

Rush

PROCESSED

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

No. SCI 2014 05162

BETWEEN:

IRWIN JAMES RAMSAY

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD

First Defendant

and

GIPPSLAND CONTRACTING PTY LTD

Second Defendant



AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD

Plaintiff by Counterclaim

and

IRWIN JAMES RAMSAY

First Defendant by Counterclaim

and

GIPPSLAND CONTRACTING PTY LTD

Second Defendant by Counterclaim

**MURPHY'S DEFENCE TO AUSNET'S DEFENCE AND  
COUNTERCLAIM**

Date of document: 20 February 2015  
Filed on behalf of: Second Defendant by Counterclaim  
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To the Defence and Counterclaim of the Defendant and Plaintiff by Counterclaim ('AusNet') dated 8 December 2014, by way of response to the defence and by way of defence to the Second Defendant by Counterclaim ('Murphy') says as follows:

1. As to paragraph 1(a), it admits that a fire occurred on 9 February 2014 between Jack River and Madalya, west of Yarram in Victoria, and does not otherwise plead to paragraph 1 as it makes no other allegation of material fact against it.
2. It does not plead to paragraph 2 as it makes no allegation of material fact against it.
3. As to paragraph 3, it admits that the plaintiff brings this proceeding on his own behalf and on behalf of the group members.
4. It does not plead to paragraph 4 as it makes no allegation of material fact against it.
5. It does not plead to paragraph 5 as it makes no allegation of material fact against it.
6. It does not plead to paragraph 6 as it makes no allegation of material fact against it.
7. As to paragraph 7(a) and (b) of AusNet's Defence:
  - (a) it admits AusNet's distribution network included a single wire earth return electricity line running in a north-westerly direction north-west of the intersection of Egan's Road and Yarram-Morwell Road in Jack River through which electricity is transmitted ('**the SWER Line**');
  - (b) it otherwise does not plead to the balance of allegations contained in paragraph 7 as no material facts or allegations are pleaded against it.
8. As to paragraph 8, subject to full reference to the relevant statutory provisions, it admits the allegations therein.
9. It does not plead to paragraph 9 as it makes no allegation of material fact against it.
10. It does not plead to paragraph 10 as it makes no allegation of material fact against it.
11. It does not plead to paragraph 11 as it makes no allegation of material fact against it.
12. As to paragraph 12:
  - (a) as to sub-paragraph (d), it refers to and repeats paragraph 27 below; and
  - (b) it otherwise does not plead to the balance of allegations contained therein as it makes no allegations of material fact against it.

13. As to paragraph 13:
  - (a) as to subparagraph 13(a), it admits that the SWER Line had a nominal voltage of 12.7kV; and
  - (b) it otherwise does not plead to the allegations contained therein as it makes no allegations of material fact against it.
14. It does not plead to paragraph 14 as it makes no allegation of material fact against it.
15. It does not plead to paragraph 15 as it makes no allegation of material fact against it.
16. It does not plead to paragraph 16 as it makes no allegation of material fact against it.
17. It does not plead to paragraph 17 as it makes no allegation of material fact against it.
18. It does not plead to paragraph 18 as it makes no allegation of material fact against it.
19. It does not plead to paragraph 19 as it makes no allegation of material fact against it.
20. It does not plead to paragraph 20 as it makes no allegation of material fact against it.
21. It does not plead to paragraph 21 as it makes no allegation of material fact against it.
22. It does not plead to paragraph 22 as it makes no allegation of material fact against it.
23. It does not plead to paragraph 23 as it makes no allegation of material fact against it.
24. It does not plead to paragraph 24 as it makes no allegation of material fact against it.
25. It does not plead to paragraph 25 as it makes no allegation of material fact against it.
26. It does not plead to paragraph 26 as it makes no allegation of material fact against it.
27. As to paragraph 27:
  - (a) it does not plead to subparagraphs (a) to (d) as they make no allegation of material fact against it;
  - (b) as to sub paragraph (e), it admits that:

- (i) on or about 26 July 2012 it entered into an agreement titled Contract Amendment and Restatement Services Agreement Vegetation Management Services – Distribution Assets (**'Services Agreement'**), with SPI Electricity Pty Ltd, now known as AusNet; and
- (ii) AusNet executed an Order Approval Request dated 2 June 2010, but specifically does not admit that:
  - (A) this document was ever provided to Murphy, or formed part of the Agreement between Murphy and AusNet;
  - (B) this document was an order for the purposes of clause 2.2 of the Services Agreement.

