

Rush

PROCESSED

IN THE SUPREME COURT OF VICTORIA
AT LATROBE VALLEY
COMMON LAW DIVISION

No S CI 2014 05162

IRWIN JAMES RAMSAY


Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) and ANOTHER

Defendants

SECOND FURTHER AMENDED STATEMENT OF CLAIM
(Filed pursuant to the order of the Honourable Justice Rush
made 3 March 2015)

<p>Date of Document:</p> <p>Filed on behalf of:</p> <p>Prepared by:</p> <p>Maddens Lawyers</p> <p>219 Koroit Street</p> <p>WARRNAMBOOL VIC 3280</p>		<p>3 March 23 January 2015 24 October September 2014</p> <p>The Plaintiff</p> <p>Solicitor's code: 102650</p> <p>DX: 28001 Warrnambool</p> <p>Tel: 5560 2000</p> <p>Ref: Brendan Pendergast/ Sophie Maraldo</p> <p>Email: bfp@maddenslawyers.com.au</p>
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A Preliminary

The Jack River Bushfire

1. At about 10.20am on 9 February 2014, a fire started north west of the intersection of Egan's Road and Yarram-Morwell Road, between Jack River and Madalya, in the State of Victoria ("**the Jack River bushfire**") and burnt over the area highlighted on the map annexed to this Statement of Claim ("**the Jack River bushfire area**").

The Plaintiff

2. The plaintiff:
 - (a) is and was at all material times, the owner of a leasehold interest in Lot 1, Jack River Valley Road, Jack River, which is located within the Jack River Bushfire area and which was damaged in the Jack River bushfire;
 - (b) was the owner of personal property destroyed in the Jack River bushfire.

3. The plaintiff brings this proceeding on his own behalf and on behalf of the group members.

Group Members

4. The group members to whom this proceeding relates are:
 - (a) all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of the Jack River bushfire (including, without limitation, an injury suffered as a result of attempts to escape the Jack River bushfire or other emergency action taken by any person in response to the Jack River bushfire);

where "psychiatric injury" in this group definition means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 30 June 2015 ; and
 - (b) all those persons who suffered loss of or damage to property as a result of the Jack River bushfire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Jack River bushfire); and
 - (c) all those persons who at the time of the Jack River bushfire resided in, or had real or personal property in, the Jack River bushfire area and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property;
 - (d) the legal personal representatives of the estates of any deceased persons who came within paragraphs (a), (b) and/or (c) at the time of the Jack River bushfire.
5. As at the date of the commencement of this proceeding there are seven or more persons who have claims against the defendant.

B AusNet Electricity Services Pty Ltd

6. The defendant ("**AusNet**") at all material times:
 - (a) was and is a corporation capable of being sued;

(b) carried on business as a supplier of electricity to residential and business consumers in Victoria ("**the Business**");

(c) in carrying on the Business was:

(i) a major electricity company; and

(ii) an operator of a supply network;

within the meaning of section 3 of the *Electricity Safety Act 1998* (Victoria) ("**the ES Act**").

7. In the course of and for the purpose of the Business, AusNet at all material times:

(a) owned and operated network infrastructure by which it transmitted electricity to end users of electricity (the "**supply network**");

(b) the supply network included a single wire earth return electricity supply line (the "**SWER line**") running in a north westerly direction across various plantations north west of the intersection of Egan's Road and Yarram-Morwell Road;

(c) transmitted electricity on the SWER line.

C The Statutory Duties

8. At all material times from 1 January 2012:

(a) section 98 of the ES Act required AusNet to design, construct, operate, and maintain its supply network to minimise as far as practicable:

(i) the hazards and risks to the safety of any person arising from the supply network; and

(ii) the hazards and risks of damage to the property of any person arising from the supply network; and

(iii) the bushfire danger arising from the supply network;

(b) section 90 of the ES Act and clause 2(1) of the *Code of Practice for Electrical Line Clearance* ("**the Code**") prescribed by section 7 of the *Electricity Safety (Electric Line Clearance) Regulations 2010* ("**the Line Clearance Regulations**")

required AusNet to create and maintain the required clearance space around a powerline in accordance with the Schedule to the Code

("the Statutory Duties").

