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Assoc to T Forrest J

PROCESSED

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

STEVEN ELLIOT WILLIAMS

Plaintiff

and

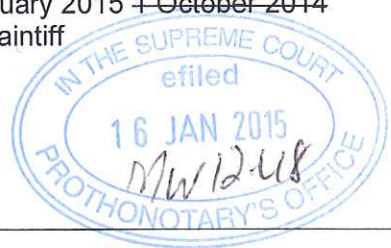
AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) and OTHERS
(according to the Schedule attached)

Defendants

AMENDED WRIT

(Filed pursuant to the Orders of the Honourable Justice T Forrest
made 19 December 2014)

Date of document: 15 January 2015 ~~1 October 2014~~
Filed on behalf of: The Plaintiff
Prepared by:
Maddens Lawyers
219 Koroit Street
WARRNAMBOOL VIC 3280



Solicitor's Code: 102650
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Tel: (03) 5560 2000
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Ref: Brendan Pendergast:
140278

TO THE DEFENDANTS

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiffs which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by-

- (a) filing a "Notice of Appearance" in the Prothonotary's office in the Law Courts, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiffs' address for service, which is set out at the end of this writ.

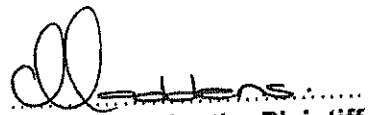
IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGEMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows-

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

- (c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in any other place, within 42 days after service.

FILED: 1 October 2014


Solicitors for the Plaintiff

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

1. Place of trial: Melbourne
2. Mode of trial: Judge alone
3. This writ was filed for the Plaintiff by Mr Brendan Pendergast of Maddens Lawyers, Warrnambool
4. The address of the Lead Plaintiff is:

7 Vanessa Drive
MICKLEHAM Victoria 3064

5. The address for service of the Plaintiffs is:

Maddens Lawyers,
219 Koroit Street
WARRNAMBOOL Victoria 3280
Ref: BFP:140278

6. The address of the Defendant is:

Level 31
2 Southbank Boulevard
Southbank Victoria 3006

7. The address for service of the Defendant is:

Herbert Smith Freehills
101 Collins Street
Melbourne Victoria 3000
Ref. 82264663

8. The address of the Second Defendant is:

1079 Pascoe Vale Road
Broadmeadows Victoria 3047

9. The address for service of the Second Defendant is:

DLA Piper Australia
Level 21, 140 William Street
Melbourne Victoria 3000
Ref. LCI/LCM/AUD

10. The address of the Third Defendant is:

Level 10, 50 Berry Street
North Sydney, New South Wales 2060

11. The address for service of the Third Defendant is:

Wotton and Kearney
Level 15, 16 Bourke Street
Melbourne Victoria 3000
ARS 3002436 JWC

IN THE SUPREME COURT OF VICTORIA

AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

STEVEN ELLIOT WILLIAMS

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) and OTHERS
(according to the Schedule attached)

Defendants

SCHEDULE OF PARTIES

STEVEN ELLIOT WILLIAMS

Plaintiff

AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118)

First Defendant

HUME CITY COUNCIL

Second Defendant

ACTIVE TREE SERVICES PTY LTD (ACN 002 919 299)

Third Defendant

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

STEVEN ELLIOT WILLIAMS

Plaintiff

and

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

Defendants

AMENDED STATEMENT OF CLAIM

Date of Document:	4 October 2014 <u>15 January 2015</u>
Filed on behalf of:	The Plaintiff
Prepared by:	Solicitor's code: 102650
Maddens Lawyers	DX: 28001 Warrnambool
219 Koroit Street	Tel: 5560 2000
WARRNAMBOOL VIC 3280	Ref: Brendan Pendergast

A Preliminary

The Mickleham Bushfire

1. On 9 February 2014 a fire started near the eastern edge of Mickleham Road, Mickleham, in the State of Victoria ("the Mickleham bushfire") and burnt over the area highlighted on the map annexed to this Statement of Claim ("the Mickleham bushfire area").

The Plaintiff

2. The plaintiff:
 - (a) is and was at all material times, owner of 5 Vanessa Drive, Mickleham, located within the Mickleham Bushfire area;
 - (b) was the owner of personal property destroyed in the Mickleham 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 Mickleham bushfire (including, without limitation, an injury suffered as a result of attempts to escape the Mickleham bushfire or other emergency action taken by any person in response to the Mickleham 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 Mickleham bushfire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Mickleham bushfire); and
- (c) all those persons who at the time of the Mickleham bushfire resided in, or had real or personal property in, the Mickleham 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 Mickleham 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 *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, further or alternatively had the use and management of, the poles, pole fittings, conductors, fuses, transformers, substations and like installations together and severally comprising:
 - (i) the three-phase 66kV electricity sub-transmission line; and
 - (ii) the three-phase 22kV electricity distribution line built beneath the 66kV sub-transmission line referred to in (i) abovewhich in part run adjacent to the eastern side of Mickleham Road between Mount Ridley Rd and Bardwell Drive, Mickleham, in the State of Victoria (**"the powerline"**);
 - (b) transmitted electricity along the powerline.
8. At all relevant times the powerline was part of a supply network within the meaning of section 3 of the ES Act.