#### PARTICULARS

The document entitled "Order Approval Request" was provided by solicitors for AusNet under cover of a letter dated 13 February 2015 in which it stated that it was the Approval Order referred to in paragraph 27(e) of the Defence and Counterclaim.

- (iii) but does not otherwise admit the allegations therein.
- (c) save that it admits it tendered for the work the subject of the Services Agreement, it otherwise cannot plead to the allegations in subparagraph (f);
- (d) as to the allegations in subparagraph (g):
  - (i) it denies the allegations in sub-paragraph (g)(i), and refers to the full terms of clause 2.2 and clause 1.3 of schedule 1, Attachment A of the Services Agreement; and
  - (ii) save that the requirement referred to in subparagraph (g)(vi), is that all contractor personnel must "*meet*" Ausnet Services' minimum training requirements, it admits the allegations in subparagraphs (g)(ii) to (g)(vi).

- (e) as to the allegations in subparagraphs (h) and (i), it will also rely at trial on the Services Agreement for its full terms and effect, and subject to that admits the allegations in subparagraphs (h) and (i);
  - (f) as to the allegations in subparagraph (j), it admits that AusNet provided to it copies of policies from time to time, but does not otherwise admit the allegations therein;
  - (g) as to the allegations in subparagraph (k), save that it admits:
    - (i) it was required to ensure that its personnel, including its vegetation assessors, undertook training as required by the Services Agreement; and
    - (ii) that AusNet, through its agent Select Solutions, provided training to Murphy's personnel, including Martin Bloom, the Murphy employee who last assessed feeder FTR 12 on the Jack River Spur between poles 22 and 23 ('the Span') prior to the Jack River fire,it otherwise does not admit the allegations therein;
  - (h) it admits that the services provided to AusNet by Murphy were audited by AusNet, but it otherwise does not admit the balance of the allegations contained in subparagraph (l);
  - (i) it admits the allegations in subparagraph (m);
  - (j) insofar as it is relevant to the claims against it in the proceeding, it denies the allegations in subparagraph (n);
  - (k) save that it admits it was an independent contractor and not an employee of AusNet, it otherwise denies the allegations in subparagraph (o); and
  - (l) it does not plead to subparagraph (p) as it contains no allegations of material fact against it.
28. It does not plead to paragraph 28 as it makes no allegation of material fact against it.
29. It does not plead to paragraph 29 as it makes no allegation of material fact against it.

30. It does not plead to paragraph 30 as it makes no allegation of material fact against it.
31. It does not plead to paragraph 31 as it makes no allegation of material fact against it.
32. It does not plead to paragraph 32 as it makes no allegation of material fact against it.
33. It does not plead to paragraph 33 as it makes no allegation of material fact against it.
34. It does not plead to paragraph 34 as it makes no allegation of material fact against it.
35. It does not plead to paragraph 35 as it makes no allegation of material fact against it.
36. It does not plead to paragraph 36 as it makes no allegation of material fact against it.
37. It does not plead to paragraph 37 as it makes no allegation of material fact against it.
38. It does not plead to paragraph 38 as it makes no allegation of material fact against it.
39. It does not plead to paragraph 39 as it makes no allegation of material fact against it.

**“BJ MURPHY”**

40. It admits the allegations in paragraph 40.
41. As to paragraph 41:
  - (a) it refers to and repeats paragraph 27(b), (d) and (e) above;
  - (b) it admits that Murphy provided services to AusNet pursuant to the Services Agreement, subject to the terms of that Agreement, and
  - (c) it does not otherwise admit the allegations therein.
42. As to paragraph 42, Murphy:
  - (a) admits that during the term of the Services Agreement, Murphy provided services to AusNet within the Distribution Network, including in respect of the SWER Line; and
  - (b) denies that it was the 'sole entity' which conducted vegetation assessments on that part of the Distribution Network.