9. The Statutory Duties imposed on AusNet obligations for the protection of a particular class of persons, being persons who from time to time, by themselves or their property:
- (a) approached or came into contact with parts of AusNet's supply network; or
 - (b) might be injured or damaged by a discharge of electricity from any part of the said network or by the consequences of any such discharge, including but not limited to fire.

Particulars

The object of protecting the class is to be inferred from the ES Act as a matter of the proper construction of the Act.

10. At all material times, the plaintiff and each of the group members were:
- (a) persons within the class described in the preceding paragraph; or
 - (b) the legal personal representatives of the estates of persons who were within that class at the time of the Jack River bushfire.

Particulars

The plaintiff resides at Lot 1, Jack River Valley Road, Jack River, in Victoria, being an area susceptible to bushfire ignited by a discharge of electricity from the AusNet network.

Particulars relating to individual group members may be provided following the trial of common questions.

11. In the premises set out in the preceding paragraph, at all material times AusNet owed the Statutory Duties to:
- (a) the plaintiff;
 - (b) each of the group members referred to in paragraphs 4(a) to (c) hereof;
 - (c) each of the deceased persons referred to in paragraphs 4(d) hereof.

D General Duty of Care

12. At all material times AusNet:
 - (a) was the owner and/or operator of the SWER line;
 - (b) had the right, to the exclusion of other private persons:
 - (i) to construct, repair, modify, inspect, maintain and operate the SWER line;
or
 - (ii) give directions as to its construction, repair, modification, inspection, maintenance or operation;
 - (c) exercised the said right; and
 - (d) in the premises, had practical control over the SWER line.
13. At all material times:
 - (a) AusNet used the SWER line to transmit electricity at high voltage;
 - (b) the transmission of electricity along the SWER line created a risk of unintended discharges of electricity from the SWER line;
 - (c) unintended discharges of electricity from the SWER line were highly dangerous in that they were capable of causing death or serious injury to persons, and damage to or loss of property, by:
 - (i) electrocution;
 - (ii) burning by electric current; further or alternatively
 - (iii) burning by fire ignited by the discharge of electricity;
 - (d) in the premises in (a) to (c) inclusive, the transmission of electricity along the SWER line was a dangerous activity;
 - (e) AusNet knew or ought reasonably to have known of the risks referred to in (b) and (c) above.
14. At all material times it was reasonably foreseeable to AusNet that:

- (a) a discharge of electricity from the SWER line could cause ignition of flammable material in the vicinity of the point of discharge;

Particulars

Flammable material is any material capable of ignition, including without limitation ignition by the application of electric current or by contact with molten or burning metal.

- (b) such ignition could produce a fire which might spread over a wide geographic area, depending on, among other things, wind direction and velocity;

Particulars

The fire spread also depended on the amount of combustible fuel, the terrain, the environmental conditions including humidity and precipitation and the effectiveness of human firefighting responses. Further particulars may be provided prior to trial.

- (c) such fire could cause death or injury to persons and loss of or damage to property within the area over which such fire spread ("**fire area**"), and consequential losses including economic losses;
- (d) such fire could cause damage to property and consequential losses including economic losses within areas:
- (i) affected by the physical consequences of fire, such as smoke or debris; or
 - (ii) the subject of emergency activity to prevent the spread of fire, including without limitation the clearing of fire breaks;
- ("affected areas");

- (e) such fire or its consequences could:
- (i) disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
 - (ii) impede the use or amenity of property located in the fire area or affected areas; or
 - (iii) reduce the value of property or businesses located in the fire area or affected areas;