C The Statutory Duties

9. At all material times:
- (a) since 13 December 2009, 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;
 - (b) since 1 January 2012, 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.

("the Statutory Duties").

10. 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.

11. 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 the class described in the preceding paragraph at the time of the Mickleham bushfire.

Particulars

The plaintiff resides at 5 Vanessa Drive, Mickleham, 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.

12. 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

13. At all material times AusNet:
- (a) had the right, to the exclusion of other private persons:
 - (i) to construct, repair, modify, inspect, maintain and operate the powerline; or

- (ii) give directions as to its construction, repair, modification, inspection, maintenance or operation;
- (b) exercised the said right; and
- (c) in the premises, had practical control over the powerline.

Particulars

AusNet constructed, repaired, modified and inspected and operated the powerline, and further gave directions to its contractors regarding the construction, repair, modification, inspection or operation of the powerline. Insofar as the plaintiffs are able to say prior to the completion of discovery, AusNet only permitted other private persons to engage in conduct as aforesaid in relation to the powerline by agreement with AusNet.

14. At all material times:
- (a) AusNet used the powerline to transmit electricity at high voltage;
 - (b) the transmission of electricity along the powerline created a risk of unintended discharges of electricity from the powerline;
 - (c) unintended discharges of electricity from the powerline 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 powerline was a dangerous activity;
 - (e) AusNet knew or ought reasonably to have known of the risks referred to in (b) and (c) above.
15. At all material times it was reasonably foreseeable to AusNet that:
- (a) a discharge of electricity from the powerline 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 likely to be higher when the environment around the powerline was dry and hot and windy than when the environment was damp or cool or windless.

16. 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 powerline ("**the Mickleham Class**"):
- (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 powerline was safe and operated safely in the operating conditions applying to it from time to time.

Particulars

The Mickleham bushfire area is shown on the map being **Annexure A** to these particulars. Particulars of the actual affected area of the Mickleham bushfire will be provided prior to trial.

The operating conditions referred to included the level of electrical current being transmitted along the powerlines, and the physical environment around the powerlines including, without limitation, wind direction and speed, ambient temperature, the presence of objects capable of coming into contact with the powerlines (including trees) and the amount of combustible fuel around or below the powerlines.

17. In the premises, at all material times AusNet owed to the Mickleham Class 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 powerline were safe and operated safely in the operating conditions that were foreseeable for the powerline ("**the General Duty**").
18. At all material times, the plaintiff and group members were persons within, or the personal representatives of deceased persons who, at the time of the Mickleham bushfire were within, the Mickleham Class.
19. 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 Statutory Duties and General Duty

20. At all material times, the Mickleham Road reserve in the vicinity of the powerline:
- (a) was in a hazardous bushfire risk area within the meaning of:
 - (i) section 3 of the ES Act;
 - (ii) clause 1 of *The Code of Practice for Electric Line Clearance* ("**Code**") pursuant to regulation 7 of the *Electricity Safety (Electric Line Clearance) Regulations 2010* ("**the Line Clearance Regulations**");

Particulars

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

- (b) featured many mature gum trees which were of such height, and sufficiently close to the powerline, that if they fell or shed branches there was a material risk that the tree or branch would fall across the powerline causing electrical arcing to occur between the tree or branch and a conductor on the powerline, or between conductors or between a conductor and other installations on the powerline.

Particulars

In the reserve to east of Mickleham Road and to the west of the powerline between Mount Ridley Road and Bardwell Drive, Mickleham there were a number of mature eucalypt trees of different species but predominantly sugar gums.

Insofar as the plaintiffs are able to estimate, the heights of the said trees were in the range of approximately 10m to approximately 30m. Many of the trees were taller than the horizontal distance between the trunk of the tree and the nearest conductor of the powerline.

Further particulars may be provided (if required) following the delivery of experts' reports.

21. At all material times since no later than 13 December 2009:
- (a) AusNet was responsible for keeping the whole or any part of a tree clear of the powerline;

Particulars

The responsibility was imposed by subsection 84(7) of the ES Act.

- (b) AusNet had the power to keep the whole or any part of a tree clear of the powerline;

Particulars

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

- (c) 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.

- (d) 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.

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

Particulars

Regulation 9(8) of the Line Clearance Regulations.