### PARTICULARS

AusNet personnel, contractors or agents carried out inspections and audits of Murphy's vegetation assessments from time to time. In particular, on 11 February 2013, AusNet inspector, Nick Jones, conducted a 'BFM assessment' of the Span and assigned it action code 'PT720', indicating that vegetation was outside the minimum clearance space and would not encroach within it between a period commencing not less than 365 days up to a maximum 720 days.

Further, AusNet conducted visual and helicopter asset inspections from time to time, including inspections of at least poles 21 and 23 in August 2013. Details of those inspections are recorded on embossed tags affixed to those poles, and are containing information provided by AusNet under cover of letter signed by Philip Bryant, Manager Network Safety, dated 13 May 2014, in response to a request by Energy Safe Victoria ('ESV') dated 9 April 2014.

Further particulars may be provided following discovery and/or provision of expert reports.

43. As to paragraph 43, Murphy:
- (a) admits it was responsible for the performance of its obligations under the Services Agreement;
  - (b) says that AusNet had responsibility for and control over:
    - (i) the assessment of vegetation clearances surrounding the Distribution Network, including the SWER Line;

### PARTICULARS

Under section 90 of the *Electricity Safety Act 1998* and clause 2(1) of the Code of Practice for Electrical Line Clearance prescribed by section 7 of the *Electricity*

*Safety (Electric Line Clearance) Regulations 2010*, AusNet had the obligation to create and maintain the required clearance space around a powerline. Murphy refers to and repeats paragraph 8 of the Further Amended Statement of Claim and paragraph 8 of AusNet's Defence.

- (ii) the scope and timing of the Services to be provided by Murphy pursuant to the Services Agreement; and

**PARTICULARS**

Clauses 2.2 and 5(a) and (b) and Schedule 1, Section 1, clauses 1.1 and 1.4 of the Services Agreement.

- (iii) setting minimum training requirements for a clearance assessment;

**PARTICULARS**

Schedule 1, section 7, clause 11 of the Services Agreement.

- (c) refers to and repeats paragraph 42 above; and
- (d) otherwise denies the allegations therein.

44. As to paragraph 44, Murphy:

- (a) admits it was reasonably foreseeable that any failure on its part to assess vegetation clearances in accordance with Clearance Procedure VEM 20-03, could result in:
  - (i) vegetation encroaching into the clearance space surrounding the relevant part of the Distribution Network; and
  - (ii) vegetation coming into contact with network assets including SWER lines;
- (b) otherwise denies the allegations therein; and



- (c) says further that any arcing between SWER lines or conductors and vegetation should have been arrested by the proper installation and operation of protection systems by AusNet along the SWER Line including the protection systems referred to in paragraph 52.

#### PARTICULARS

Murphy refers to the particulars to paragraph 52 below. Further particulars will be provided following discovery.

45. Save that it admits it knew of the matters referred to in subparagraph 44(a) hereof above, Murphy denies the allegations in paragraph 45.
46. As to the allegations in paragraph 46, Murphy:
- (a) refers to and repeats paragraphs 42 to 44 above; and
  - (b) denies the allegations therein.
47. As to paragraph 47, Murphy:
- (a) denies the allegations therein; and
  - (b) says further or alternatively, if Murphy owed a duty to the plaintiff and group members as alleged therein (which is denied), the scope and content of any such duty, and the standard of reasonable care required, is to be assessed by reference to, among other things:
    - (i) the nature and sufficiency of instructions and training for vegetation assessment provided by or on behalf of AusNet to Murphy and its personnel, including Clearance Procedure VEM 20-03; and
    - (ii) that AusNet paid Murphy pursuant to the Services Agreement, a rate at the relevant time for vegetation assessment work of \$6.38 per span.

#### PARTICULARS

Services Agreement, Schedule 2 - Schedule of Rates.