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

- (f) the risks referred to in (c) , further or alternatively (d), further or alternatively (e) above were greater during periods of high or extreme bushfire danger than otherwise.
15. At all material times members of the public who might be, or who owned or had an interest in real or personal property that might be, within the fire area or the affected area of a fire caused by the discharge of electricity from the SWER line:
- (a) had no ability, or no practical and effective ability, to prevent or minimise the risk of such discharge occurring; and
 - (b) were vulnerable to the impact of such fire; and consequently
 - (c) were to a material degree dependent, for the protection of their persons and property, upon AusNet ensuring that the SWER line was safe and operated safely in the operating conditions applying to it from time to time.
16. In the premises, at all material times AusNet owed to the class of persons described in paragraph 15 above a duty:
- (a) to take reasonable care, by its officers, servants and agents; and
 - (b) to ensure that reasonable care was taken, by its agents or contractors;
- to ensure that all parts of the SWER line were safe and operated safely in the operating conditions that were foreseeable for the line ("**the General Duty**").
17. At the time of the Jack River bushfire:
- (a) the plaintiff;
 - (b) each of the group members referred to in paragraphs 4(a) to (e) hereof;
 - (c) each of the deceased persons referred to in paragraphs 4(d) hereof
- were within the class described in paragraph 15 above.
18. In the premises set out in the preceding paragraph, at all material times AusNet owed the General Duty to:

- (a) the plaintiff;
- (b) each of the group members referred to in paragraphs 4(a) to (c) hereof;
- (c) each of the deceased persons referred to in paragraphs 4(d) hereof.

E Standard of Care and Statutory Duties

19. At all material times, the area in the vicinity of the SWER line was in a hazardous bushfire risk area within the meaning of:
- (a) section 3 of the ES Act;
 - (b) clause 1 of the Code pursuant to regulation 7 of the Line Clearance Regulations;

Particulars

The area in the vicinity of SWER line was not in an urban area and had not been assigned a fire hazard rating of "low" under s 80 of the ES Act.

20. At all material times:
- (a) the SWER line was:
 - (i) an electric line within the meaning of section 3 of the ES Act;
 - (ii) a powerline within the meaning of clause 1 of the Code;
 - (b) AusNet was responsible for keeping the whole or any part of a tree clear of the SWER line;

Particulars

The responsibility was imposed by subsection 84(7) of the ES Act because none of subsections 84(2), (4), (5) or (6) applied to the SWER line.

- (c) AusNet had the power to keep the whole or any part of a tree clear of the SWER line;

Particulars

The power was conferred by sections 85 and 86 of the ES Act.

- (d) AusNet was obliged to create and maintain the required clearance space around the SWER line in accordance with the Code including the Schedule to the Code;

Particulars

The obligation was imposed by clause 2(1) of the Code and s 90 of the ES Act.

Under reg. 8 of the Line Clearance Regulations, clause 2(1) of the Code was a prescribed penalty provision for the purposes of section 90 of the ES Act.

- (e) AusNet was required, by 31 March of each year, to prepare and submit to ESV for approval a management plan relating to compliance with the Code;

Particulars

Regulation 9(2)-(4) of the Line Clearance Regulations.

- (f) AusNet did prepare and submit to ESV and obtained ESV's approval for vegetation management plans ("**VM plans**") in compliance with the Line Clearance Regulations;

Particulars

Further particulars may be provided following the completion of discovery and prior to trial.

- (g) AusNet was required to comply with its VM plans;

Particulars

Regulation 9(8) of the Line Clearance Regulations.

- (h) AusNet was required by its VM plans, as approved by ESV from time to time, to, among other things:
 - (i) conduct an annual pre summer tree inspection of the SWER line, by the start of the Fire Season ("**pre-summer tree inspection**");
 - (ii) maintain the required clearance space between the SWER line and trees in accordance with the Code;

Particulars

Further particulars may be provided following the completion of discovery and prior to trial.

