of planned burning on native biodiversity, such as weed and pest invasion;
 - (H) the negative effects on water yields and water quality;
 - (I) resource availability for the sustainable timber production industry;
 - (J) the need to protect significant cultural sites;
 - (K) the risk of escaped burns;
 - (L) traffic conditions and the effects of road closures and air visibility on flight paths;
 - (M) the effects of planned burning on recreational activity;
 - (N) the impact of planned burning on people with respiratory ailments;
 - (O) the nature and complexity of the topography, including types of areas that are not subjected to planned burning;
 - (P) the impact of prolonged drought on the ability to conduct planned burning;
 - (Q) the safety of the public and personnel involved in carrying out the planned burning;
 - (R) the nature of the vegetation in the area, in particular the presence of wet, damp or moist vegetation;
 - (S) the socio economic impacts of planned burning;
- (iv) compliance with the area of treatment and quantities of fuel hazard levels specified in the Fire Protection Plan was subject to qualifications including the constraints identified in (iii) above, and,

in any event did not set the standard of care for measuring compliance with the alleged duty;

- (v) the matters identified in paragraphs 119(a), 141(d), 141(e), 141(f), 141(g), 141(h), 141(i), 141(j), 141(k) and 141(l) hereof;
- (vi) other fire protection measures taken by the DEPI Secretary pursuant to section 62(2) of the Forests Act and section 17(2)(b) of the National Parks Act;
- (vii) the matters alleged in paragraph 133 above.

- (c) they will rely on sections 83, 84 and 85 of the Wrongs Act at trial;
- (d) in the absence of full and proper particulars of the matters alleged it is not able to plead further to the said allegations;
- (e) they otherwise deny the allegations therein.

143 They deny the allegations in paragraph 143 and repeat paragraphs 104, 104, 106, 107, 119(a), 119(b), 141 and 142 above.

144 They deny the allegations in paragraph 144 and repeat paragraphs 103, 104, 105, 106, 119(a), 119(b), 141 and 142 above.

145 They deny the allegations in paragraph 145 and say further, and in the alternative, that by reason of the conditions prevailing on 7 February 2009, if the DEPI Secretary owed and breached the alleged duties or any of them (which is denied), the fires in the Murrindindi land and fire district were not a natural and foreseeable consequence of the alleged breaches.

146 As to paragraph 146:

- (a) they deny the allegations therein and repeat paragraphs 143 and 144 above;
- (b) they say further, and in the alternative, that any loss and damage suffered by the claimants by reason of any alleged breach of duty by the DEPI Secretary (which is denied) was too remote;

- (c) they say further that, if and to the extent that, it is alleged that any liability of the DEPI Secretary results from an act done in the performance or purported performance of its functions under the Forests Act or the National Parks Act, that act was done in good faith and, by reason of section 86 of the *Conservation, Forests and Lands Act 1987* (Vic), the DEPI Secretary bears no liability.
- 147 They deny that SP AusNet is entitled to any reduction or limitation in its liability to the plaintiffs pursuant to section 24A1 of the Wrongs Act by reason of any alleged liability on the part of the DEPI Secretary. They otherwise do not plead to paragraph 147.
- 148 As to paragraph 148, they refer to and repeat paragraphs 1 to 147 above.
- 149-152 They do not plead to paragraphs 149 to 152 as no allegation is made against them.
- 153 As to paragraph 153:
- (a) they repeat paragraphs 98 to 147 above;
 - (b) they deny that SP AusNet is entitled to the declaratory relief sought.
- 154 As to paragraph 154:
- (a) they repeat paragraphs 98 to 146 above;
 - (b) they otherwise deny the allegations therein.
- 155 They deny the allegations in paragraph 155.
- 156-170 They do not plead to paragraphs 156 to 170 above as no allegation is made against them.
- 171 As to paragraph 171:
- (a) they admit that section 23(1)(b) of the *Crown Proceedings Act 1958* (Vic) and sections 123(1) and (2) of the *Police Regulation Act 1958* (Vic) (**Police Regulation Act**) are substantially to the effect alleged;

- (b) they will refer to the provisions in subparagraph (a) for their full terms and effect;
- (c) they otherwise deny the allegations therein.

172 As to paragraph 172:

- (a) they admit that at all relevant times section 5(1) of the Police Regulation Act provided that the Chief Commissioner shall have, subject to the directions of the Governor in Council, the superintendence and control of the force (as defined in that Act), and all officers of police shall have the superintendence and control of that portion of the force which is placed under their charge subject to the authority conferred upon the Chief Commissioner and to the regulations made or to be made by the Governor in Council as thereafter provided;
- (b) they otherwise deny the allegations therein.

173 As to paragraph 173:

- (a) they admit that at all relevant times section 6(1) of the Police Regulation Act provided that anything by that or any other Act or by any regulation made under that Act or any other Act appointed or authorized or required to be done or signed by the Chief Commissioner may be done by a Deputy Commissioner and shall be valid and effectual as if done or signed by the Chief Commissioner;
- (b) they otherwise deny the allegations therein.

174 As to paragraph 174:

- (a) they admit that:
 - (i) the *Emergency Management Act 1986* (Vic) (**EM Act**) was in force on 7 February 2009, and that the then relevant version of the EM Act was No 40 incorporating amendments as at 1 May 2008;
 - (ii) sections 4A(a) and (b) of the EM Act were substantially to the effect alleged;

- (iii) the phrase “emergency management” was defined in section 4 of the EM Act in the terms alleged;
 - (b) they say further that:
 - (i) at trial they will rely on the full terms of section 4A of the EM Act;
 - (ii) the purpose of the EM Act, set out in section 1, was “to provide for the organisation of emergency management in Victoria”;
 - (c) they otherwise deny the allegations therein.
- 175 As to paragraph 175:
- (a) they admit that the definition of “emergency” in section 4 of the EM Act included a chapeau substantially to the effect alleged, and the words “a fire” (as set out in (b) of the definition);
 - (b) they say further that they will rely on the full terms of the definition of “emergency” in section 4 of the EM Act at trial.
- 176 Subject to section 7 of the EM Act, they admit the allegations in paragraph 176.
- 177 Subject to section 7 of the EM Act, they admit the allegations in paragraph 177.
- 178 They admit that “emergency management” was defined in section 4 of the EM Act substantially to the effect alleged, but otherwise do not admit the allegations in paragraph 178.
- 179 Subject to section 7 of the EM Act, they admit the allegations in paragraph 179.
- 180 As to paragraph 180:
- (a) they admit the allegations therein;
 - (b) they say further that, on 7 February 2009, Assistant Commissioner Stephen Fontana undertook the roles and responsibilities of the State Co-ordinator set out in the EM Act.
- 181 Subject to section 12 of the EM Act, they admit the allegations in paragraph 181.

- 182 They admit the allegations in paragraph 182, and say further that they will rely on the full terms of section 15 of the EM Act at trial.
- 183 Subject to section 7 of the EM Act, they admit the allegations in paragraph 183.
- 184 As to paragraph 184:
- (a) they admit that the CFA and DEPI were identified in Part 7 of the Emergency Management Manual Victoria (**Manual**) as a control or support agency with responsibility for responding to certain emergency situations, including fire;
 - (b) they otherwise deny the allegations therein.
- 185 As to paragraph 185:
- (a) they say that the Office of the Emergency Services Commissioner was responsible for publishing the Manual in about January 2005;
 - (b) they say further that:
 - (i) in or about May 1997 the Minister for Police and Emergency Services as the Co-ordinator in Chief published DISPLAN, which publication applied in the State of Victoria as at 7 February 2009;
 - (ii) the Manual was a loose-leaf service that was amended and updated from time to time;
 - (c) they otherwise deny the allegations therein.
- 186 As to paragraph 186:
- (a) they say that, on 7 February 2009, Part 3 of the Manual contained part of the DISPLAN which had been published pursuant to section 17(a) of the EM Act;
 - (b) they otherwise deny the allegations therein.
- 187 As to paragraph 187:
- (a) they say that page 3-5 of the DISPLAN stated, among other things, that "Emergency response co-ordinators are responsible for ensuring the co-

ordination of the activities of agencies having roles or responsibilities in response to emergencies”;

- (b) they refer to and repeat paragraph 184 above;
- (c) they otherwise deny the allegations therein.

188 As to paragraph 188:

- (a) they say that page 3-5 of the DISPLAN stated, among other things, that “[t]he principal role of emergency response co-ordinators is to [among other things]... ensure that consideration has been given to alerting the public to existing and potential dangers arising from a serious emergency direct or through the media”;
- (b) they otherwise deny the allegations therein.

189 As to paragraph 189:

- (a) they say that the DISPLAN stated, in substance, among other things, that a Municipal Emergency Response Co-ordinator (**MERC**) was a form of Emergency Response Co-ordinator, and that page 3-6 of the Manual stated, among other things, that “the State Emergency Response Co-ordinator appoints, for each municipal district, a member for Victoria Police as municipal emergency response co-ordinator”;
- (b) they say further that the DISPLAN did not state that the response roles, responsibilities and duties of a MERC included ensuring that consideration has been given to alerting the public to existing and potential dangers arising from a serious emergency, the need for evacuation and public information;
- (c) they otherwise deny the allegations therein.

190 As to paragraph 190:

- (a) they say that the DISPLAN stated, in substance, among other things, that a Divisional Emergency Response Co-ordinator (**DERC**) was a form of Emergency Response Co-ordinator, and that page 3-6 of the Manual stated, among other things, that “the State Emergency Response Co-

ordinator appoints, for each emergency response division, a commissioned officer of police as divisional emergency response co-ordinator”;

(b) they otherwise deny the allegations therein.

191 As to paragraph 191:

(a) they say that the DISPLAN stated, in substance, among other things, that the response roles, responsibilities and duties of the MERC included obtaining and forwarding regular advice to the DERC regarding the potential of an emergency which was not under substantial control by the control agency;

(b) they otherwise deny the allegations therein.

192 As to paragraph 192:

(a) they refer to and repeat paragraph 191 above;

(b) they say that the DISPLAN stated, in substance, among other things, that the response roles, responsibilities and duties of the DERC included ensuring that consideration has been given to alerting the public to existing and potential dangers arising from a serious emergency, the need for evacuation and other public information;

(c) they otherwise deny the allegations therein.

