HIGH COURT OF AUSTRALIA

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File Number:	P5/2022
File Title:	Electricity Networks Corporation Trading as Western Power v.
Registry:	Perth
Document filed:	Form 27D - Fifth Respondent's Submissions
Filing party:	Respondents
Date filed:	01 Jun 2022

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P5 of 2022

BETWEEN: **ELECTRICITY NETWORKS CORPORATION T/AS WESTERN POWER (ABN 18 540 492 861)**
Appellant

and

HERRIDGE PARTIES (PER ORDER MADE BY JUSTICE MITCHELL ON 28 OCTOBER 2019)
First Respondents

and

IAG/ALLIANZ PARTIES (PER ORDER MADE BY JUSTICE MITCHELL ON 28 OCTOBER 2019)
Second Respondents

and

RAC PARTIES (PER ORDER MADE BY JUSTICE MITCHELL ON 28 OCTOBER 2019)
Third Respondents

and

NOREEN MERLE CAMPBELL
Fourth Respondent

and

VENTIA UTILITY SERVICES PTY LTD (ACN 010 725 247) (FORMERLY KNOWN AS THIESS SERVICES LTD)
Fifth Respondent

FIFTH RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. The appellant (**WP**) misstates the ultimate issue in its submissions (**AS**) at [2]. By incorporating into its description of the duty found by the Court of Appeal (**CA**) a paraphrased version of the CA's finding as to the reasonable precaution that would have been taken by a reasonable person in WP's position to *comply* with that duty (compare AS[2] with J[9]), WP conflates discrete issues of the *existence* of a duty of care, and the *standard of care* owed, the latter being a question to be dealt with at the breach stage of

the negligence analysis. Such a conflation has been described as "*wrong in principle*"[1] and is of real practical significance, as it is well settled that differing (albeit overlapping) considerations apply to the question of the existence of a duty of care and the question of the reasonable precautions that are to be taken in order to comply with a duty (the latter question being here governed by ss 5B and 5W of the *Civil Liability Act 2002* (WA) (**CLA**)). In putting in issue the "*duty of care*" as formulated at AS[2], WP therefore raises not one but two issues: the CA's findings as to (a) the existence of a duty of care; and (b) the reasonable precautions required to be taken to discharge the duty as found. For the reasons elaborated below, the CA's findings on both issues should be upheld.

10 **PART III: SECTION 78B NOTICE**

3. No s 78B Notice is considered necessary.

PART IV: MATERIAL FACTS

4. The Appellant's recitation of material facts at AS[5]-[9] omits the following critical findings. WP's defined terms are adopted for ease of reference.

5. The service life of untreated jarrah poles such as the PA pole is 15 to 25 years in ground: J[166](1). Any untreated and unreinforced jarrah pole of over 25 years' service life was beyond its probable life expectancy and operating at an elevated risk of in-service failure: J[166](2). Any untreated jarrah pole displaying signs of fungal rot or termite damage at or near ground level, or in the below ground section able to be excavated in the course of
20 routine inspections, was operating at an elevated risk of in-service failure: J[166](3). Any in-service failure of a wooden pole created a serious risk of unintended discharges of electricity from the electricity installation supported by, or connected to, a point of attachment pole and if the unintended discharge occurred in hot, dry, windy conditions, the ignition of a bushfire: J[166](4).

6. The probability that harm will occur if point of attachment poles are not inspected is high, approaching certainty over time, given the limited lifespan of wooden poles. This risk of harm was foreseeable and known. The likely seriousness of the resulting harm is grave, with a bushfire in a high fire-risk area likely to imperil the lives, health and property of a large number of persons in the vicinity of the failed pole: J[167]; see also J[21].

30 7. WP knew, or ought to have known, of each of the matters in [5]-[6] above: J[19]-[21].

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[1] ***Crimmins*** *v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [65] per McHugh J; see also ***Vairy*** *v Wyong Shire Council* (2005) 223 CLR 442 at [54], [59], [64], [73] and [98] per Gummow J; ***Stuart*** *v Kirkland-Veenstra* (2009) 237 CLR 215 at [85] per Gummow, Hayne and Heydon JJ; *Amaca Pty Ltd v Werfel* (2020) 138 SASR 295 at [176] per Kourakis CJ, Nicholson and Livesey JJ, citing *Amaca Pty Ltd v AB & P Constructions Pty Ltd* (2007) 2 DDCR 543 at [47]ff per Giles JA.