- (f) 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 powerline, by the start of the Fire Season ("**pre-summer tree inspection**");
 - (ii) maintain the clearance spaces between the powerline and trees in accordance with the Code;

Particulars

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

- (g) AusNet was required, as part of its pre-summer tree inspection, to:
- (i) inspect the space outside the clearance space of the powerline (prescribed by the Line Clearance Regulations) in which trees or limbs due to their unsafe condition were a potential hazard to the safety of the powerline under a range of weather conditions that can be reasonably expected to prevail ("**hazard space**");
 - (ii) inspect the hazard space to identify and evaluate potential hazards ("**potential hazards**") within the space, including:

- (1) dead and dangerous limbs;
 - (2) trees with poor structure or health;
 - (3) other trees or limbs that may be unstable and could fall on the powerline under the range of weather conditions that could reasonably be expected to prevail in the locality of the powerline;
- ("vegetation assessments");

Particulars

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

22. Further and in the alternative, at all material times AusNet was required to inspect the hazard space for hazard trees ("**hazard trees**").

Particulars

A hazard tree is one which is likely to fall onto or otherwise come into contact with an electric line: clause 3 of the Code.

23. At all material times, it was reasonably foreseeable to AusNet that a failure:
- (a) to conduct vegetation assessments;
 - (b) to identify potential hazards and/or hazard trees within the hazard space;
 - (c) to clear or remove a potential hazard and/or a hazard tree from the hazard space could result in a tree falling or shedding limbs across conductors on AusNet's supply network.
24. At all material times:
- (a) the conductors on the powerline were bare or uninsulated aerial conductors;
 - (b) the conductors were in close proximity to each other;
 - (c) there was a material risk that in the event of conductors being displaced in any way by a tree, tree stem or branch they could arc between themselves or with the tree, tree stem or branch;
 - (d) there was a material risk that an arc occurring might cause the discharge of molten particles of super-heated metal ("**sparks**") from the section of conductor where arcing occurred;

- (e) there was a material risk that an arc occurring between a conductor and a tree, tree stem or branch might cause vegetation in the tree, tree stem or branch to ignite;
- (f) the 3 phase 66kV sub-transmission line and the 22kV distribution line comprising the powerline were fitted with fault current detection and protection devices ("**protection systems**");

Particulars

Further particulars may be provided following the completion of discovery and receipt of expert evidence.

- (g) the protection systems regulating the powerline were such that there was a material risk that, in the event of a tree, tree stem or branch falling across the powerline, the protection systems would or could allow current to continue to be transmitted through the powerline to cause ignition of a fire, especially in dry and windy conditions.

Particulars

So far as the plaintiff is able to say prior to discovery, interrogation, and receipt of expert evidence, the protection systems on the powerline were such that after a tree, tree stem or branch fell on the powerline, electricity would or could continue to be transmitted, or would resume transmission, during which time arcing could occur resulting in the discharge of heat and/or sparks and the ignition of vegetation.

- (h) there was material risk that molten metal sparks or electrical discharge or heat from arcing could ignite vegetation in the vicinity of the sparks, heat or discharge;
 - (i) the risk referred to in (h) was higher the longer that the protection systems permitted current to be transmitted through the powerline after a tree or branch came into contact with a conductor or conductors of the powerline;
 - (j) the risk referred to in (h) was higher when conditions around the powerlines were dry and hot and windy than when conditions were moist, cool and calm;
 - (k) the dry, hot and windy conditions which increased the risk referred to in (h) above were also likely to increase the risks of a tree falling, or shedding branches, across the powerline.
25. At all material times AusNet knew or, as operator of a supply network, ought reasonably to have known the matters set out in the preceding paragraph.
26. In the premises, at all material times, the Statutory Duties required AusNet to remove potential hazards and/or hazard trees:

- (a) as quickly as possible;
 - (b) in any event, before the commencement of the next fire danger period declared pursuant to s.4 of the *Country Fire Authority Act 1958 (Vic)* ("**fire danger period**").
27. In the premises, at all material times, the General Duty required AusNet to:
- (a) carry out vegetation assessments with due skill, care and diligence;
 - (b) further or alternatively to (a), ensure that vegetation assessments carried out by contractors were carried out with due skill, care and diligence;
 - (c) ensure that potential hazards and/or hazard trees were removed:
 - (i) as quickly as possible;
 - (ii) in any event, before the commencement of the next fire danger period.

F The Tree and the Mickleham Bushfire

28. At all material times prior to 9 February 2014, in the span between poles 931061 and 931062 of the powerline, there was a eucalyptus tree ("**the Tree**"), the trunk of which was located approximately 15 metres west of the powerline.

Particulars

So far as the plaintiff is able to say prior to the delivery of experts' reports, the Tree was a *Eucalyptus Cladocalyx* also known as Sugar Gum.