193 They deny the allegations in paragraph 193.

194 As to paragraph 194:

(a) they say that the DISPLAN stated, in substance, among other things, that the State and Divisional Emergency Response Co-ordination Centres (**SERCC** and **DERCC**) and the Municipal Emergency Co-ordination Centres (**MECC**) are the locations where emergency response co-ordinators, among others, receive, collate and disseminate intelligence, and co-ordinate the provision of resources;

(b) they otherwise deny the allegations therein.

195 As to paragraph 195:

- (a) they say that page 3-9 of the DISPLAN stated, in substance, among other things, that, when activated, the SERCC is responsible for, among other things, information collection, analysis of, and dissemination of intelligence to emergency response co-ordinators, and the dissemination of, information to the media and general public;
- (b) they say further that:
 - (i) on 4 February 2004, the Australian Broadcasting Corporation (Victoria) (**ABC**) entered into a memorandum of understanding with, among others, the Minister for Police and Emergency Services, pursuant to which any person authorised by an emergency service (including the CFA and the DEPI) could telephone a 'hotline' within ABC Local Radio Victoria to communicate an emergency message to be transmitted to listeners of ABC Radio;
 - (ii) on 7 February 2009:
 - (A) information was disseminated to the media and general public about fires in the Murrindindi area via, among other sources, ABC Radio, the DEPI website and the CFA website;
 - (B) the MERC for the Murrindindi municipal district, the DERC for the Seymour Division, and the State Emergency Response Co-ordinator, ensured that consideration had been given to alerting the public to existing and potential dangers arising from the fires in the Murrindindi area, either directly or through the media;
- (c) they otherwise deny the allegations therein.

196 As to paragraph 196:

- (a) they deny the allegations in subparagraph (a);
- (b) they admit that the DISPLAN included statements in substance to the effect alleged in subparagraphs (b) to (e);

(c) they otherwise deny the allegations therein.

197 As to paragraph 197:

(a) they say that the DISPLAN included a list summarising the principles which should be kept in mind by those responsible for managing the flow of information, being:

(i) get information to the people who need it;

(ii) get the right information to the right people;

(iii) make sure it is timely, user-friendly, accurate, compatible and useful;

(b) they otherwise deny the allegations therein.

198 As to paragraph 198:

(a) they admit the allegations insofar as they relate to Part 7 of the Manual;

(b) they do not admit the allegations insofar as they relate to Part 8 of the Manual.

199 As to paragraph 199:

(a) to subparagraph (a):

(i) they say that page 7-1 of Part 7 of the Manual stated, in substance, among other things, that a control agency is an agency identified within the table on page 7-1 to page 7-3, assigned to control the response activities to a specified type of emergency, and that a support agency is an agency which provides essential services, personnel, or material to support or assist a control agency or affected persons;

(ii) they otherwise deny the allegations therein;

- (b) to subparagraph (b):
 - (i) they say that the table on page 7-2 of the Manual identified that, in respect to a fire, either the CFA, MFB or DEPI would be the control agency;
 - (ii) they otherwise deny the allegations in subparagraph (b).
- (c) they admit that page 7-4 of the Manual stated, among other things, that “in addition to the list of control agencies and key support agencies, there is a range of generic support services for response”, and that such support services were listed in a table on that same page, but otherwise deny the allegations in subparagraph (c);
- (d) they say that for the purposes of the Manual, Victoria Police was identified as the primary agency for the support service of public warnings, as contained in the table on page 7-4 of the Manual, but otherwise deny the allegations in subparagraph (d);
- (e) they say that in the agency role statement on page 7-72 of the Manual, “Victoria Police” response activities included responsibility for the effective coordination of resources or services in response to emergencies, responsibility for provision of media coordination (where no other facility exists) and support to other agencies in dissemination of public information, but otherwise deny the allegations in subparagraph (e);
- (f) they say further that:
 - (i) the agency role statements were stated as being “believed to be current at the date of publication” but that “readers are advised to contact the required agency to ensure that functions can still be carried out as expected”;
 - (ii) they refer to and repeat subparagraph 195(b) above;
- (g) they otherwise deny the allegations therein.

200 They admit the allegations in paragraph 200.

201 They admit the allegations in paragraph 201.

- 202 They admit the allegations in paragraph 202.
- 203 Save that the power of delegation itself had not been delegated to or was exercisable by the Deputy Co-ordinator, they admit the allegations in paragraph 203.
- 204 As to paragraph 204:
- (a) they admit that on 7 February 2009 Stephen Fontana acted as Deputy Co-ordinator and undertook the roles and responsibilities of the State Co-ordinator (as referred to in paragraph 180 above), which roles and responsibilities had been delegated to him as head of the Victoria Police Counter Terrorism Co-ordination and Emergency Management Department;
 - (b) they otherwise deny the allegations in paragraph 204.
- 205 As to paragraph 205:
- (a) they refer to and repeat paragraphs 202 to 204 above;
 - (b) they otherwise deny the allegations in paragraph 205.
- 206 They deny the allegations in paragraph 206.
- 207 As to paragraph 207:
- (a) they repeat paragraphs 187 to 197;
 - (b) they say that in relation to the fires in the Murrindindi area, and in relation to the designations "DERC" and "MERC" as contained in the DISPLAN, as at 7 February 2009:
 - (i) the DERC for the Seymour division was a member of the police force;
 - (ii) the MERC for the Murrindindi municipal district was a member of the police force;
 - (c) they otherwise deny the allegations therein.

208 As to paragraph 208:

- (a) they say that:
 - (i) on 5 February 2009, the Chief Commissioner of Police caused an email to be sent to all members and staff of Victoria Police stating that fire agencies had advised her that Victoria was at very serious risk of wild fire breaking out over the coming days;
 - (ii) they admit that at the commencement of the 2008/9 fire season, and in the days immediately prior to 7 February 2009, representatives from the CFA and the DEPI made announcements about the high risk of fire danger in Victoria;
- (b) they otherwise do not admit the allegations therein.

209 As to paragraph 209:

- (a) they say that, in some circumstances and at some times, the publication of specific rather than general information about the threat of bushfire might assist persons likely to be affected by such bushfire to decide what steps they may take to avoid the risk of personal injury or death;
- (b) they say further that, by reason of the general, unparticularised and hypothetical nature of the allegations, they cannot further plead to paragraph 209;
- (c) they otherwise deny the allegations therein.

210 They refer to and repeat paragraph 212(a) below, and otherwise deny the allegations in paragraph 210.

211 As to paragraph 211:

- (a) they say that, in some circumstances and at some times, the provision of warnings about the risk that a bushfire might reach a particular place at a particular time might assist persons likely to be affected by such bushfire to decide what steps they may take to avoid the risk of personal injury or death;

(b) they say further that, by reason of the general and hypothetical nature of the allegations, they cannot further plead to paragraph 211;

(c) they otherwise deny the allegations therein.

212 As to paragraph 212:

(a) They say that in defining the matters alleged in subparagraphs 210(a) to (d) of the ~~SP~~ AusNet Defence and Counterclaim collectively as 'the Murrindindi fire risks', the allegations in subparagraphs 212(a) and (b), each of which imports reference to the collectively defined 'Murrindindi fire risks', are incapable of being understood and pleaded to, and are therefore embarrassing and should be struck out;

(b) they refer to and repeat paragraphs 234(a)(vi) to ~~(vii)~~(viii) below;

(c) they deny the allegations therein.

213 As to paragraph 213:

(a) they deny the allegations therein;

(b) they say further that:

(i) neither the State Co-ordinator, the Deputy Co-ordinator, the SER Personnel, nor any of the Murrindindi Fire Emergency Response Co-ordinators exercised the degree of control over the risk of harm to the 'personal injury claimants' necessary to support any duty to exercise reasonable care, having regard to, among other things:

(A) the size of the Murrindindi area;

(B) the high speed with which the fires spread over the Murrindindi area;

(C) the occurrence of 'spotting', which caused the outbreak of new fires in unpredictable locations, large distances from the existing fire front;

(D) the unpredictable direction and speed at which the fires travelled;

- (E) the circumstances of widespread emergency and danger in the Murrindindi area and other areas in the State of Victoria;
- (F) the difficulty, in circumstances of widespread emergency and danger, of gathering, controlling and evaluating information concerning, among other things:
 - (a) the ignition, location, direction, size, intensity and speed of fires, including those in the Murrindindi area and any other relevant adjacent area;
 - (b) the local topography and fuel types and their effect upon the behaviour of fires;
 - (c) the available methods and means of transport and communication in the Murrindindi area and any other relevant adjacent area;
 - (d) existing and forecast weather patterns, including temperature, relative humidity, and the direction, speed and type of winds impacting or likely to impact upon fires within the Murrindindi area and any other relevant adjacent area;
 - (e) the predicted behaviour of all fires within the Murrindindi area and any other relevant adjacent area;
 - (f) in the context of the above, the time or any reasonably approximate time at which particular fires of a particular intensity and behaviour might impact upon particular towns and communities in the Murrindindi area;
- (G) the need to assess, check and evaluate the accuracy and likely effect of, and the risk to persons in delivering, warnings that a particular bushfire might reach a particular place at a particular time, having regard to the circumstances of emergency, all other warnings which might have been made

and the need to allocate resources to the task of particular assessment, checking and evaluation;

- (H) the inability to control the source of the risk of harm itself, being the fires within the Murrindindi area;
 - (I) the inability to control the actions of persons exposed to the risk of harm presented by the fires in the Murrindindi area, including the inability to compel the evacuation of persons from any land, building or premises in which they had a pecuniary interest, or if they had an interest in any goods or valuables thereon;
 - (J) the inability to control whether 'persons at risk' are able to hear, read or otherwise obtain warnings about the risk of harm presented by the fires in the Murrindindi area;
 - (K) in light of the matters set out in subparagraphs (A) to (J) above, the risk of not being able to:
 - (a) identify persons who may be located at a particular place, at a particular time, in respect of a particular fire or fires, and who may therefore be 'persons at risk';
 - (b) communicate a timely, efficacious and accurate warning to 'persons at risk';
 - (L) the different locations and circumstances of members of the public who may be affected by a bushfire;
- (ii) the imposition of a duty of care in the terms alleged in paragraph 213 of the SP AusNet Defence and Counterclaim:
- (A) would be inconsistent with the duties owed by the Chief Commissioner of Police (in that capacity or as the State Co-ordinator of DISPLAN), or by any other member of Victoria Police;

- (B) would impose liability of an indeterminate amount to an indeterminate class;
- (C) is wrongly premised on:
 - (a) members of Victoria Police being able to provide timely, accurate and efficacious warnings to persons at risk, at a particular time, in a particular place, in respect of one or more of the fires in the Murrindindi area;
 - (b) 'persons at risk' having the time and means available to take steps to avoid the risk of harm presented by the fires in the Murrindindi area;
- (iii) the ability to issue timely and adequate bushfire warnings in the context of events that occurred in Victoria on 7 and 8 February 2009 involved financial, economic, social, policy and operational decisions which are not properly the subject of a duty of care;
- (iv) they say further that they will also rely on sections 83 and 85 of the Wrongs Act at trial.