- 21. In the premises, at all material times, the Statutory Duties and the General Duty required AusNet to:

- (a) keep the whole or any part of a tree clear of the SWER line;
- (b) create and maintain the required clearances around the SWER line in accordance with the Code;
- (c) carry out pre-summer inspections of the space around the SWER line with due skill, care and diligence;
- (d) further or alternatively to (c), ensure that pre-summer inspections of the space around the SWER line carried out by contractors were carried out with due skill, care and diligence.

F Clearance Spaces and the Jack River Fire

22. In accordance with the Code, at all material times, the required clearance space around the SWER line was:
- (a) the smallest space such that if a tree were cut or removed from that space, the tree would not grow into the minimum clearance space around the SWER line between cutting times;
 - (b) the space above the space described in (a).

Particulars

Clause 12(4) of the Code, which applied to the SWER line by reason that it was not constructed with aerial bundled cable or insulated cable, was located in a hazardous bushfire area, and was an electric line within the meaning of clause 1 of the Code.

If required, the plaintiff will provide further particulars of the required clearance space after receipt of expert reports.

23. In accordance with the Code, at all material times, the minimum clearance space around the SWER line away from the poles was 2 metres in all directions, plus an additional distance to allow for the sag and sway of the conductors, except vertically upwards, in which direction all space was within the minimum clearance space.

Particulars

Clause 12(2) and (3); Table 3 and Figure 5 of the Code.

The nominal voltage of the SWER line was over 1kV and less than 66kV and the span between poles on the SWER line was ~~greater than 45 metres~~ but not greater than 350 metres.

If required, the plaintiff will provide further particulars of the minimum clearance space after receipt of expert reports as to the sag and sway of the SWER line.

24. From a date unknown to the plaintiff but no later than about 1 October 2012 and continuing up to 9 February 2014, there were two pine trees growing from beneath the SWER line approximately 400 150 metres south east of pole 23 262160 ~~(the Trees)~~.

Particulars

So far as the plaintiffs are able to say prior to the delivery of experts' reports, the Trees were *Pinus Radiata*.

The base of the trunk of one of the Trees (**Tree 1**) was located at coordinates 0456989-5735318, approximately 1.6 metres horizontally to the north of the SWER line when the SWER line was not under sway.

The base of the trunk of the other of the Trees (**Tree 2**) was located at coordinates 0456991-5735318, approximately 1.8 metres horizontally to the south of the SWER line when the SWER line was not under sway.

25. From a date unknown to the plaintiff but no later than about 1 October 2013 and continuing up to 9 February 2014, each of the Trees was within the required clearance space around the SWER line under the Code.

Particulars

On 9 February 2014, each of the Trees rose above the vertical height of the SWER line Tree 1 was no more than 1.3 metres and Tree 2 no more than 1.1 metres horizontally from the SWER line when the SWER line was not under sway.

26. On 9 February 2014:
- (a) a strong, blustery, hot and dry nor' nor' westerly wind was blowing in the vicinity of, and against, the Trees and the SWER line;
 - (b) each of the Trees came into contact with the SWER line and/or became sufficiently close to the SWER line to cause arcing;
 - (c) the arcing between the SWER line and each of the Trees caused a discharge of sparks and heat;
 - (d) the sparks and/or heat ignited the vegetation of each of the Trees at or near the points of contact between the SWER line and the Trees;

If required, the plaintiff will provide further particulars of the minimum clearance space after receipt of expert reports as to the sag and sway of the SWER line.

24. From a date unknown to the plaintiff but no later than about 1 October 2012 and continuing up to 9 February 2014, there were two pine trees growing from beneath the SWER line approximately ~~400~~ 150 metres south east of pole 23 262160 ~~(the Trees)~~.

Particulars

So far as the plaintiffs are able to say prior to the delivery of experts' reports, the Trees were *Pinus Radiata*.