29. On a date unknown to the plaintiff but many years prior to 9 February 2014, the Tree was lopped at a height of about 2.5 metres above the ground and the stem of the Tree was left in the ground ("**the remaining stem**").
30. Subsequently, over a period of time unknown to the plaintiff, but many years prior to 9 February 2014:
- (a) epicormic stems grew from near the base of the remaining stem; and
 - (b) the remaining stem of the Tree died.
31. At all material times prior to 9 February 2014:
- (a) the remaining stem formed a large dead spar at the centre of the base of the Tree;
 - (b) there were four large epicormic stems growing from the outer sides of the base of the remaining stem ("**the living stems**");

- (c) each of the living stems had poor physical attachment to the Tree;
- (d) the living stem on the eastern side of the Tree ("**the eastern stem**") grew in the direction of the powerline;
- (e) the Tree was taller than the horizontal distance to the powerline such that if the Tree, a living stem or a branch from the Tree fell in the direction of the powerline, there was a significant risk that it would come into contact with the powerline.

Particulars

So far as the plaintiffs are able to say prior to the delivery of experts' reports, the living stems were, and therefore the Tree was, approximately 23 metres tall.

- 32. By reason of the matters alleged in paragraph 31, at all material times prior to 9 February 2014, the Tree:
 - (a) had very poor structure;
 - (b) was located within the hazard space;
 - (c) was a potential hazard;
 - (d) was a hazard tree.

- 33. At approximately midday on 9 February 2014:
 - (a) a strong, blustery, hot and dry north-westerly wind was blowing in the vicinity of, and against, the Tree;
 - (b) the eastern stem broke away from the Tree and fell onto the 66kV conductors of the powerline pushing them down onto the 22kV conductors;
 - (c) two or more of the conductors of the powerline touched and/or became sufficiently close to cause arcing between them;
 - (d) the conductors which the eastern stem came into contact with arced with the vegetable matter of the eastern stem;
 - (e) for a period of time unknown to the plaintiff after the eastern stem fell onto the conductors, current continued to flow and/or resumed flow through the conductors by reason of the operation of the protection systems;
 - (f) the arcing caused a discharge of sparks or heat;
 - (g) the sparks or heat ignited dry vegetable material on the ground near the base of the powerline, alternatively, the eastern stem of the Tree; and

- (h) the sparks or heat thereby started a fire which subsequently spread over a wide geographic area, being the Mickleham bushfire.

Particulars

At about midday the air temperature exceeded 38° C and wind gusts were in the vicinity of 80km/h. The load imposed by the eastern stem became too great for the structure of the Tree. The attachment of the eastern stem to the Tree failed and the eastern stem fell to the east and onto the powerline. A second branch subsequently dislodged from an adjacent living stem of the Tree and fell to the east over the powerline a short time later. Further particulars may be provided following the delivery of experts' reports.

G Breaches of Duties

34. By not later than 13 December 2009, and continuing at all times up to and including 9 February 2014, each of the matters alleged in paragraph 31 was visible and capable of being observed in the course of a vegetation assessment.
35. A vegetation assessment conducted with due care, skill and diligence would have identified that the Tree:
- (a) was a potential hazard;
 - (b) was a hazard tree.
36. AusNet did not at any time prior to 7 February 2014, identify the Tree as:
- (a) a potential hazard; or
 - (b) a hazard tree.
37. In the premises, by not later than the 13 December 2009, and continuing at all times up to and including 9 February 2014, AusNet failed to:
- (a) exercise, by its officers, servants or agents, reasonable skill, care and diligence in conducting vegetation assessments;
 - (b) ensure that contractors exercised reasonable skill, care and diligence in conducting vegetation assessments;
 - (c) remove the Tree or the eastern stem of the Tree.
38. In the premises, at all material times prior to 9 February 2014, from not later than the 2009 pre-summer inspection, AusNet was in breach of:
- (a) the Statutory Duties;

- (b) the General Duty.

H Cause of Mickleham Bushfire

39. 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 powerline.

Particulars

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

40. The Mickleham bushfire was caused by AusNet's breaches of:

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

Particulars

But for the breaches of duty alleged in paragraph 38 above, the Tree or, alternatively, the eastern stem would have been removed by no later than the start of the 2013-2014 fire danger period such that the eastern stem could not have fallen onto the powerline to cause the Mickleham bushfire.

41. The Mickleham 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 having the features described in paragraph 31 above is that the attachment of one or

more of the living stems would fail causing it to break away from the tree and fall. A natural and foreseeable consequence of such a living stem being weighted in the direction of the powerline and being under the force of a wind blowing in the direction of the powerline was that the stem would fall in that direction. A natural and foreseeable consequence of such a stem being taller than the horizontal distance of the stem to the powerline was that in falling it would contact the powerline. A natural consequence of a large tree or tree stem falling across the powerline was that it would or could cause the conductors on the powerline to clash or come close enough to permit arcing, alternatively for arcing to occur between conductors and vegetation across the powerline, and the ignition of sparks and heat. The natural consequence of exposing the Tree or dry grass in late summer conditions at Mickleham to contact with molten or burning metal, or to the levels of heat produced by the formation of an electrical arc, was that the Tree and / or grass would ignite. A natural and foreseeable consequence of such ignition, in such conditions, was fire. A natural and foreseeable consequence of fire in dry grass adjacent to and upwind of available fuel in such a location in such a season, was the spread of fire, being bushfire.