Particulars

Pursuant to section 79(f) of the Wrongs Act, the Chief Commissioner of Police (in that capacity or as the State Co-ordinator of DISPLAN) the Deputy Co-ordinator, the SER Personnel or any Murrindindi Fire Emergency Response Co-ordinator as defined in the ~~SP~~ AusNet Defence and Counterclaim, was a person holding an office or position established under an Act, and therefore a "public authority" for the purpose of Part XII of the Wrongs Act.

- 214 They admit the allegations in paragraph 214.
- 215 Save that they admit the allegations in sub-paragraph 215(f), they do not admit the allegations in paragraph 215.
- 216 As to paragraph 216:
- (a) they refer to paragraphs 208 to 211 and 213(b) above;
 - (b) they deny the allegations therein;
 - (c) they say further that the allegations in paragraph 219 are embarrassing.
- 217 They deny the allegations in paragraph 217 and say further that they rely on sections 56 and 83 of the Wrongs Act at trial.
- 218 As to paragraph 218:
- (a) they deny the allegations therein;
 - (b) further or alternatively, they say that even if there was a 'Victoria Police Duty to Warn' (which is denied) and this duty was breached (which is also denied), the acts or omissions of the Chief Commissioner of Police (in that capacity or as the State Co-ordinator of DISPLAN), the Deputy Co-ordinator, the SER Personnel, or any Murrindindi Fire Emergency Response Co-ordinator as defined in the SP AusNet Defence and Counterclaim, did not cause the 'personal injury claimants' to suffer personal injury loss and damage as a consequence of the fires in the Murrindindi area;
 - (c) further or alternatively, they say that:
 - (i) to the extent that the plaintiff on behalf of himself and group members (as personal injury claimants) claims damages for past or future economic loss for any personal or bodily injury, any award of damages is subject to the limitations in sections 28F and 28I of the Wrongs Act;
 - (ii) the plaintiff and each group member must show that they suffered a 'significant injury' as that term is defined by section 28LF of the

Wrongs Act before the plaintiff or any group member is entitled to any damages for non-economic loss for personal or bodily injury;

- (iii) further to (ii) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in sections 28G and 28H of the Wrongs Act;
- (iv) to the extent that any personal injury claimant has suffered any injury arising out of or in the course of or due to the nature of employment, such claim may not be brought other than in accordance with section 134AB of the *Accident Compensation Act 1985* (Vic) (**Accident Compensation Act**);
- (v) to the extent that any personal injury claimant has suffered any damage in respect of an injury or death of a person as a result of a transport accident, such a claim may not be brought other than in accordance with section 93 of the *Transport Accident Act 1986* (Vic) (**Transport Accident Act**); and
- (vi) they will rely on sections 72 to 75 of the Wrongs Act at trial.

219 They deny the allegations in paragraph 219.

220 As to paragraph 220:

- (a) they refer to and repeat paragraphs 213, 217 and 218 above;
- (b) they therefore deny the allegations therein.

221 They deny the allegations in paragraph 221.

222 As to paragraph 222:

- (a) they refer to and repeat paragraphs 213, 217 and 218 above;
- (b) they therefore deny the allegations therein.

223 As to paragraph 223:

- (a) they refer to and repeat paragraphs 171 to 222 above;
- (b) they therefore deny the allegations therein.

224 They repeat paragraph 223 above, and therefore deny the allegations in paragraph 224.

225 They admit the allegations in paragraph 225.

226 As to paragraph 226:

- (a) they say that they will refer to and rely upon all of the relevant terms of the *Country Fire Authority Act 1958 (Vic) (CFA Act)* with respect to the purpose, functions, duties and powers of the CFA at trial;
- (b) they otherwise admit the allegations therein.

227 As to paragraph 227:

- (a) they refer to and repeat subparagraph 195(b) above and paragraph 228 below;
- (b) they otherwise deny the allegations therein.

228 As to paragraph 228:

- (a) they say that the EM Act did not impose on the CFA:
 - (i) a statutory duty of the kind alleged in paragraph 227 of the SP AusNet Defence and Counterclaim, enforceable at the suit of individuals or any class of individuals, in that:
 - (A) the provisions and policy of the EM Act are not compatible with the imposition of a statutory duty in the terms alleged in paragraph 227 of the SP AusNet Defence and Counterclaim.

Particulars

They refer to and rely on section 84(3) of the Wrongs Act.

- (B) none of the obligations contained in Part 3 of the EM Act explicitly or implicitly support the existence of such a statutory duty;

- (C) the EM Act does not expressly confer on the Minister for Police and Emergency Services, or any other member of the executive government, a power to create an action in damages at the suit of any person injured by breach of, or failure to comply with, the substantive provisions of DISPLAN or the Manual including Appendix 5, at page 20 of Part 8;
- (ii) a statutory duty capable of giving rise to a private right of action for the benefit of the 'personal injury claimants';
- (b) they say further that the Manual was prepared and existed for the benefit of the community generally to provide information and guidance on the emergency management arrangements for Victoria, the role of various organisations within them and the planning and management arrangements that bring all the different elements together, and was not prepared (nor did it exist) for the protection or benefit of any individual or class of individuals to which the claimants, or any of them, belong;
- (c) they otherwise deny the allegations therein.

229 As to paragraph 229:

- (a) they repeat paragraphs 213 and 227 above;
- (b) they otherwise deny the allegations therein.

230 They refer to and repeat paragraph 212(a) above and otherwise deny the allegations in paragraph 230.

231 As to paragraph 231:

- (a) they refer to and repeat paragraph 234(a)(vi) to (viii) below;
- (b) they say that in the absence of proper particulars as to the bushfire warnings and their content, they cannot plead further to the allegation; and
- (c) they otherwise deny the allegations therein.

232 As to paragraph 232:

- (a) they say that in defining the matters alleged in subparagraphs 210(a) to (d) of the ~~SP~~ AusNet Defence and Counterclaim collectively as the 'Murrindindi fire risks', the allegations in subparagraphs 232(a) to (c), each of which imports reference to the collectively defined 'Murrindindi fire risks', are incapable of being understood and pleaded to, and are therefore embarrassing and should be struck out;
- (b) they refer to and repeat paragraphs 234(a)(vi) to (viii), 237 and 251 below;
- (c) they otherwise deny the allegations therein.

233 As to paragraph 233:

- (a) they refer to and repeat paragraphs 234 and 237 below;
- (b) they otherwise deny the allegations therein.

234 As to paragraph 234:

- (a) they say that, having regard to factors including, in particular, the following:
 - (i) the number of incidents to which the CFA was called to respond on 7 February 2009;

Particulars

The CFA responded to a total of 632 discrete incidents on 7 February 2009.

- (ii) the nature and extent of such incidents including, in particular, the fires in the Murrindindi area;

Particulars

Following ignition of the fire to the north of the Murrindindi sawmill in Wilhelmina Falls Road, Murrindindi at approximately 2.55pm on 7 February 2009, the fire initially travelled in a southerly direction from the point of ignition towards the Murrindindi mill, gaining momentum as it reached the mill. Fanned by strong winds, low

humidity and assisted by the extreme drought-like conditions, the fire front thereafter travelled quickly in a south-westerly direction and spread into the forest and plantation areas behind the mill. The size, intensity and rate of spread of the fire rendered it unpredictable in its behaviour due to factors beyond the control of the CFA including the following:

- (A) weather conditions, including atmospheric instability, high temperature, wind speed and direction, drought conditions and low humidity;
 - (B) the topography and terrain of the area in which the fire burned;
 - (C) the type, extent, variability and nature of the fuel in the path of the fire;
 - (D) the size of the fire;
 - (E) the speed, direction and spread of the fire;
 - (F) the intensity and behaviour of the fire including the occurrence and extent of 'spotting' causing the outbreak of new fires in unpredictable locations large distances from the existing fire;
 - (G) the location and accessibility of the fireground;
- (iii) the general operational exigencies and pressures under which CFA personnel operate when they are engaged in responding to a bushfire, including the need to make, communicate and implement tactical and strategic decisions in a very short space of time and in dangerous and trying conditions;
- (iv) the existence of factors, beyond the control of the CFA, with a critical bearing on the size, spread, predictability and controllability of bushfires generally, including:

- (A) weather conditions, including atmospheric instability temperature, wind speed and direction, humidity, drought factor and variability in such weather conditions;
- (B) the topography and terrain of the area in which the bushfire is burning including any terrain limitations such as steep hills, gullies, rocky outcrops and 'washouts' and the existence of plantations, dense forests and/or rivers in the area where the fire burns after ignition;
- (C) the location and accessibility of a fire;
- (D) the intensity and behaviour of the fire including the occurrence and extent of 'spotting', causing the outbreak of new fires in unpredictable locations, potentially large distances from the existing fire;
- (E) considerations of firefighter safety, preservation of life, property (including critical external infrastructure) and natural resources;
- (F) the size of a fire both at detection and during the initial attack stages;
- (G) the speed, direction and spread of a fire;
- (H) the type, extent, variability and nature of fuel in the path of a fire in the immediate vicinity of the ignition point and beyond;
- (I) the existence, nature and location of other fires;
- (J) the availability of, and competition for, resources including personnel, ground based appliances, aircraft and command structure;
- (K) the ability to deploy available resources and to do so in a timely way;
- (L) the type, shape, size and moisture content of material lofted up from a fire;