The base of the trunk of one of the Trees (**Tree 1**) was located at coordinates 0456989-5735318, approximately 1.6 metres horizontally to the north of the SWER line when the SWER line was not under sway.

The base of the trunk of the other of the Trees (**Tree 2**) was located at coordinates 0456991-5735318, approximately 1.8 metres horizontally to the south of the SWER line when the SWER line was not under sway.

25. From a date unknown to the plaintiff but no later than about 1 October 2013 and continuing up to 9 February 2014, each of the Trees was within the required clearance space around the SWER line under the Code.

Particulars

On 9 February 2014, each of the Trees rose above the vertical height of the SWER line Tree 1 was no more than 1.3 metres and Tree 2 no more than 1.1 metres horizontally from the SWER line when the SWER line was not under sway.

26. On 9 February 2014:
- (a) a strong, blustery, hot and dry nor' nor' westerly wind was blowing in the vicinity of, and against, the Trees and the SWER line;
 - (b) each of the Trees came into contact with the SWER line and/or became sufficiently close to the SWER line to cause arcing;
 - (c) the arcing between the SWER line and each of the Trees caused a discharge of sparks and heat;
 - (d) the sparks and/or heat ignited the vegetation of each of the Trees at or near the points of contact between the SWER line and the Trees;

- (d) further or alternatively to (c), ensure that pre-summer inspections of the space around the SWER line carried out by contractors were carried out with due skill, care and diligence.

28. In the premises, at all material times prior to 9 February 2014, AusNet was in breach of:

- (a) the Statutory Duties;
- (b) the General Duty.

H Cause of Jack River bushfire

29. Each of:

- (a) the dry summer condition of nearby vegetation;
- (b) the ambient temperature;
- (c) the wind speed and velocity;

on 9 February 2014, was within the range of conditions which, at all times while AusNet was the network operator, were within the range of foreseeable operating conditions for the SWER line.

Particulars

It was foreseeable to AusNet that the SWER line would be required to operate in temperatures higher and lower than the temperature which was present at Jack River on 9 February 2014. It was foreseeable to AusNet that during summer vegetation in the Jack River bushfire area would be relatively dry and susceptible to the ignition of fire. It was foreseeable to AusNet that the Trees and the SWER line would experience wind conditions involving velocities higher and lower than the wind velocities that were occurring around the Trees and the SWER line on 9 February 2014. It was foreseeable to AusNet that the SWER line would experience winds coming from each compass point and in particular coming from directions between due north and due west.

30. The Jack River bushfire was caused by AusNet's breaches of:

- (a) the Statutory Duties; further or alternatively
- (b) the General Duty.

Particulars

But for Ausnet's breaches of duty, the Trees would have been removed or cut so that they could not contact the SWER line by no later than the start of the 2013-2014 fire danger period such that the Tees could not have come into contact with the SWER line to cause the Jack River bushfire.

31. The Jack River bushfire was a natural and foreseeable consequence of the breaches of duty alleged in the preceding paragraph.

Particulars

A natural and foreseeable consequence of a tree being within the required clearance space around the SWER line was that the tree would come into contact with the SWER line. A natural and foreseeable consequence of a tree coming into contact with the SWER line, or coming sufficiently close to the SWER line to cause arcing, was that there would be arcing between the SWER line and the tree and/or the transmission of electricity into the tree. A natural and foreseeable consequence of arcing between a tree and the SWER line was that heat and sparks would be discharged from the SWER line. A natural and foreseeable consequence of electricity being transmitted into a tree was that the vegetable matter in the tree would ignite. A natural and foreseeable consequence of exposing a tree or dry grass in late summer condition to contact with molten or burning metal, or to the levels of heat produced by the formation of an electrical arc, or the transmission of electricity into the tree was that the tree and/or grass would ignite. A natural consequence of such ignition, in such conditions, was fire. A natural consequence of fire in dry grass adjacent to and upwind of available fuel in such a location at such a season was the spread of fire, being bushfire.