I Subgroup Claims - private nuisance

42. 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 Mickleham bushfire's interference with their use and enjoyment of interests in land.

Particulars

The plaintiff was registered proprietor of land over which the bushfire burned, being the land situated at 5 Vanessa Drive, Mickleham.

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

43. At all material times each of:
- (a) the risks referred to in paragraphs 14 and 15 above; and
 - (b) the risk that a bushfire ignited by a discharge of electricity from the powerline 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.

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

J Causation and Loss and Damage

48. 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 described in paragraphs 4(a) to (c) hereof;
- (iii) the deceased persons referred to in paragraphs 4(d) hereof;
- (iv) each of the subgroup members

as the case may be, suffered loss and damage of the kinds referred to in paragraph 15(c) to (e) above.

Particulars of loss and damage

The plaintiff suffered property loss and damage, including:

- (i) damage to house roof and interior;
- (ii) damage to septic system;
- (iii) destruction of red gum and perimeter fencing;
- (iv) damage to water infrastructure;

- (v) damage and destruction of trees and garden;
- (vi) destruction of electrical infrastructure and home electrical equipment;
- (vii) destruction of two trailers.

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 Hume City Council

49. 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 (**Hume**) as follows.
50. Hume is and was at all relevant times:
- (a) a municipal council; and
 - (b) a body corporate pursuant to s 5 of the *Local Government Act 1989 (Vic)*.
51. At all relevant times:
- (a) the Tree was situated on the Mickleham Road Reserve; and
 - (b) the 66 kV line and the 22 kV line, referred to in paragraph 7 above, were situated on the Mickleham Road Reserve.
52. At all relevant times, the Mickleham Road Reserve was:
- (a) within the municipal district of the City of Hume;
 - (b) outside the metropolitan fire district established under s 4 of the *Metropolitan Fire Brigades Act 1958 (Vic)*; and
 - (c) within the country area of Victoria for the purposes of the *Country Fire Authority Act 1958 (Vic)*.
53. At all relevant times the Mickleham Road Reserve was under:
- (a) the control;
 - (b) alternatively, the management;
 - (c) alternatively, the care and management –
of Hume.

54. Accordingly, pursuant to s 43 of the Country Fire Authority Act, at all relevant times:
- (a) it was the duty of Hume to take all practicable steps to prevent the occurrence of fire on, and to minimise the danger of the spread of fires on and from the Mickleham Road Reserve; and
 - (b) Hume was empowered to:
 - (i) acquire any equipment;
 - (ii) do any thing; and
 - (iii) expend from its funds any amount -
that was necessary or expedient for the purposes of fulfilling its duty.
55. At all relevant times, Hume was required by s 55A of the Country Fire Authority Act to prepare and maintain a municipal fire prevention plan for its municipal district.
56. At all relevant times on and after 21 October 2010, Hume was required by s 86B of the ES Act to specify, in its municipal fire prevention plan:
- (a) procedures and criteria for the identification of hazard trees; and
 - (b) procedures for the notification of responsible persons of trees that are hazard trees in relation to electric lines for which they are responsible.
57. From time to time, including after 21 October 2010, Hume prepared municipal fire prevention plans.
58. Hume, by its employees or agents, inspected the Tree on the following occasions:
- (a) on or about 15 October 2007;
 - (b) on or about 15 February 2012;
 - (c) on or about 27 March 2012;
 - (d) on or about 18 January 2013;
 - (e) on or about 9 September 2013.
59. Hume, by its employees or agents, determined:
- (a) as a result of the inspection on or about 15 October 2007, that the Tree required structural pruning and weight reduction; and
 - (b) by the subsequent inspections (alleged in sub-paragraphs 57(b)-(e) above) that the Tree did not require any works.

60. At all relevant times, the following risks (collectively, the Risks) were or ought to have been reasonably foreseeable to Hume:

- (a) the trees situated on the Mickleham Road Reserve could fall or shed limbs and thereby come into contact with the power lines along Mickleham Road;
- (b) contact between the failed trees or their limbs and the power lines might cause arcing between power lines or conductors and vegetation which could cause a discharge of sparks and heat;
- (c) sparks and heat might ignite nearby fuel and result in a fire;
- (d) such a fire could:
 - (i) spread over a wide geographic area;
 - (ii) cause injury to persons and loss or damage to property within the area affected by the fire;
 - (iii) cause 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; and
 - (3) by reducing the value of real property or businesses located in the area affected by the fire.

61. At all relevant times the plaintiff and group members were:

- (a) vulnerable to the Risks materialising; and
- (b) for the purposes of protecting themselves and their property and their economic interests against the Risks, dependent upon Hume exercising reasonable care in:
 - (i) managing the trees on the Mickleham Road Reserve;
 - (ii) inspecting the trees on the Mickleham Road Reserve to determine whether by reason of their health or structure they were at risk of failure or shedding limbs and at risk of coming into contact with power lines; and
 - (iii) planning and carrying out inspections of the trees.