- (M) the location of fireground water sources;
 - (N) special hazards such as overhead powerlines;
 - (O) the time required to detect a fire;
 - (P) the time required to travel to the location of a fire;
 - (Q) the existence and nature of co-operative arrangements with other agencies, in particular the applicable co-operative arrangements with the DEPI Secretary, as to which , the State Parties refer to and repeat paragraph 264 below;
- (v) the inability of the CFA to control the source of the risk of harm presented by a bushfire, namely, ignition of the bushfire itself;
- (vi) the steps taken by the CFA in the lead-up to bushfire season
- (A) to educate those living in bushfire prone areas about:
 - (a) bushfire risk including the limitations upon firefighting agencies when attempting to suppress a bushfire;
 - (b) the fact that experience shows that many residents receive little, if any, official warning of an approaching bushfire;
 - (c) the fact that in the event of a bushfire, residents should not expect a warning and should not expect a fire truck;
 - (d) the need to mitigate the threat posed by bushfires by being self-reliant;
 - (e) the need for members of the community, when faced with the risk of a bushfire, to leave early (that is, early enough to avoid the threat of bushfire) or to make a decision to stay and actively defend their property;

- (f) the general need for members of the community to prepare themselves and their property so far as possible against the effect of a bushfire;
- (B) to assist those living in bushfire prone areas to prepare themselves and their property so far as possible against the risk of bushfire well ahead of the occurrence of a fire which might affect them;

Particulars

The types of steps taken by the CFA include:

- (A) Fire Ready Victoria street meetings and community meetings led by CFA trained presenters;
- (B) meetings similar to the Fire Ready Victoria street meetings and community meetings delivered to special interest groups;
- (C) Community Fireguard Groups facilitated by CFA personnel to assist in development of bushfire survival plans to suit communities' needs;
- (D) community forums;
- (E) bushfire planning workshops;
- (F) Victorian Bushfire Information Line;
- (G) media campaigns including local and state radio and newspapers, television, talk back sessions and radio interviews;
- (H) CFA website;
- (I) information displays;
- (J) bushfire safety and other publications and CDs, distributed in hard copy and made available where feasible on the CFA website;

- (K) Statewide multi-agency strategies such as Fire Ready Victoria Strategy 2004-2007 and the Living with Fire Framework 2008-2012;
 - (L) local brigade activities;
 - (M) telephone surveys in some high risk areas to assess awareness of campaigns;
- (vii) the fact that the CFA relies upon community participation and willingness to ensure the effectiveness of the steps taken by the CFA in the lead-up to bushfire season;
 - (viii) the fact that in the days immediately prior to 7 February 2009, announcements and media releases were made, including by representatives from the CFA and the DEPI Secretary, about the high risk of fire danger in Victoria and the need for members of the community to:
 - (A) make a decision whether they were going to leave early or to stay and actively defend their property in the event of a bushfire on that day;
 - (B) prepare themselves and their property so far as possible against the effect of a possible bushfire on that day;

Particulars

The announcements made on 4, 5 and 6 February 2009 are set out in **Annexure A**.

- (ix) the inability of the CFA to control the acts and omissions of persons potentially exposed to the risk of harm presented by a bushfire, particularly insofar as:
 - (A) such acts or omissions might increase the risk of harm to their person or property, or the person or property of those close to them;

- (B) they might fail to take steps reasonably available to them to mitigate the risk of harm to their person or property, or the person or property of those close to them;
- (x) the inherent insusceptibility of operational decisions and activities undertaken on behalf of an emergency services organisation in responding to a bushfire or bushfires to review by the courts;
- (xi) the facts that:
 - (A) the role of the CFA under the CFA Act is to act in and for the collective welfare of members of the community generally;
 - (B) no special relationship existed between the CFA and the plaintiffs, or any of them, which could have given rise to a duty of care of the kind alleged;
- (xii) the fact that a duty of care of the kind alleged would expose the CFA to liability of an indeterminate amount to an indeterminate class;
- (xiii) the different locations and circumstances of members of the public who may be affected by a bushfire;
- (xiv) the absence of any statutory duty to provide factual and timely advice to any member of Victoria Police so that such a person could issue or cause to be issued bushfire warnings enforceable by the plaintiffs, on the part of the CFA;

Particulars

They repeat paragraphs 227 and 228 above.

- (xv) the principles set out in section 83 of the Wrongs Act, in particular the fact that the functions required to be exercised by the CFA under the CFA Act are necessarily limited by the financial and other resources available to it for the purposes of exercising those functions;
- (xvi) the fact that the CFA has functions and provides services including:

- (A) fire suppression and prevention;
- (B) rescue and extrication services as set out in section 97A of the CFA Act;
- (C) road accident rescue services as set out in section 97B of the CFA Act;
- (D) protection services as set out in section 97C of the CFA Act;

there existed, on the part of the CFA, no duty of care of the kind alleged either in respect of the fires in the Murrindindi area or at all;

- (b) they say further that they will rely on section 85 of the Wrongs Act at trial;
- (c) they otherwise deny the allegations contained therein.

235 As to paragraph 235:

- (a) they repeat paragraphs 227, 228 and 234 above;
- (b) they otherwise deny the allegations therein.

236 As to paragraph 236:

- (a) they repeat the particulars subjoined to paragraph 234(a)(ii) and (iv) above;
- (b) they say that:
 - (i) while the CFA admits that it knew that the weather conditions on 7 February 2009 were predicted to include high temperatures, northerly winds, high wind speeds and low humidity and that such conditions may, under some circumstances, contribute to the ignition and spread of fire in any area of Victoria including fire in the Murrindindi area, the ignition and spread of the fires in the Murrindindi area as alleged in paragraph 236 of the ~~SP~~ AusNet Defence and Counterclaim was not foreseeable by the CFA;
 - (ii) the CFA could not, prior to 7 February 2009, foresee the particular combination of weather conditions or other factors which might

affect the path and spread of any particular bushfire which ignited on that day;

(c) they otherwise do not admit the allegations therein.

237 As to paragraph 237:

(a) they repeat paragraphs 227, 228, 234 to 236 above;

(b) they otherwise deny the allegations therein;

(c) they say further, that even if (which is denied), a duty of care on the part of the CFA to the personal injury claimants or any of them existed, the CFA was not obliged, in carrying out that duty:

(i) to:

(A) undertake particular tasks, measures or activities;

(B) have or apply particular resources; or

(C) otherwise act in any particular manner,

for the purpose of issuing warnings to persons at risk;

(ii) to act in the manner alleged in paragraph 237;

(d) further or alternatively, even if there was a 'First CFA common law warnings duty' or a 'First CFA statutory warnings duty' (each of which is denied):

(i) a large body of information regarding the fires in the Murrindindi area, including the existence, nature, location and potential path of such fires, was available to members of the public, including the personal injury claimants, on 7 February 2009;

Particulars

Particulars are being compiled and will be provided as soon as practicable. The State Parties rely on section 56 of the Wrongs Act.

- (ii) any failure by the CFA to provide factual and timely advice to members of Victoria Police to enable them to issue or cause to be issued bushfire warnings to persons at risk as alleged in paragraph 235 of the SP AusNet Defence and Counterclaim (which is also denied), did not constitute a breach of that duty because it was not, in the circumstances, so unreasonable that no public authority having the functions of the CFA could properly consider the alleged failure to be a reasonable exercise of its functions;

Particulars

They refer to section 84(2) of the Wrongs Act.

- (e) they say further that, in the absence of proper particulars as to the 'bushfire warnings' they cannot plead further to the allegations.

238 As to paragraph 238:

- (a) they repeat paragraphs 227, 228, 234 and 237 above;
- (b) they say further that in the absence of proper particulars as to the steps that the personal injury claimants or any of them could and would have taken, in the circumstances, to avoid injury or death but for the asserted breaches of duty, they cannot further plead to the allegations in that paragraph;
- (c) they otherwise deny the allegations therein and say further that, to the extent that the personal injury claimants suffered loss and damage, the same was not caused by any breach or breaches of the First CFA statutory warnings duty or the First CFA common law warnings duty (the existence of which duties and breaches is denied);
- (d) alternatively, they say that:
 - (i) to the extent that the plaintiff on behalf of himself and group members (as personal injury claimants) claims damages for past or future economic loss for any personal or bodily injury, any award of damages is subject to the limitations in sections 28F and 28I of the Wrongs Act;

- (ii) the plaintiff and each group member must show that she or he suffered a 'significant injury' as that term is defined by section 28LF of the Wrongs Act before the plaintiff or any group member is entitled to any damages for non-economic loss for personal or bodily injury;
- (iii) further to (ii) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in sections 28G and 28H of the Wrongs Act;
- (iv) to the extent that any personal injury claimant has suffered any injury arising out of or in the course of or due to the nature of employment, such claim may not be brought other than in accordance with section 134AB of the Accident Compensation Act;
- (v) to the extent that any personal injury claimant has suffered any damage in respect of an injury or death of a person as a result of a transport accident, such a claim may not be brought other than in accordance with section 93 of the Transport Accident Act;
- (vi) they will rely on sections 72 to 75 of the Wrongs Act at trial.

239 As to paragraph 239:

- (a) they repeat paragraphs 237 and 238 above;
- (b) they otherwise deny the allegations therein.

240 As to paragraph 240:

- (a) they say that they will refer to and rely upon all of the relevant terms of the CFA Act with respect to the purpose, functions, duties and powers of the CFA;
- (b) they admit that section 20 of the CFA Act at all material times provided that:

'The duty of taking superintending and enforcing all necessary steps for the prevention and suppression of fires and for the protection of life and property in case of fire and the general control of all stations and of all brigades and of all groups of brigades shall, subject to the

provisions of this Act, so far as relates to the country area of Victoria be vested in the Authority.'

- (c) they repeat paragraphs 241 and 242 below;
- (d) they otherwise deny the allegations therein.

241 They deny the allegations in paragraph 241 and say further that:

- (a) the purpose and effect of section 20 of the CFA Act:
 - (i) is to describe and define the functions of the CFA;

Particulars

In particular, the purpose and effect of section 20 is to identify the parameters of the CFA's area of responsibility in relation to the prevention and suppression of fire, and the protection of life and property in the case of fire as being with respect to the country (as opposed to metropolitan) area of Victoria.