48. As to paragraph 48, Murphy:

- (a) admits that on 15 August 2013, it, by its employee, Martin Bloom (**'Bloom'**):
    - (i) inspected the SWER Line;
    - (ii) assessed the Span;
    - (iii) assigned the Span action code 'PT720'; and
    - (iv) conveyed that assessment to AusNet;
  - (b) otherwise does not admit the allegations contained therein.
49. As to paragraph 49, Murphy:
- (a) does not admit that in the period between 1 October 2013 and continuing up to 9 February 2014, two pines trees (**'the Trees'**) were within the required clearance space around the SWER Line;
  - (b) specifically denies that the conductor on the SWER Line was in the same position relative to the Trees on the date of the assessment, 15 August 2013 (**'the Assessment'**), as on 9 February 2014;
  - (c) specifically denies that the Assessment was not conducted with reasonable care, skill and diligence; and

#### PARTICULARS

The Assessment, conducted by Murphy's employee, Martin Bloom (**'Bloom'**), who assigned the Span the code 'PT720', was accurate and appropriate for the relevant conditions on that day, including:

- A. the weather;
- B. the condition of poles 21 to 24, their insulators and the conductor running between them;
- C. the position of the conductor relative to any surrounding vegetation.

The assessment of the Span was consistent with other assessments or inspections of that Span conducted by AusNet:

- A. on 11 February 2013, AusNet's employee, Nick Jones, assessed the Span and assigned to it the code 'PT720';
- B. during its asset inspections of the SWER Line and poles 21 and 23 in, among other times, August 2013, AusNet, by its employees, contractors or other agents, did not identify any trees within the minimum clearance space in the Span or take any action to clear or prune such trees.

Assessment compliance audits conducted by AusNet pursuant to the terms of the Services Agreement referred to in paragraph 27(h)(vii) of AusNet's Defence, in respect of Bloom's assessments on various dates between 28 March 2013 and 11 November 2013 verified compliance by Bloom with the relevant standards, codes and requirements of the Services Agreement. The results of the audits were:

- A. in two audits, 100% compliance;
- B. in two audits compliance of 98.33% or higher; and
- C. all other audit results were above 99% compliance.

Further particulars may be provided following discovery.

(d) otherwise denies the allegations therein.

50. It denies the allegations in paragraph 50.

51. It denies the allegations in paragraph 51, and refers to and repeats paragraph 49 hereof.

52. As to paragraph 52, Murphy:

(a) denies the allegations therein, and

(b) says further that if the Jack River fire started as alleged in paragraph 26 of the Further Amended Statement of Claim, which Murphy does not admit, then the

said fire and any injury, loss or damage alleged to have resulted therefrom, was caused by the acts, omissions and/or breaches by AusNet, in that:

- (i) on 9 February 2014, AusNet had in place the following protective equipment on the Jack River SWER line:

Protective equipment	Details	Settings
SWER ISO 22kV HV Fuses	BA15E	Fuse size not recorded
Hydraulic OCR (‘Oil Circuit Recloser’)	Make: Line Material Industries Continuous Current: 10A Minimum Trip Current: 20A	Standard Settings on all OCRs: 2 Fast Trips (Kyle Curve A) 2 Slow Trips (Kyle Curve B)
OCR Bypass Fuse	BA6K	Fuse size not recorded
Fuse on Pole 13 (LIS 2621605)	BA12K	BA12K
Fuse on Pole 19 (LIS 2621605)	BA12K	BA12K

(‘the Protection System’);

#### PARTICULARS

Section 4 of the information provided by AusNet under cover of letter signed by Philip Bryant, Manager Network Safety, dated 13 May 2014, in response to a request by ESV dated 9 April 2014.

Further particulars may be provided following discovery and/or provision of expert reports.

- (ii) the protection system did not operate on 9 February 2014;

#### PARTICULARS

At section 6 of the information provided by AusNet under cover of letter signed by Philip Bryant, Manager Network Safety, dated 13 May 2014, in response to a

request by ESV dated 9 April 2014, and to ESV's request for:

*"The details of all operations (if any) of electrical protection equipment on the Jack River SWER on 9 February 2014, in particular:*

- *The sequence of operation of the protection devices;*
- *The magnitude of the faults; and*
- *The operating time(s) of the protective equipment",*

AusNet stated:

*"There are no known protection operations on the Jack River SWER on 9 February 2014."*

Further, at section 9 thereof, in response to ESV's request for:

*"The details of any electrical faults relating to the Jack River Spur between 1 January and 9 February 2014",*

AusNet stated:

*"There were no unplanned interruptions recorded in our Distribution Outage Management System between 1 January 2013 and 9 February 2014 due to the operation of any of the following devices:*

- *Jack River SWER ISO substation/transformer.*
- *SWER ISO OCR switch#818216.*
- *Switch fuse YM040 (Boric Acid 12K fuse).*

- *Switch Fuse 5656348 (Boric Acid 12K fuse).*
- *Any of the 26 SWER substations supplied by the Jack River SWER ISO."*

Further particulars may be provided following discovery and/or provision of expert reports.