I Subgroup Claims - private nuisance

32. Further to paragraph 3 above, the plaintiff brings this proceeding on behalf of those group members ("**subgroup members**") who suffered loss of or damage to property, further or alternatively economic loss, in connection with the Jack River bushfire's interference with their use and enjoyment of interests in land.

Particulars

The plaintiff had a leasehold interest in Lot 1 Jack River Valley Road, Jack River damaged by the Jack River bushfire.

Particulars relating to individual subgroup members will be provided following the trial of common questions or otherwise as the Court may direct.

33. At all material times each of:
- (a) the risks referred to in paragraphs 13 and 14 above; and

(b) the risk that a bushfire ignited by a discharge of electricity from the SWER line would unreasonably interfere with the use or enjoyment of interests in land:

- (i) over which the fire passed; further or alternatively
- (ii) that was affected by physical consequences of the fire or by emergency responses to the fire;
- (iii) by the persons entitled to the said use or enjoyment;

were reasonably foreseeable to AusNet.

- 34. By transmitting electric current along the SWER line, alternatively doing so on 9 February 2014 when the SWER line was not safe or operated safely, AusNet created or increased the risks referred to in the preceding paragraph.
- 35. AusNet by the conduct alleged in the preceding paragraph in fact caused the Jack River bushfire, which fire spread to land in which the subgroup members had interests ("**subgroup lands**").
- 36. The Jack River bushfire unreasonably interfered with the subgroup members' use and enjoyment of their interests in the subgroup lands.
- 37. In the premises, the subgroup members suffered nuisance created by AusNet.

J Causation and Loss and Damage

38. By reason of:

- (a) the breaches of the Statutory Duties;
- (b) the breaches of the General Duty; further or alternatively
- (c) the nuisance;

by AusNet alleged herein

- (i) the plaintiffs;
- (ii) each of the group members referred to in subparagraphs 4(a) to (c) hereof;
and
- (iii) each of the deceased persons referred to in subparagraph 4(d) hereof

as the case may be, suffered loss and damage of the kinds referred to in paragraph 14(c) to (e) above.

Particulars of loss and damage

The plaintiffs suffered loss as a result of damage to his leasehold interest in the land and damage to personal property, including destruction of:

- (i) standing pasture;
- (ii) electric fence unit;
- (iii) fencing materials;
- (iv) a spray tank unit; and
- (v) wood splitter.

Further particulars of the plaintiff's loss and damage, including particulars as to quantum, will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions.

K BJ Murphy

39. Further or alternatively to the claims against AusNet set out above, by reason of Part IVAA of the *Wrongs Act 1958*, the plaintiff on his own behalf and on behalf of the group members adopts AusNet's claims against the second defendant (**BJ Murphy**) as follows.
40. At all material times, BJ Murphy was incorporated pursuant to the *Corporations Act 2001 (Cth)*.

The Services Agreement

41. By a written agreement dated 2 August 2012 (the **Services Agreement**), and an Approval Order issued under clause 2.2 of the Services Agreement, AusNet appointed BJ Murphy to provide vegetation management services.

Particulars

A copy of the Services Agreement and the Approval Order is in the possession of the plaintiff's solicitors and is available for inspection by appointment.