- (ii) is not to impose on the CFA any duty of a specific or prescriptive nature;
- (b) the purpose and effect of section 20 is not to impose upon the CFA a duty enforceable at the suit of individuals or any class of individuals, including the personal injury claimants:
 - (i) to:
 - (A) undertake particular tasks, measures or activities;
 - (B) have or apply particular resources; or
 - (C) otherwise act in any particular manner,

for the purpose of preparing emergency warnings to be given to the public;

- (ii) to:
 - (A) undertake particular tasks, measures or activities;
 - (B) have or apply particular resources; or
 - (C) otherwise act in any particular manner,
 for the purpose of disseminating warnings to members of the public;

- (iii) to:
 - (A) undertake the tasks, measures or activities;
 - (B) have or apply the resources; or
 - (C) otherwise act in the manner,
 pleaded in paragraph 241;

- (c) further, section 20 was enacted for the benefit of the community generally and was not enacted for the protection or benefit of any individual or class of individuals to which the claimants, or any of them, belong.
- (d) further, in the absence of proper particulars as to the “emergency warnings” and/or the “warnings and/or the “CFA bushfire warnings” referred to in paragraph 241, they cannot plead further to the allegations.

242 As to paragraph 242:

- (a) they repeat paragraph 241 above;
- (b) they say further that the CFA Act did not impose on the CFA:
 - (i) a statutory duty of the kind alleged in paragraphs 240 and 241 of the ~~SP~~ AusNet Defence and Counterclaim, in that:
 - (A) the provisions and policy of the CFA Act are not compatible with the imposition of a statutory duty in the terms alleged;

Particulars

They refer to and rely on section 84(3) of the Wrongs Act.

- (B) none of the obligations contained in section 20 of the CFA Act explicitly or implicitly support the existence of such a statutory duty;
- (ii) a statutory duty capable of giving rise to a private right of action for the benefit of the 'personal injury claimants';
- (c) they otherwise deny the allegations therein.

243 As to paragraph 243:

- (a) they admit that it has, at all material times, been the CFA's view that it is desirable to provide warnings to the public about bushfire risks as soon as practicable;
- (b) they otherwise do not admit the allegations therein;
- (c) they say further that the CFA did provide warnings, to the extent practicable, and as soon as was practicable, in the circumstances.

244 As to paragraph 244:

- (a) they say that, in some circumstances and at some times, the publication of specific rather than general information about the threat of bushfire might be more effective in assisting persons likely to be affected by such bushfire to decide what steps they may take to avoid the risk of personal injury or death;
- (b) they say further that, by reason of the general, unparticularised and hypothetical nature of the allegations, they cannot further plead to paragraph 244;
- (c) they otherwise deny the allegations therein.

245 They refer to and repeat paragraphs 212(a), 234 and 236 above and otherwise deny the allegations in paragraph 245.

246 As to paragraph 246:

- (a) they say that Part 1.6 on page 1-15 of the Manual states among other things that:

‘The ultimate goal of emergency management is a safer more sustainable community, a goal it shares with many other activities such as crime prevention or occupational health and safety.’

- (b) they say further that they will rely upon the full terms of Part 1.6 of the Manual at trial;
- (c) they otherwise deny the allegations therein.

247 As to paragraph 247:

- (a) they refer to and repeat paragraphs 234(a)(vi) to (viii) and 241 above;
- (b) they say that in the absence of particulars as to the CFA bushfire warnings and their content they cannot plead to the allegation;
- (c) they otherwise deny the allegations therein.

248 As to paragraph 248:

- (a) they say that in defining the matters alleged in subparagraphs 210(a) to (d) of the ~~SP~~ AusNet Defence and Counterclaim collectively as the ‘Murrindindi fire risks’, the allegations in subparagraphs 248(a) to (c), each of which imports reference to the collectively defined ‘Murrindindi fire risks’, are incapable of being understood and pleaded to, and are therefore embarrassing and should be struck out;
- (b) they refer to and repeat paragraphs 234(a)(vi) to (viii) and 237 above and 251 below; and
- (c) they otherwise deny the allegations in paragraph 248.

249 As to paragraph 249:

- (a) they repeat paragraphs 241 and 244 above and 253 and 255 below;

- (b) they say whether or not the provision of information concerning bushfires would enable persons at risk to take steps to avoid personal injury or death depends upon a range of factors including, inter alia, the information which is conveyed, the speed, intensity and spread of the fire in question, the location of the person at risk and the capacity and willingness of the person at risk to take any or any appropriate steps;
- (c) they otherwise deny the allegations therein.

250 As to paragraph 250, they:

- (a) say that the CFA did not exercise control in any relevant sense over whether the personal injury claimants, or any of them, were exposed to harm as a result of bushfire generally or the Murrindindi fire in particular;
- (b) otherwise deny they deny the allegations in paragraph 250.

251 As to paragraph 251, they:

- (a) admit that the DEPI Secretary and/or the CFA issued media releases on 4, 5 and 6 February 2009;

Particulars

The media releases issued on 4, 5 and 6 February 2009 are included in **Annexure A**.

- (b) say that they will rely on those media releases for their full terms and effect;
- (c) say further that some of the media releases informed the public of several sources where they might obtain information relating to bushfires and stated, among other things, that:
- For information on fires in Victoria and general fire safety, please contact the Victorian Bushfire Information Line (VBIL) on freecall 1800 240 667. Callers who are deaf, hard of hearing, or have a speech or communication impairment may call textphone/telewriter (TTY) on 1800 122 969.

Information is also available at www.dse.vic.gov.au/fires
or www.cfa.vic.gov.au

- For bushfire information, check the CFA and DSE websites or call the Victorian Bushfire Information Line on 1800 240 667.

(d) refer to and repeat paragraphs 234(a)(v) to (viii) above and 253(a)(vi) to (viii) below; and

(e) otherwise deny the allegations therein.

252 As to paragraph 252:

(a) they say that the CFA knew that the website would provide a source of information for members of the public;

(b) they repeat paragraphs 234(a)(vi) to (viii) above and 253(a)(vi) to (viii) below;

(c) they otherwise do not admit the allegations therein.

253 As to paragraph 253:

(a) they say that, having regard to factors including, in particular, the following:

(i) the number of incidents to which the CFA was called to respond on 7 February 2009;

Particulars

The CFA responded to a total of 632 discrete incidents on 7 February 2009.

(ii) the nature and extent of such incidents including, in particular, the fires in the Murrindindi area;

Particulars

They refer to and repeat the particulars subjoined to the preceding subparagraph and to paragraph 234 above.

- (iii) the general operational exigencies and pressures under which CFA personnel operate when they are engaged in responding to a bushfire, including the need to make, communicate and implement tactical and strategic decisions in a very short space of time and in dangerous and trying conditions;
- (iv) the existence of factors, beyond the control of the CFA, with a critical bearing on the size, spread, predictability and controllability of bushfires, including:
 - (A) weather conditions, including temperature, atmospheric instability, wind speed and direction, humidity, drought factor and variability in such weather conditions;
 - (B) the topography and terrain of the area in which the bushfire is burning, including any terrain limitations such as steep hills, gullies, rocky outcrops and 'washouts' and the existence of plantations, dense forests and/or rivers in the area where the fire burns after ignition;
 - (C) the location and accessibility of the fire;
 - (D) the intensity and behaviour of the fire including the occurrence and extent of 'spotting', causing the outbreak of new fires in unpredictable locations, potentially large distances from the existing fire;
 - (E) considerations of fire fighter safety, preservation of life, property (including critical external infrastructure) and natural resources;
 - (F) the size of a fire both at detection and during the initial attack stages;
 - (G) the speed, direction and spread of a fire;
 - (H) the type, extent, variability and nature of fuel in the path of a fire in the immediate vicinity of the ignition point and beyond;
 - (I) the existence, nature and location of other fires;

- (J) the availability of, and competition for, resources including personnel, ground based appliances, aircraft and command structure;
 - (K) the ability to deploy available resources and to do so in a timely way;
 - (L) the type, shape, size and moisture content of material lofted up from a fire;
 - (M) the location of fireground water sources;
 - (N) special hazards such as overhead powerlines;
 - (O) the time required to detect a fire;
 - (P) the time required to travel to the location of a fire;
 - (Q) the existence and nature of co-operative arrangements with other agencies, in particular the applicable co-operative arrangements with the DEPI Secretary as to which, the State Parties refer to and repeat paragraph 264 below;
- (v) the inability of the CFA to control the source of the risk of harm presented by a bushfire, namely, ignition of the bushfire itself;
- (vi) the steps taken by the CFA in the lead-up to bushfire season:
- (A) to educate those living in bushfire prone areas about:
 - (a) bushfire risk including the limitations upon firefighting agencies when attempting to suppress a bushfire;
 - (b) the fact that experience shows that many residents receive little, if any, official warning of an approaching bushfire;
 - (c) the fact that in the event of a bushfire, residents should not expect a warning and should not expect a fire truck;

- (d) the need to mitigate the threat posed by bushfires by being self-reliant;
 - (e) the need for members of the community, when faced with the risk of a bushfire, to leave early (that is, early enough to avoid the threat of bushfire) or to make a decision to stay and actively defend their property;
 - (f) the general need for members of the community to prepare themselves and their property so far as possible against the effect of a bushfire; and
- (B) to assist those living in bushfire prone areas to prepare themselves and their property so far as possible against the risk of bushfire well ahead of the occurrence of a fire which might affect them;

Particulars

The types of steps taken by the CFA include:

- (A) Fire Ready Victoria street meetings and community meetings led by CFA trained presenters;
- (B) meetings similar to the Fire Ready Victoria street meetings and community meetings delivered to special interest groups;
- (C) Community Fireguard groups facilitated by CFA personnel to assist in development of bushfire survival plans to suit communities' needs;
- (D) community forums;
- (E) bushfire planning workshops;
- (F) Victorian Bushfire Information Line;

- (G) media campaigns including local and state radio and newspapers, television, talk back sessions and radio interviews;
 - (H) CFA website;
 - (I) information displays;
 - (J) bushfire safety and other publications and CDs, distributed in hard copy and made available (where feasible) on the CFA website;
 - (K) Statewide multi-agency strategies such as Fire Ready Victoria Strategy 2004-2007 and the Living with Fire Framework 2008-2012;
 - (L) local brigade activities;
 - (M) telephone surveys in some high risk areas to assess awareness of campaigns.
- (vii) the reliance by the CFA upon community participation and willingness to ensure the effectiveness of the steps taken by the CFA in the lead-up to bushfire season;
- (viii) the fact that in the days immediately prior to 7 February 2009, announcements were made, including by representatives from the CFA and the DEPI, about the high risk of fire danger in Victoria and the need for members of the community to:
- (A) make a decision whether they were going to leave early or to stay and actively defend their property in the event of a bushfire on that day;
 - (B) prepare themselves and their property so far as possible against the effect of a possible bushfire on that day;

Particulars

They repeat the particulars to paragraph 234(a)(viii) above.