- (iii) had the protection system operated, the Jack River fire would have been prevented.

### **PROPORTIONATE LIABILITY – WRONGS ACT, PART IVA**

53. As to paragraph 53, Murphy:

- (a) denies the allegation in paragraph 53 that Murphy caused the loss or damage the subject of the claim;
- (b) further or alternatively, says that:
  - (i) if, which is denied, Murphy by its acts or omissions caused the loss or damage the subject of the plaintiff's claim;
  - (ii) by reason of the matters alleged in the Further Amended Statement of Claim and paragraph 52 above, the acts or omissions of AusNet also caused the loss or damage the subject of the claim;
  - (iii) accordingly, pursuant to s.24AI(1) of the *Wrongs Act* 1958 (Vic) ('**Wrongs Act**'), Murphy's liability is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the Murphy's responsibility for the loss or damage; and
  - (iv) judgment must not be given against Murphy for more than that amount.

### **DEFENCE TO COUNTERCLAIM**

54. As to paragraph 54, Murphy refers to and repeats its responses set out above to the allegations in the relevant paragraphs of AusNet's Defence.

**CONTRIBUTION – WRONGS ACT PART IV**

55. As to paragraph 55, Murphy:

- (a) denies that it is liable in respect of any claims by the Plaintiff or any group members for any claims, including any claims other than for economic loss or damage to property;
- (b) says further that if, which is denied, Murphy is liable to the plaintiff for any group members for any claims other than claims for economic loss or damage to property, then:
  - (i) by reason of the matters alleged in the Further Amended Statement of Claim and paragraph 52 above, AusNet is also liable in respect of the same damage; and
  - (ii) pursuant to Part IV of the Wrongs Act, Murphy is entitled to recover contribution from AusNet in such amount as is found to be just and equitable having regard to AusNet's responsibility for the damage.

**CONTRACTUAL CLAIMS BY AUSNET AGAINST MURPHY**

56. Subject to reference to the full terms and effect of the Services Agreement, it admits the terms of the Services Agreement alleged in paragraph 56.

57. As to paragraph 57, Murphy:

- (a) denies the allegations therein;
- (b) says further that by reason of the matters referred to in paragraphs 42, 43, 44 (c), 49 and 52 hereof, the claims by the Plaintiff and group members do not arise out of or in consequence of the vegetation assessment services carried out by Murphy;
- (c) further or alternatively, if the claims by the Plaintiff and group members arise out of or in consequence of the vegetation assessment services carried out by Murphy (which is denied), by the operation of clause 10.2 of the Services Agreement, Murphy's liability to indemnify AusNet must be reduced proportionally to the extent that AusNet's negligent act or omissions are

proved to have contributed to any loss and damage found in favour of the Plaintiff and group members.

58. As to paragraph 58, Murphy:
- (a) refers to and repeats paragraphs 49 to 52 above; and
  - (b) denies the allegations therein.
59. As to paragraph 59, Murphy:
- (a) refers to and repeats paragraphs 51 to 54 above; and
  - (b) denies the allegations therein.

**DATED:** 20 FEBRUARY 2015

**MICHAEL WHITTEN**

**CLAIRE HARRIS**

*Moray & Agnew*

**MORAY & AGNEW**

Solicitors for the Second Defendant by Counterclaim



SCHEDULE OF PARTIES

BETWEEN:

**IRWIN JAMES RAMSAY**

Plaintiff

-and-

**AUSNET ELECTRICITY SERVICES PTY LTD**

First Defendant

and

**GIPPSLAND CONTRACTING PTY LTD**

Second Defendant

(Primary Proceeding)

AND BETWEEN:

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Plaintiff by Counterclaim

-and-

**IRWIN JAMES RAMSAY**

First Defendant by Counterclaim

-and-

**GIPPSLAND CONTRACTING PTY LTD**

Second Defendant by Counterclaim

(Counterclaim Proceeding)