PART V: ARGUMENT

A. Introduction

8. Thiess' argument may be summarised as follows. *First*, WP's framing of the issue in this appeal improperly collapses into duty something which can only be assessed at the breach stage; namely whether a system of inspection was required to discharge WP's duty of care. Thiess defends the CA's statement of *duty* at J[9] and [158], which is described at a level of generality which is appropriate to the question of law raised by duty, leaving the jury question of what compliance with the duty required in this particular case for the stage of breach (see **Section C** below).

10 9. *Secondly*, Thiess defends the CA's findings on *breach*, including in particular as to the reasonable precautions in the form of a system of inspection that WP ought to have taken to discharge its duty of care: J[9], [178] (see **Section D** below).

10. *Thirdly*, given WP accepts it has a duty of care in respect to the foreseeable risk of electricity escaping from its system and igniting a fire, causing harm to persons or property (J[152]), the real issue which WP is seeking to agitate concerns what the duty does, or does not, require at what might be described as the "points of interface" between its system and the system of the following (or indeed, prior) conveyor of electricity. This is an intensely fact-specific question. It is not a question apt for an answer as a matter of law. It is properly dealt with at the breach stage. It follows that in circumstances where

20 WP has conceded a duty of care, WP's arguments about lack of control and inconsistency do not arise; they are attempts to attack at the duty stage (and dress up in a duty analysis concerning control and inconsistency) matters that arise at the factual breach stage.

11. But even if it is necessary to build into the *duty* some conception of the outer points of the electricity distribution system which attract the duty of care, taking a functional approach, the duty *reaches forward* to any item of property (here, the PA pole), whether owned or controlled by WP or not, which serves the function of ensuring the handover of the electricity from WP to the consumer (just as it reaches back to any item of property, whether owned or controlled by WP or not, which serves the function of ensuring the handover of the electricity from the generator to WP) (see **Section E** below).

30 12. *Finally*, if WP's contentions as to inconsistency and control are taken at face value and treated as going to duty, they must nonetheless be rejected (see **Section F** below).

B. Uncontentious matters

13. Thiess understands that the following matters are uncontentious. *First,* WP's statutory functions included providing electricity distribution services and maintaining and

operating apparatus forming part of its electricity distribution system: J[107]; [153]; ss 41 and 42 of the ECs Act; AS[12].

14. *Secondly*, the risk of harm by fire to persons and property in the vicinity of WP's electricity distribution system if a pole supporting an aerial electrical cable failed was both reasonably foreseeable and not insignificant: J[157]; [164].

15. *Thirdly*, in the operation of its electricity distribution system, WP owed a duty to exercise reasonable care to deal with the risk of fire from that system: J[152].

16. *Fourthly*, at the point in time when WP attached an aerial electrical cable to a pole which it did not own, WP had a duty to take reasonable care to see that the pole was not going to collapse at that point: J[152]. WP also owed the plaintiffs a duty of care before and when undertaking work on the PA pole: J[91].

17. *Fifthly*, WP has power in certain circumstances to enter upon land and other premises without the owner or occupier's consent and to inspect poles to which its service cables are attached (though the precise bounds of that power may be in dispute): ss 28(3)(c), 46, 48, 49, 68 of the EOP Act; AS[18].

18. *Sixthly*, it would be open to WP, on discovering a pole supporting its cables on a consumer's land which was in danger of collapse, to require the consumer to repair or replace the pole if the consumer is to continue to receive electricity through the service cable supported by the pole. This follows from the fact that WP has power in certain circumstances to interrupt, suspend or restrict the supply of electricity to consumers: J[145]; s 31 of the EI Act; s 63 of the ECs Act; reg 242 of the *Electricity Regulations 1947* (**E Regs**); AS[13]; [84].

19. *Seventhly*, consumers do not have an unfettered right to interfere with point of attachment poles: s 47(1) of the E Act; s 75(2) of the EOP Act; reg 19 of the E Regs.

20. *Finally*, and notwithstanding the matters recorded at [13]-[19] above, WP did not undertake periodic inspections of consumer wooden poles supporting its electrical apparatus: J[179], whereas it did have a system of periodic inspections of those poles it owned, being some 625,000-758,000 poles. This would have seen the PA pole inspected and treated every 4 years and replaced after 25 years if it had been owned by WP: J[168].