- (ix) the inability of the CFA to control the acts and omissions of persons potentially exposed to the risk of harm presented by a bushfire, particularly insofar as:
 - (A) such acts or omissions might increase the risk of harm to their person or property, or the person or property of those close to them;
 - (B) they might fail to take steps reasonably available to them to mitigate the risk of harm to their person or property, or the person or property of those close to them;
- (x) the inherent insusceptibility of operational decisions and activities undertaken on behalf of an emergency services organisation in responding to a bushfire or bushfires to review by the courts;
- (xi) the facts that:
 - (A) the role of the CFA under the CFA Act is to act in and for the collective welfare of members of the community generally;
 - (B) no special relationship existed between the CFA and the plaintiffs, or any of them, which could have given rise to a duty of care of the kind alleged;
- (xii) the fact that a duty of care of the kind alleged would expose the CFA to liability of an indeterminate amount to an indeterminate class;
- (xiii) the different locations and circumstances of members of the public who may be affected by a bushfire;
- (xiv) the absence of any statutory duty to issue bushfire warnings, enforceable by the plaintiffs, on the part of the CFA;

Particulars

They repeat paragraphs 227, 228, 240 to 242 above.

- (xv) the principles set out in section 83 of the Wrongs Act, in particular the fact that the functions required to be exercised by the CFA under the CFA Act are necessarily limited by the financial and other resources available to it for the purposes of exercising those functions;
- (xvi) the fact that the CFA has functions and provides services including:
 - (A) fire suppression and prevention;
 - (B) rescue and extrication services as set out in section 97A of the CFA Act;
 - (C) road accident rescue services as set out in section 97B of the CFA Act;
 - (D) protection services as set out in section 97C of the CFA Act;

there existed, on the part of the CFA, no duty of care of the kind alleged either in respect of the fires in the Murrindindi area or at all;

- (b) they say further that they will rely on section 85 of the Wrongs Act at trial;
- (c) they otherwise deny the allegations therein.

254 As to paragraph 254:

- (a) they repeat paragraphs 213, 234, 240, 242 and 253 above;
- (b) they say further that they will rely on sections 83, 84 and 85 of the Wrongs Act at trial;
- (c) they otherwise deny the allegations therein.

264A Save that they admit that in respect of the management of all fire-related activities on public land the DEPI Secretary was required by the 2006 Code of Practice to participate in interagency coordination in accordance with relevant legislation and arrangements put in place under the State Emergency Response Plan and agreed

reciprocal arrangements, they otherwise deny the allegations contained in paragraph 264A.

255 As to paragraph 255:

- (a) they refer to and repeat paragraphs 234, 240, 242 to 253 and 254 above;
- (b) they say that if the CFA did owe the Second CFA statutory warnings duty (which is denied) it did not act in breach of such duty by reason of the matters alleged;
- (c) they say that if the CFA did owe the Second CFA common law warnings duty (which is also denied) it did not act in breach of such duty by reason of the matters alleged;
- (d) they say further, that even if (which is denied), a duty of care on the part of the CFA to the personal injury claimants or any of them existed, the CFA was not obliged, in carrying out that duty:
 - (i) to:
 - (A) undertake particular tasks, measures or activities;
 - (B) have or apply particular resources; or
 - (C) otherwise act in any particular manner,
 for the purpose of issuing warnings to persons at risk;
 - (ii) to act in the manner alleged in paragraph 204;
- (e) further or alternatively, even if there was a 'Second CFA common law warnings duty' or a 'Second CFA statutory warnings duty' (each of which is denied):
 - (i) a large body of information regarding the fires in the Murrindindi area, including the existence, nature, location and potential path of such fires, was available to members of the public, including the personal injury claimants, on 7 February 2009;

Particulars

Particulars are being compiled and will be provided as soon as practicable. The State Parties rely on section 56 of the Wrongs Act.

- (ii) any failure by the CFA to provide factual and timely advice to members of Victoria Police to enable them to issue or cause to be issued bushfire warnings to persons at risk as alleged in paragraph 235 of the SP AusNet Defence and Counterclaim (which is also denied), did not constitute a breach of that duty because it was not, in the circumstances, so unreasonable that no public authority having the functions of the CFA could properly consider the alleged failure to be a reasonable exercise of its functions;

Particulars

They refer to section 84(2) of the Wrongs Act.

- (f) further, they say that in the absence of proper particulars of:
 - (i) the warnings it is alleged that the CFA wrongfully failed to issue;
 - (ii) the persons to whom the CFA wrongfully failed to issue:
 - (A) warnings;
 - (B) timely warnings; and/or
 - (C) adequate warnings;
 - (iii) the basis upon which it is said that the warnings issued by the CFA were not timely or adequate,

they cannot plead further to the allegations in paragraph 255;

- (g) they otherwise deny the allegations therein.

256 As to paragraph 256:

- (a) they repeat paragraphs 240 to 242 and 253 to 255 above;

- (b) they otherwise deny the allegations therein.

257 As to paragraph 257:

- (a) they repeat paragraphs 240 to 242, 253, 255 and 256 above;
- (b) they say further that in the absence of proper particulars as to the steps that the personal injury claimants or any of them could and would have taken, in the circumstances, to avoid injury or death but for the asserted breaches of duty, they cannot further plead to the allegations in that paragraph;
- (c) they otherwise deny the allegations therein and say further that, to the extent that the personal injury claimants suffered loss and damage, the same was not caused by any breach or breaches of the Second CFA statutory warnings duty or the Second CFA common law warnings duty (the existence of which duties and breaches is denied);
- (d) alternatively, they say that:
 - (i) to the extent that the plaintiff on behalf of himself and group members (as personal injury claimants) claims damages for past or future economic loss for any personal or bodily injury, any award of damages is subject to the limitations in sections 28F and 28I of the Wrongs Act;
 - (ii) the plaintiff and each group member must show that she or he suffered a 'significant injury' as that term is defined by section 28LF of the Wrongs Act before the plaintiff or any group member is entitled to any damages for non-economic loss for personal or bodily injury;
 - (iii) further to (ii) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in sections 28G and 28H of the Wrongs Act;
 - (iv) to the extent that any personal injury claimant has suffered any injury arising out of or in the course of or due to the nature of

employment, such claim may not be brought other than in accordance with section 134AB of the Accident Compensation Act;

(v) to the extent that any personal injury claimant has suffered any damage in respect of an injury or death of a person as a result of a transport accident, such a claim may not be brought other than in accordance with section 93 of the Transport Accident Act;

(vi) they will rely on sections 72 to 75 of the Wrongs Act at trial.

258 As to paragraph 258:

(a) they repeat paragraphs 256 and 257 above;

(b) they otherwise deny the allegations therein.

259 As to paragraph 259:

(a) they deny that any member of Victoria Police (including those referred to therein) or the DEPI owed the statutory or common law duties alleged;

(b) they deny that the CFA owed the First CFA statutory warnings duty and/or the Second CFA statutory warnings duty and/or the First CFA common law warnings duty and/or the Second CFA common law warnings duty;

(c) they repeat paragraphs 227, 228, 234, 240 to 242 and 253 above;

(d) they otherwise deny the allegations therein.

260 They deny the allegations in paragraph 260.

261 As to paragraph 261:

(a) they deny the allegations therein;

(b) they say further that SP AusNet is not entitled to the relief sought by it against the CFA or to any relief.

262 They admit the allegations in paragraph 262.

263 As to paragraph 263, they repeat paragraphs 99, 103 and 104 hereof.

264 As to paragraph 264:

- (a) they say that there existed arrangements between the CFA and the DEPI Secretary to work in partnership in conducting integrated emergency management activities;

Particulars

The partnership arrangements were set out in:

- (i) the Heads of Agreement between the CFA and the DEPI dated 25 October 2006;
 - (ii) the Australasian Inter-service Incident Management System;
 - (iii) the Partnership Guidelines between the CFA and the DEPI dated 25 October 2006;
 - (iv) the Joint Standard Operating Procedures of the CFA and the DEPI;
 - (v) the Local Mutual Aid Plan between DEPI North East Area and CFA North East Area 2008-2009 Fire Season;
- (b) they say that the said arrangements referred to in subparagraph (a) are referred to in section 3.2 of the DEPI Fire Management Manual;
 - (c) they otherwise deny the allegations therein.

265 As to paragraph 265:

- (a) they say that the DEPI Secretary maintained an intranet web system known as Fireweb which contained fire management information;
- (b) they otherwise deny the allegations therein.

266 As to paragraph 266:

- (a) they repeat paragraphs 213 and 264;
- (b) they otherwise deny the allegations therein.