62. By reason of the matters alleged in paragraphs 50 to 60 above, at all relevant times Hume:

- (a) was under a duty to control and reduce the Risks;

- (b) was reasonably able to exercise powers to control and reduce the Risks; and
 - (c) entered upon the exercise of powers under s 43 and s 55A of the *Country Fire Authority Act* and s 86B of the *Electricity Safety Act* to control or reduce the Risks.
63. In the premises, Hume was under a common law duty to the plaintiff and group members:
- (a) to take reasonable care; and
 - (b) to ensure that reasonable care was taken, by its agents or contractors to eliminate or reduce the Risks.
64. By reason of the matters alleged in paragraphs 31, 32 and 35 above, in exercising reasonable care Hume, its employees or agents, ought reasonably to have:
- (a) identified the Tree as a hazard tree;
 - (b) identified the Tree as a potential hazard;
 - (c) determined that the Tree was at risk of failure or shedding limbs;
 - (d) determined that the Tree was at risk of coming into contact with power lines;
 - (e) determined that the Tree had very poor structure;
 - (f) pruned or removed the Tree to mitigate the risks of it failing, shedding limbs or coming into contact with power lines; and
 - (g) further and alternatively, notified AusNet, alternatively, VicRoads, of the matters set out in sub-paragraphs (d) to (h) above.
65. Negligently, and in breach of its duty of care Hume:
- (a) failed to exercise, by its officers, servants or agents, reasonable skill, care and diligence in conducting vegetation assessments of the Tree;
 - (b) failed to ensure that any of its contractors exercised reasonable skill, care and diligence in conducting vegetation assessments of the Tree; and
 - (c) failed to take any of the measures alleged in sub-paragraphs 64(a) to (g) above.
66. Had Hume exercised reasonable care as alleged:
- (a) the risk of the Tree failing, shedding limbs or coming into contact with power lines would have been identified; and

- (b) prior to 9 February 2014 Hume, alternatively VicRoads, alternatively AusNet Services, would have pruned or removed the Tree to mitigate the risks of it failing, shedding limbs or coming into contact with power lines.
67. By reason of the matters alleged in paragraphs 51 to 66 above, the Mickleham bushfire was caused by the negligence of Hume, its agents or employees.
68. By reason of the negligence of Hume, its agents or employees:
- (a) the plaintiffs;
- (b) each of the group members referred to in sub-paragraphs 4(a) to (c) hereof; and
- (c) each of the deceased persons referred to in sub-paragraph 4(d) hereof
- as the case may be, suffered loss and damage of the kinds referred to in sub-paragraphs 15(c) to (e) above.
69. The Mickleham bushfire was a natural and foreseeable consequence of the negligence of Hume, its agents or employees.
- L Active Tree Services**
70. Further or alternatively to the claims against AusNet and Hume 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 third defendant (**Active Tree Services**) as follows.
71. At all relevant times, Active Tree Services was incorporated pursuant to the *Corporations Act 2001 (Cth)*.
72. 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 Active Tree Services to provide to it vegetation management services.
73. The Services Agreement provided, relevantly, that:
- (a) Active Tree Services 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 procedure VEM 20-03 (namely, the Vegetation and Easement Management Assessment Procedure (Distribution));

- (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 Active Tree Services 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.
74. There were written terms of the Services Agreement that Active Tree Services 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 Active Tree Services 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 Services' 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 Services [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, code and requirements of the contract [Schedule 1, Section 4, clause 1.2];
 - (h) during the normal span assessment process, report any hazardous tree that the assessor observes whilst performing their normal duties, as per AusNet Services' procedure VEM 20-01 'Hazard Tree and 56M Assessment Procedure', and in accordance with procedure VEM 20-02 'Hazardous Tree and 56M Management Procedure' that pose a potential threat to the AusNet Services Distribution Network [Schedule 1, Section 1, clause 1.9].

Particulars

The plaintiff will rely at trial on the Services Agreement for its full terms and effect.

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.

75. From the commencement of the Services Agreement and from time to time thereafter AusNet provided to Active Tree Services copies of its policies as amended from time to time, including its VM Plans, and in particular procedure VEM 20-03 'Vegetation and Easement Management Assessment Procedure (Distribution)'.
76. During the term of the Services Agreement Active Tree Services provided services to AusNet, including in respect of the 66 kV line referred to in sub-paragraph 7(a)(i) above.
77. By reason of the matters alleged at paragraphs 68 to 74 and 76 above, Active Tree Services had a responsibility for and a degree of control over:
 - (a) the assessment of vegetation clearances surrounding parts of AusNet's distribution network, including the 66 kV line;
 - (b) the implementation and observance by its employees of the requirements of the Services Agreement and of AusNet Services' policies and procedures, including Clearance Procedure VEM 20-03, during and for the purposes of assessing vegetation clearances.
78. During the term of the Services Agreement, it was reasonably foreseeable that any failure by Active Tree Services, 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 could result in the materialisation of the Risks alleged in paragraph 60 above.
79. 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 and their economic interests against the Risks, reliant on Active Tree Services by its servants and agents exercising reasonable care in undertaking the Services.