42. The Services Agreement provided, relevantly, that:

- (a) BJ Murphy was to undertake electric line clearance work including the management of allocated feeders throughout the period of the contract to ensure that assessment and cutting programs as agreed and managed by AusNet were met, and assessing vegetation (**Services**);
 - (b) assessments were to be undertaken in accordance with Ausnet's VM Plan, Clearance Procedure VEM 20-03;
 - (c) all spans in high bushfire risk areas (**HBRA**) were to be assessed prior to 15 August each year with re-inspections commencing on 1 September and being completed prior to 30 October each year;
 - (d) a programmed review of HBRA spans prior to and throughout the declared bushfire period must be instigated by BJ Murphy and agreed with AusNet to ensure compliance to the Code clearance for all vegetation;
 - (e) AusNet would conduct random sampling of the contractor's work in order to verify compliance with relevant standards and with the contract;
 - (f) all contractor personnel must meet AusNet's minimum training requirements.
43. There were written terms of the Services Agreement that BJ Murphy should:
- (a) perform the services to that standard of care and skill to be expected of a service provider who regularly acted in the capacity in which BJ Murphy was engaged and who possessed the knowledge, skill and experience of a service provider qualified to act in that capacity [clause 2.4];
 - (b) comply with AusNet's policies and procedures [clause 3(c)];
 - (c) comply with all applicable legislative requirements [clause 3(e)];
 - (d) remain fully responsible for the services carried out notwithstanding any review of acceptance of those services by AusNet [clause 3(d)];
 - (e) employ personnel with appropriate qualifications and experience to carry out the services [clause 7.3(a)];
 - (f) ensure that all personnel engaged to carry out the services were adequately trained and were competent to carry out their duties [clause 7.3(b)];

- (g) conduct sample audits of all its work, procedures and practices in order to verify compliance with relevant standards, codes and requirements of the contract [Schedule 1, Section 4, clause 1.2].
44. From the commencement of the Services Agreement and from time to time thereafter, AusNet provided to BJ Murphy copies of its policies as amended from time to time, including its VM Plans, Clearance Procedure VEM 20-03 and training policies.
45. During the term of the Services Agreement, BJ Murphy provided Services to AusNet, including in respect of the SWER line, and was the sole entity engaged by AusNet to conduct, and which conducted, vegetation assessments on that part of AusNet's distribution network.
46. BJ Murphy carried out a clearance assessment in relation to the SWER line between poles 22 and 23 on 15 August 2013 (the **August 2013 Assessment**).
47. By reason of the matters alleged at paragraphs 40 to 45 above, during the term of the Services Agreement, BJ Murphy had a responsible for and some control over:
- (a) the assessment of vegetation clearances surrounding the SWER line;
 - (b) the implementation and observance by its employees of the requirements of the Services Agreement and of AusNet's policies and procedures, including Clearance Procedure VEM 20-03, for the purposes of assessing vegetation clearances.
48. During the term of the Services Agreement, it was reasonably foreseeable that any failure by BJ Murphy, its servants or agents to observe and implement the requirements of the Services Agreement and of AusNet's policies in respect of the assessment of vegetation clearances, in particular to assess vegetation clearances in accordance with Clearance Procedure VEM 20-03, could result in:
- (a) vegetation encroaching into the clearance space surrounding network assets;
 - (b) vegetation coming into contact with network assets including SWER lines;
 - (c) arcing between SWER lines or conductors and vegetation which could cause a discharge of sparks and heat;
 - (d) sparks and heat igniting nearby fuel and starting a fire;

- (e) such a fire:
 - (i) spreading over a wide geographic area;
 - (ii) causing injury to persons and loss or damage to property within the area affected by the fire;
 - (iii) causing economic loss to people affected by the fire:
 - (1) by disrupting or impairing their income earning activities;
 - (2) by impeding the use or amenity of their properties if they were located in areas affected by the fire;
 - (3) by reducing the value of real property or businesses located in the area affected by the fire,

(collectively, **the Risks**).