- 267 They refer to and repeat paragraph 212(a) above and otherwise deny the allegations in paragraph 267.
- 268 As to paragraph 268:
- (a) they refer to and repeat paragraphs 234(a)(vi) to (viii) above;
 - (b) they otherwise deny the allegations therein;
 - (c) they say further that, in the absence of proper particulars as to the warnings and their content, they cannot plead further to the allegations.
- 269 They refer to and repeat paragraphs 117(b)(ii), 212(a), 234(a)(vi) to (viii) and 251 above and otherwise deny the allegations in paragraph 269.
- 270 They deny the allegations in paragraph 270 and say further:
- (a) whether or not the provision of information about a bushfire would enable persons at risk to take steps to avoid personal injury or death depends upon a range of factors including, inter alia, the information conveyed, the speed, intensity and spread of the fire in question, the location of the person at risk and the capacity and willingness of the person at risk to take any or any appropriate steps;
 - (b) by reason of the general unparticularised and hypothetical nature of the allegations they cannot plead further.
- 271 They deny the allegations in paragraph 271 and say further that no duty of care of the kind alleged existed having regard to, inter alia, the following matters:
- (a) the absence of any duty owed by the State Co-ordinator, the Deputy Co-ordinator, the SER Personnel or the Murrindindi Fire Emergency Response Co-ordinators to issue warnings as alleged;
 - (b) the matters alleged in paragraphs 234(a)(vi) to (viii) and 263 to 270 inclusive above;
 - (c) the imposition of the duty alleged would expose the DEPI Secretary to liability of an indeterminate amount to an indeterminate class or would raise the prospect of an intolerably large class of potential plaintiffs;

- (d) the alleged duty of care would unreasonably interfere with the autonomy of the DEPI Secretary in performing its functions including its functions leading up to and on 7 February 2009;
- (e) the DEPI Secretary did not exercise the degree of control over the risk of harm to the personal injury claimants necessary to support the duty alleged in respect of fires like the Murrindindi fire having regard to:
 - (i) the source of the ignition of the fire;
 - (ii) the size of the Murrindindi area;
 - (iii) the intensity and the high speed with which the fires spread over the Murrindindi area;
 - (iv) the occurrence of 'spotting', which caused the outbreak of new fires in unpredictable locations, large distances from the existing fire front;
 - (v) the unpredictable direction and speed at which the fires travelled;
 - (vi) the inability of the DEPI Secretary to control the acts and omissions of persons potentially exposed to the risk of harm presented by a bushfire, particularly insofar as:
 - (A) such acts or omissions might increase the risk of harm to their person or property, or the person or property of those close to them;
 - (B) they might fail to take steps reasonably available to them to mitigate the risk of harm to their person or property, or the person or property of those close to them;
- (f) the DEPI Secretary was not vested with any relevant statutory responsibility for the safety of members of the public who lived in the vicinity of State forests, national parks and protected public land;
- (g) the DEPI Secretary was not vested with any relevant statutory responsibility to issue bushfire warnings or to provide information relating to bushfires to other bodies or entities;

- (h) the alleged duty of care would be impractical and/or burdensome to fulfil having regard to:
- (i) the vast area of public land in the State of Victoria constituted by State forests, national parks and protected public land;
 - (ii) the vast areas of public land managed by the DEPI Secretary in the State of Victoria;
 - (iii) the range of statutory functions of the DEPI Secretary with respect to the management of public land in the State of Victoria constituted by State forests, national parks and protected public land;
 - (iv) the number of fires which occur and the areas which they can potentially cover;
 - (v) the nature and unpredictability of fires like those which occurred on 7 February 2009 in the Murrindindi area;
 - (vi) the general operational exigencies and pressures under which DEPI personnel operate when they are engaged in responding to bushfires like those which occurred on 7 February 2009;
 - (vii) the existence of factors beyond the control of the DEPI Secretary, with a critical bearing on the location, size, spread, predictability and controllability of bushfires including weather conditions, the topography of the area in which the bushfire is burning, the extent and nature of fuel in the path of the fire and the occurrence and extent of spotting causing the outbreak of new fires in unpredictable locations, large distances from the existing fire front;
 - (viii) the inability of the DEPI Secretary to control the source of the risk of harm presented by a bushfire, namely, ignition of the bushfire itself;
 - (ix) the matters alleged in subparagraph (e) hereof;
 - (x) the different locations and circumstances of members of the public who may be affected by a bushfire;
 - (xi) the resources available to the DEPI Secretary;

- (i) the fact that no special relationship existed between the DEPI Secretary and the plaintiff, or any of the personal injury claimants, which could have given rise to a duty of care of the kind alleged;
- (j) decisions concerning the issuing of warnings (including who should issue warnings in respect of particular bushfires) and the provision of information to other bodies in respect of bushfires involve policy considerations which are not properly the subject of the duty of care alleged;
- (k) decisions in relation to the alleged First DEPI warnings duty would involve matters of judgment which are not properly the subject of the duty of care alleged;
- (l) operational decisions and activities undertaken on behalf of an emergency services organisation in the context of actively attempting to suppress a bushfire or bushfires are inherently unsusceptible to review by the courts.

They will rely on sections 83, 84 and 85 of the Wrongs Act at trial.

272 As to paragraph 272:

- (a) they deny the allegations in paragraph 272;
- (b) they refer to and repeat paragraph 271 above.

273 They deny the allegations in paragraph 273 and say further that:

- (a) predicting the likely direction, path and spread of a bushfire like the fires which ignited on 7 February 2009 in the Murrindindi area involves matters of opinion and judgment;
- (b) during the afternoon of 7 February 2009, the likely direction, path and spread of the Murrindindi fire was unpredictable having regard to its speed, intensity, its nature, the topography, the weather conditions and the occurrence of 'spotting', which caused the outbreak of new fires in unpredictable locations, large distances from the existing fire front;
- (c) further and alternatively, by reason of the factors identified in subparagraph (b) hereof, during the afternoon of 7 February 2009, the likely direction, path and spread of the fire could not be predicted in a timely manner.

274 As to paragraph 274:

- (a) they deny the allegations in paragraph 274;
- (b) they refer to and repeat paragraphs 271 and 273 above;
- (c) they say that if the DEPI Secretary did owe the First DEPI warnings duty (which is denied) it did not act in breach of such duty by reason of the matters alleged or at all;
- (d) they say that a large body of information regarding the fires in the Murrindindi area, including the existence, nature, location and potential path of such fires, was available to members of the public, including the personal injury claimants, on 7 February 2009;

Particulars

Particulars are being compiled and will be provided as soon as practicable. The State Parties rely on section 56 of the Wrongs Act.

- (e) they say that they will rely upon sections 83, 84 and 85 of the Wrongs Act at trial;
- (f) they say further that, in the absence of proper particulars as to what constitutes factual and timely advice and information, and in the absence of proper particulars as to the warnings and their content, they cannot plead further to the allegations.

275 As to paragraph 275:

- (a) they repeat paragraphs 271 to 274 above;
- (b) they say that even if there was a 'First DEPI warnings duty' as alleged (which is denied) and even if that duty was breached (which is denied), the acts or omissions of the DEPI Secretary did not cause the 'personal injury claimants' to suffer personal injury loss and damage as a consequence of the fires in the Murrindindi area;
- (c) they therefore deny the allegations therein and, further, rely on the matters alleged in paragraph 146(c) above;

- (d) alternatively, they say that:
- (i) to the extent that the plaintiff on behalf of himself and group members (as personal injury claimants) claims damages for past or future economic loss for any personal or bodily injury, any award of damages is subject to the limitations in sections 28F and 28I of the Wrongs Act;
 - (ii) the plaintiff and each group member must show that she or he suffered a 'significant injury' as that term is defined by section 28LF of the Wrongs Act before the plaintiff or any group member is entitled to any damages for non-economic loss for personal or bodily injury;
 - (iii) further to (ii) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in sections 28G and 28H of the Wrongs Act;
 - (iv) to the extent that any personal injury claimant has suffered any injury arising out of or in the course of or due to the nature of employment, such claim may not be brought other than in accordance with section 134AB of the Accident Compensation Act;
 - (v) to the extent that any personal injury claimant has suffered any damage in respect of an injury or death of a person as a result of a transport accident, such a claim may not be brought other than in accordance with section 93 of the Transport Accident Act; and
 - (vi) they will rely on sections 72 to 75 of the Wrongs Act at trial.

276 As to paragraph 276:

- (a) they repeat paragraphs 274 and 275 above;
- (b) they otherwise deny the allegations therein.

277 As to paragraph 277:

- (a) they say that, in the absence of proper particulars as to the warnings and their content, they cannot plead to the allegations;

(b) they otherwise do not admit the allegations therein.

278 As to paragraph 278:

(a) they say that, in some circumstances and at some times, specific rather than general information about the threat of bushfire might be more effective in assisting persons likely to be affected by such bushfire in deciding what steps they may take to avoid the risk of personal injury or death;

(b) they say further that, by reason of the general, unparticularised and hypothetical nature of the allegations, they cannot further plead to paragraph 278;

(c) they otherwise deny the allegations therein.

279 They refer to and repeat paragraph 212(a) above and otherwise deny the allegations in paragraph 279.

280 As to paragraph 280:

(a) they refer to and repeat paragraphs 234(a)(vi) to (viii) above;

(b) they otherwise deny the allegations therein;

(c) they say further that, in the absence of proper particulars as to the warnings and their content, they cannot plead further to the allegations.

281 As to paragraph 281:

(a) they say that the concepts and objectives of emergency management are outlined in section 1.3 of the Manual;

(b) they admit that section 1.6 of the Manual states, inter alia, that the ultimate goal of emergency management is a safer more sustainable community;

(c) they otherwise deny the allegations therein.

282 They refer to and repeat paragraphs 117(b)(ii), 212(a), 234(a)(vi) to (viii) and 251 above and otherwise deny the allegations in paragraph 282.

283 They deny paragraph 283 and say further:

- (a) whether or not the provision of information about a bushfire would enable persons at risk to take steps to avoid personal injury or death depends upon a range of factors including, inter alia, the information conveyed, the speed, intensity and spread of the fire in question, the location of the person at risk and the capacity and willingness of the person at risk to take any or any appropriate steps;
- (b) by reason of the general, unparticularised and hypothetical nature of the allegations they cannot plead further.

284 ~~They deny the allegations in paragraph 284 and~~ As to paragraph 284 they:

- (a) say that the DEPI Secretary did not exercise control in any relevant sense over whether the personal injury claimants, or any of them, were exposed to harm as a result of bushfire generally or the Murrindindi fire in particular;
- (b) say further that the matters alleged in the particulars subjoined to paragraph 284 of the AusNet Defence and Counterclaim do not amount to an assumption of responsibility by the DEPI Secretary to:
 - (i) issue warnings as alleged; and/or
 - (ii) issue warnings in relation to bushfires like the Murrindindi fire; and
- (c) otherwise deny paragraph 284.

285 As to paragraph 285:

- (a) they refer to and repeat paragraph 251 above;
- (b) they otherwise deny the allegations therein.