80. In the premises, throughout the term of the Services Agreement, Active Tree Services 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 assessments of vegetation outside the clearance space that could fall within the clearance space and come into contact with power lines;
 - (b) to ensure that the assessment of vegetation outside the clearance space was undertaken in accordance with the requirements of the Services Agreement and of AusNet's policies and procedures including Clearance Procedure VEM 20-03.
81. During the term of the Services Agreement, and prior to the Mickleham bushfire, Active Tree Services, by an employee, conducted one or more inspections of the 66 kV line in the vicinity of the Tree.
82. By reason of the matters alleged in paragraphs 31, 32 and 35 above, in exercising reasonable care, Active Tree Services, its employees or agents, ought reasonably to have:
- (a) identified the Tree as a hazard tree;
 - (b) identified the Tree as a potential hazard;
 - (c) determined that the Tree was at risk of failure or shedding limbs;
 - (d) determined that the Tree was at risk of coming into contact with power lines;
 - (e) determined that the Tree had very poor structure; and
 - (f) notified AusNet of the matters set out at sub-paragraphs (a) to (e) above.
83. In the premises, Active Tree Services itself, or by its employees or agents, breached the duty of care alleged in paragraph 80 above.
84. Had Active Tree Services notified AusNet Services of the matters alleged in sub-paragraphs 82(a) to (b) above, then:
- (a) subject to arranging for an assessment by a qualified arborist; and
 - (b) subject to the arborist confirming the likelihood of contact with an electric line having regard to foreseeable local conditions –
- AusNet services would have cut or removed the Tree.

85. By reason of the matters alleged in paragraphs 71 to 84 above, the Mickleham bushfire was caused by the negligence of Active Tree Services, its agents or employees.
86. By reason of the negligence of Active Tree Services, its agents or employees:
- (a) the plaintiffs;
 - (b) each of the group members referred to in sub-paragraphs 4(a) to (c) hereof; and
 - (c) each of the deceased persons referred to in sub-paragraph 4(d) hereof
- as the case may be, suffered loss and damage of the kinds referred to in sub-paragraphs 15(c) to (e) above.
87. The Mickleham bushfire was a natural and foreseeable consequence of the negligence of the negligence of Active Tree Services, its agents or employees.

Common Questions of Law or Fact

88. 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 Mickleham 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 Duty to the plaintiff and group members, and if so the content of the duty;
 - (d) whether the Mickleham bushfire was caused by a breach by AusNet of any of the Statutory Duties or General Duty;
 - (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 Hume and/or Active Tree Services is a concurrent wrongdoer;
- (iii) if either Hume and/or Active Tree Services is a concurrent wrongdoer, the proportionate responsibility of the defendants under Part IVAA of the *Wrongs Act*.

(relevant to Hume)

- (e2) whether Hume owed the plaintiff and group members a duty of care, and if so, the content of the duty;
- (e3) whether the Mickleham bushfire was caused by Hume's breach of its duty of care;
- (e4) to the extent that economic loss and property damage claims are made against Hume:
 - (i) whether the claims are apportionable claims under Part IVAA of the *Wrongs Act*;
 - (ii) if they are apportionable claims, whether AusNet and/or Active Tree Services is a concurrent wrongdoer;
 - (iii) if AusNet and/or Active Tree Services is a concurrent wrongdoer, the proportionate responsibility of the defendants under Part IVAA of the *Wrongs Act*.

(relevant to Active Tree Services)

- (e5) whether Active Tree Services owed the plaintiff and group members a duty of care, and if so, the content of the duty;
- (e6) whether the Mickleham bushfire was caused by Active Tree Services' breach of its duty of care;
- (e4) to the extent that economic loss and property damage claims are made against Active Tree Services:
 - (i) whether the claims are apportionable claims under Part IVAA of the *Wrongs Act*;
 - (ii) if they are apportionable claims, whether AusNet and/or Hume is a concurrent wrongdoer;

(iii) if AusNet and/or Hume 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 Hume)

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

(Against Active Tree Services)

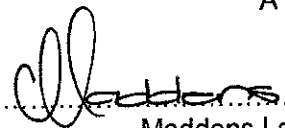
- G. Damages.
- H. Interest.
- I. Costs.