49. Throughout the term of the Services Agreement, BJ Murphy, and its relevant employees, knew or ought reasonably to have known of the matters alleged in paragraph 48 above.
50. Throughout the term of the Services Agreement, the plaintiff and group members were:
- (a) vulnerable to the Risks materialising; and
 - (b) for the purposes of protecting themselves and their property against the Risks, reliant on BJ Murphy by its servants and agents exercising reasonable care in undertaking the Services.
51. In the premises, throughout the term of the Services Agreement, BJ Murphy and its relevant employees owed to the plaintiff and group members a duty to take reasonable care and to ensure that reasonable care was taken by them:
- (a) in providing the Services, in particular, in conducting vegetation clearance assessments;
 - (b) to ensure that the assessment of vegetation clearances was undertaken competently and with due care, skill and diligence;

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

- (i) the August 2013 Assessment was not undertaken in accordance with the requirements of the Services Agreement, or with Clearance Procedure VEM 20-03;
 - (ii) the August 2013 Assessment was not conducted with reasonable care, skill and diligence.
54. In the premises, BJ Murphy itself, or by its employee, breached the duty of care alleged in paragraph 51 above.
55. Had BJ Murphy by its employee conducted the August 2013 assessment with reasonable care and skill and in accordance with Clearance Procedure VEM 20-03, then on the allocation of an appropriate action code, AusNet would have caused any vegetation within clearance space between poles 22 and 23 on the SWER line to be pruned back so that it was outside the clearance space.
56. By reason of the matters alleged in paragraphs 51 to 55 above, the Jack River bushfire was caused by the negligence of BJ Murphy itself or by its employees.
57. By reason of the negligence of BJ Murphy:
- (a) the plaintiffs;
 - (b) each of the group members referred to in subparagraphs 4(a) to (c) hereof; and
 - (c) each of the deceased persons referred to in subparagraph 4(d) hereof
- as the case may be, suffered loss and damage of the kinds referred to in paragraph 14(c) to (e) above.

Particulars

The plaintiff refers to and repeats the particulars to paragraph 38 above.

58. The Jack River bushfire was a natural and foreseeable consequence of the negligence of BJ Murphy.

KL Common Questions of Law or Fact

59. The questions of law or fact common to the claims of the plaintiff and each of the group members or subgroup members are:

(relevant to each defendant)

- (a) how the Jack River bushfire started;

(relevant to AusNet)

- (b) whether AusNet owed the Statutory Duties to the plaintiff and group members, and if so the content of those duties;
- (c) whether AusNet owed the General Duties to the plaintiff and group members, and if so the content of the duty;
- (d) whether the Jack River bushfire was caused by a breach by AusNet of any of the Statutory Duties or General Duties;
- (e) whether the plaintiff and subgroup members suffered actionable nuisance created by AusNet;
- (e1) to the extent that economic loss and property damage claims are made against AusNet:
 - (i) whether the claims are apportionable claims under Part IVAA of the Wrongs Act;
 - (ii) if they are apportionable claims, whether BJ Murphy is a concurrent wrongdoer;
 - (iii) if BJ Murphy is a concurrent wrongdoer, the proportionate responsibility of the defendants under Part IVAA of the Wrongs Act.

(relevant to BJ Murphy)

- (e2) whether BJ Murphy owed the plaintiff and group members a duty of care, and if so, the content of the duty;
- (e3) whether the Jack River bushfire was caused by BJ Murphy of its duty of care;
- (e4) to the extent that economic loss and property damage claims are made against BJ Murphy:
 - (i) whether the claims are apportionable claims under Part IVAA of the Wrongs Act;
 - (ii) if they are apportionable claims, whether AusNet is a concurrent wrongdoer;

- (iii) if AusNet is a concurrent wrongdoer, the proportionate responsibility of the defendants under Part IVAA of the *Wrongs Act*.

(relevant to each defendant)

- (f) what are the principles for identifying and measuring compensable losses suffered by the claimants resulting from the breaches of duty or nuisance alleged herein.

AND THE PLAINTIFF CLAIMS on his own behalf and on behalf of the group members:

(Against AusNet)

- A. Damages.
- B. Interest.
- C. Costs.

(Against BJ Murphy)

- D. Damages.
- E. Interest.
- F. Costs.

TP Tobin

GD Dalton

Dated: ~~September 24~~ ~~October 2014~~ ~~23~~ ~~January~~ 3 March 2015