286 As to paragraph 286:

- (a) they say that the DEPI Secretary knew or ought to have known that the DEPI website and the Victorian Bushfire Information Line would provide a source of information for members of the public;
- (b) they otherwise deny the allegations therein.

- 287 They deny the allegations in paragraph 287 and say further that no duty of care of the kind alleged existed having regard to, inter alia, the following matters:
- (a) the matters alleged in paragraphs 234(a)(vi) to (viii), 264 and 277 to 286 inclusive hereof;
 - (b) the statutory duty of the DEPI Secretary alleged in paragraph 263 of the SP AusNet Defence and Counterclaim does not support a duty of care in favour of the claimants with respect to warnings as alleged;
 - (c) the imposition of the duty alleged would expose the DEPI Secretary to an indeterminate liability or would raise the prospect of an intolerably large class of potential plaintiffs;
 - (d) the alleged duty of care would unreasonably interfere with the autonomy of the DEPI Secretary in performing its functions including its functions leading up to and on 7 February 2009;
 - (e) the DEPI Secretary did not exercise the degree of control over the risk of harm to the personal injury claimants necessary to support the duty alleged in respect of fires like those that ignited on 7 February 2009 in the Murrindindi area having regard to:
 - (i) the source of the ignition of the fire;
 - (ii) the size of the Murrindindi area;
 - (iii) the intensity and the high speed with which the fires spread over the Murrindindi area;
 - (iv) the occurrence of 'spotting', which caused the outbreak of new fires in unpredictable locations, large distances from the existing fire front;
 - (v) the unpredictable direction and speed at which the fires travelled;
 - (vi) the inability of the DEPI Secretary to control the acts and omissions of persons potentially exposed to the risk of harm presented by a bushfire, particularly insofar as:

- (A) such acts or omissions might increase the risk of harm to their person or property, or the person or property of those close to them;
 - (B) they might fail to take steps reasonably available to them to mitigate the risk of harm to their person or property, or the person or property of those close to them;
- (f) the DEPI Secretary was not vested with any relevant statutory responsibility for the safety of the members of the public who lived in the vicinity of State forests, national parks and protected public land;
- (g) the DEPI Secretary was not vested with any relevant statutory responsibility to issue bushfire warnings;
- (h) the alleged duty of care alleged would be impractical and/or burdensome for the DEPI Secretary to fulfil having regard to:
 - (i) the vast area of public land in the State of Victoria constituted by State forests, national parks and protected public land;
 - (ii) the vast area of State forests, national parks and protected public land managed by the DEPI Secretary in the State of Victoria;
 - (iii) the range of statutory functions of the DEPI Secretary with respect to the management of State forests, national parks and protected public land in the State of Victoria;
 - (iv) the number of fires which occur and the areas which they can potentially cover;
 - (v) the nature and unpredictability of some fires like those that occurred on 7 February 2009 in the Murrindindi area;
 - (vi) the general operational exigencies and pressures under which DEPI personnel operate when they are engaged in responding to bushfires like those which occurred on 7 February 2009;
 - (vii) the existence of factors beyond the control of the DEPI Secretary, with a critical bearing on the location, size, spread, predictability and

controllability of bushfires including weather conditions, the topography of the area in which the bushfire is burning, the extent and nature of fuel in the path of the fire and the occurrence and extent of spotting causing the outbreak of new fires in unpredictable locations, large distances from the existing fire front;

- (viii) the inability of the DEPI Secretary to control the source of the risk of harm presented by a bushfire, namely, ignition of the bushfire itself;
 - (ix) the matters alleged in subparagraph (e) above;
 - (x) the different locations and circumstances of members of the public who may be affected by a bushfire;
 - (xi) the resources available to the DEPI Secretary;
- (i) the fact that no special relationship existed between the DEPI Secretary and the plaintiff, or any of the personal injury claimants, which could have given rise to a duty of care of the kind alleged;
 - (j) decisions in relation to the alleged Second DEPI warnings duty would involve matters of judgment which are not properly the subject of the duty of care alleged;
 - (k) decisions concerning the issuing of warnings in respect of bushfires (including who should issue warnings in respect of particular bushfires) involve policy considerations which are not properly the subject of the duty of care alleged;
 - (l) operational decisions and activities undertaken on behalf of an emergency services organisation in the context of actively attempting to suppress a bushfire or bushfires are inherently insusceptible to review by the courts.

They will rely on sections 83, 84 and 85 of the Wrongs Act at trial.

288 As to paragraph 288:

- (a) they deny the allegations in paragraph 288;
- (b) they refer to and repeat paragraph 287 above.

289 As to paragraph 289:

- (a) they deny the allegations in paragraph 289;
- (b) they repeat paragraphs 287 and 288 above;
- (c) they say that if the DEPI Secretary did owe the Second DEPI warnings duty (which is denied), it did not breach that duty as alleged or at all;
- (d) they say that a large body of information regarding the fires in the Murrindindi area, including the existence, nature, location and potential path of such fires, was available to members of the public, including the personal injury claimants, on 7 February 2009;

Particulars

Particulars are being compiled and will be provided as soon as practicable. The State Parties rely on section 56 of the Wrongs Act.

- (e) they say that they will rely upon sections 83, 84 and 85 of the Wrongs Act at trial;
- (f) they say further that, in the absence of proper particulars as to the warnings and their content they cannot plead further to the allegations.

290 As to paragraph 290:

- (a) they deny the allegations therein;
- (b) they repeat paragraphs 287 and 289 above;
- (c) they say further, and in the alternative, that by reason of the matters alleged in paragraph 273 above the DEPI Secretary could not reasonably provide the information alleged.

291 As to paragraph 291:

- (a) they repeat paragraphs 287 to 290 above;
- (b) they say that even if there was a 'Second DEPI warnings duty' as alleged (which is denied) and even if that duty was breached (which is denied), the acts or omissions of the DEPI Secretary did not cause the 'personal injury

claimants' to suffer personal injury loss and damage as a consequence of the fires in the Murrindindi area;

- (c) they therefore deny the allegations therein and, further, rely on the matters alleged in paragraph 146(c) above;
- (d) alternatively, they say that:
 - (i) to the extent that the plaintiff on behalf of himself and group members (as personal injury claimants) claims damages for past or future economic loss for any personal or bodily injury, any award of damages is subject to the limitations in sections 28F and 28I of the Wrongs Act;
 - (ii) the plaintiff and each group member must show that she or he suffered a 'significant injury' as that term is defined by section 28LF of the Wrongs Act before the plaintiff or any group member is entitled to any damages for non-economic loss for personal or bodily injury;
 - (iii) further to (ii) above, any assessment of damages for non-economic loss for personal or bodily injury is subject to the limitations in sections 28G and 28H of the Wrongs Act;
 - (iv) to the extent that any personal injury claimant has suffered any injury arising out of or in the course of or due to the nature of employment, such claim may not be brought other than in accordance with section 134AB of the Accident Compensation Act;
 - (v) to the extent that any personal injury claimant has suffered any damage in respect of an injury or death of a person as a result of a transport accident, such a claim may not be brought other than in accordance with section 93 of the Transport Accident Act; and
 - (vi) they will rely on sections 72 to 75 of the Wrongs Act at trial.

292 As to paragraph 292:

- (a) they repeat paragraphs 290 and 291 above;

(b) they otherwise deny the allegations therein.

293 As to paragraph 293:

(a) they deny that the State Co-ordinator, the Deputy Co-ordinator, the SER Personnel or the Murrindindi Fire Emergency Response Co-ordinators, or that the CFA, owed the statutory or common law duties alleged;

(b) they deny that the DEPI Secretary owed the First and/or Second DEPI warnings duties;

(c) they repeat paragraphs 271 and 287 above;

(d) they otherwise deny the allegations therein.

294 They deny the allegations in paragraph 294.

295 They deny the allegations in ~~As to~~ paragraph 295:

~~(a) they deny the allegations therein;~~

~~(b) they say further that SP AusNet is not entitled to the relief sought by it against the DEPI Secretary or to any relief.~~

296 As to paragraph 296:

(a) they say that in relation to fire and other emergencies, the CFA and the DEPI Secretary participated in interagency coordination in accordance with relevant legislation and arrangements put in place under the State Emergency Response Plan and agreed reciprocal arrangements;

(b) they otherwise deny the allegations contained therein.

297 They deny the allegations contained in paragraph 297.

298 They deny the allegations contained in paragraph 298.

299 As to paragraph 299:

(a) they deny the allegations therein;

Particulars

The arrangements referred to in paragraph 242(a) above provided for collaboration, and, in certain instances, a division of responsibility between the CFA, the DEPI Secretary and/or other emergency services with respect to response to particular fire incidents.

If (which is denied), the CFA and/or the DEPI Secretary owed and breached duties of the kind alleged in the Statement of Claim, those arrangements, and the collaboration and/or division of responsibility for which they provided, did not relevantly amount to or form the basis of a joint enterprise with respect to the acts or omissions constituting the wrongdoing alleged against the CFA and/or the DEPI Secretary, and were not otherwise of a kind which could ground a finding of joint tortfeasance as alleged.

- (b) they say further that AusNet is not entitled to the relief sought by it against the DEPI Secretary or to any relief.

J H Karkar
P E Anastassiou
S L Marks
W A Harris
J P Gorton
P Zappia
A L Robertson
J Firkin
A D Pound
R M Nelson

Dated 1 December 2014

Norton Rose Fulbright Australia
Norton Rose Fulbright Australia
Solicitors for the State Parties

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

S CI 4538 of 2012

SCHEDULE OF PARTIES

BETWEEN

RODERIC LIESFIELD

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 561 118)

First Defendant

ACN 060 674 580 PTY LTD (ACN 060 674 580)

Second Defendant

**SECRETARY TO THE DEPARTMENT OF
ENVIRONMENT AND PRIMARY INDUSTRIES**

Third Defendant

COUNTRY FIRE AUTHORITY

Fourth Defendant

STATE OF VICTORIA

Fifth Defendant

AND BETWEEN

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 561 118)

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 INDUSTRIES**

Second Defendant to Counterclaim

COUNTRY FIRE AUTHORITY

Third Defendant to Counterclaim

STATE OF VICTORIA

Fourth Defendant to Counterclaim

RODERIC LIESFIELD

Fifth Defendant to Counterclaim