TP Tobin

G Dalton

A Fraatz

Dated: 15 January 2015 ~~4 October 2014~~


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Maddens Lawyers
Solicitors for the plaintiff

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No S CI 5296 of 2014

STEVEN ELLIOT WILLIAMS

Plaintiff

and

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

Defendants

CERTIFICATE IDENTIFYING ANNEXURE

Date of document: 15 January 2015
Filed on behalf of: The Plaintiff
Prepared by:
Maddens Lawyers
219 Koroit Street
WARRNAMBOOL VIC 3280

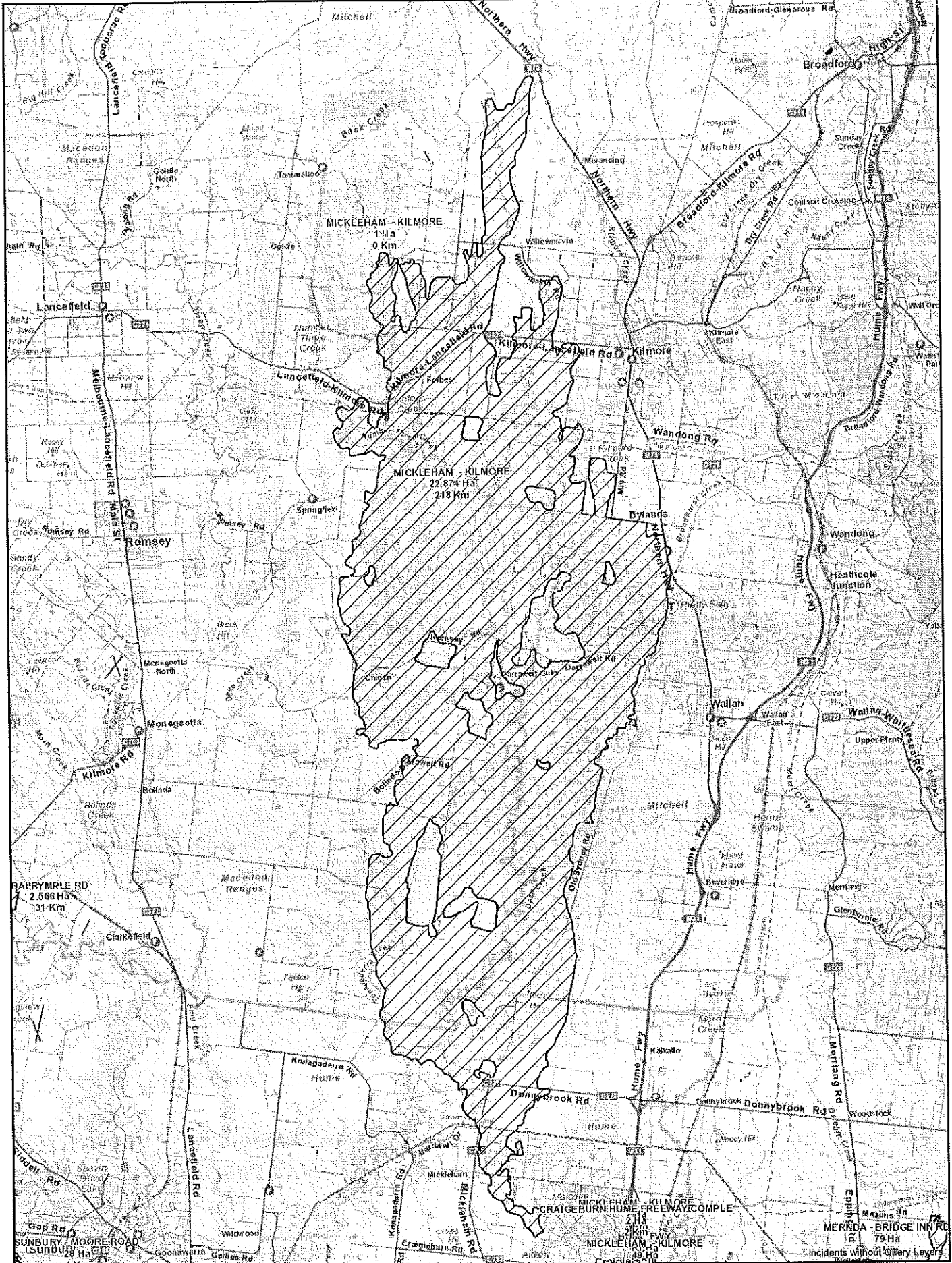
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Ref: Brendan Pendergast: 140278


This is the Annexure marked "A" referred to in Amended Statement of Claim dated 15 January 2015.

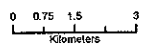
Annexure "A"

**Map of the Mickleham – Kilmore
Bushfire Area dated 14 February 2014**

Public Information Map
Mickleham Kilmore Fire 14 Feb 2014 0200hrs



 Burnt Area



1:125,000



Disclaimer: This map is a snapshot generated from Victorian Government data. The State of Victoria does not guarantee that the publication is without flaw of any kind or is wholly appropriate for our particular purposes and therefore disclaims all liability for error, loss or damage which may arise from reliance upon it. All persons accessing this information should make appropriate enquiries to assess the currency of the data.