C. The duty of care owed by WP

21. The CA found that WP owed "*to persons in the vicinity of its electricity distribution system a duty to take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system*":

J[9]; see also [158]. The duty of care as found by the CA is a common law duty of care "*which operates alongside the rights, duties and liabilities created by statute*" (***Graham Barclay Oysters*** *Pty Ltd v Ryan* (2002) 211 CLR 540 at [147]), rather than being a *statutory duty*, as to which see *Stuart* per Crennan and Kiefel JJ at [123] and [130].

22. While WP has purported to put the existence of a duty of care in issue, there can be no serious dispute that WP owed a duty of care to the plaintiffs given its concessions recorded at J[91] and [152]. Indeed, while at J[160] the CA observes that the duty found "*is similar to the duty accepted by [WP] during oral submissions*" it will be seen that the duty found by the CA is substantively the same as the duty conceded. WP seeks to distinguish the two duties on the basis that it conceded a duty with respect to risks of harm "*arising from*" the operation of WP's electricity network, whereas the CA found the duty was owed with respect to risks of harm "*connected with*" WP's operation of WP's electricity network: AS[64]. There is no meaningful difference between a risk "*arising from*" the operation of WP's electricity network and a risk "*in connection with*" the operation of that network. On that basis alone, the Court ought reject WP's challenge to the duty as formulated by the CA.

23. In any event, even leaving aside WP's concessions, the CA was wholly correct to find that WP owed the plaintiffs a duty as found at J[9] and [158], for the reasons that follow.

Duty falls into an established category

24. In ***Thompson*** *v Bankstown Corporation* (1953) 87 CLR 619, this Court considered a claim brought by a plaintiff who suffered injury by reason of his having received an electric shock from a charged earth-wire when he climbed an electricity pole erected by the respondent Council in a public area. The trial proceeded on the basis that the Council was "*the authority in whom was vested the electrical undertaking of which the poles and wires formed a part and that they had been erected … under statutory powers enabling the transmission of energy*": 625. Chief Justice Dixon and Williams J held at 628 that "*[t]he law which … should be applied to such a case as this is that which imposes a duty of care on those carrying on in the exercise of statutory powers an undertaking involving the employment of a highly dangerous agency*". At 629 their Honours found: "*[t]he … transmission of electrical energy of a lethal voltage imposed the duty upon the defendant.*" This duty of care was said to be "*measured by a high standard both because of the lethal nature of the agency and because of the almost infinite variety of mischance by which attempts to insulate it and prevent its escape may be defeated.*" See also McTiernan J at 637 and Kitto J at 645.

25. In ***Munnings*** *v Hydro-Electric Commission* (1971) 125 CLR 1, this Court was again faced with a negligence claim brought by a plaintiff who received an electric shock when he climbed up a pole erected by the respondent. In this instance, the pole was erected on land owned by another. At 10, Barwick CJ found that the case was "*governed by this Court's decision in Thompson*" which his Honour considered (at 11) "*is an authority for the proposition that a person bringing such a substance as electricity into proximity of the public owes a duty to take care by the adoption of reasonable steps or methods that it does not harm those whom it ought to foresee might otherwise come into contact with it*". See also Menzies J at 17 to similar effect. At 18 Menzies J concluded that the fact that the pole in *Munnings* was located on land that was not owned by the respondent, and suffered differing defects to the pole in *Thompson* afforded "*no ground for distinguishing Thompson's Case*". At 28, Windeyer J also adopted Dixon CJ and Williams J's formulation of duty in *Thompson*, which he described as a "*duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency, such as electricity of a lethal voltage* ". At 29 his Honour held that "*the duty of care that the Commission owed … was a duty which arose from the very fact that it [the pole] was dangerous to trespassers. High voltage electricity is a highly dangerous thing. To bring such a dangerous thing to a locality frequented by members of the public imposed a duty of care*". See also Walsh J at 39-41 and Gibbs J at 49.

26. In ***Brocklands*** *Pty Ltd v Tasmanian Networks Pty Ltd* [2020] TASFC 4, the Full Court considered a negligence claim in respect of damage to property, arising in circumstances where electricity travelled along a statutory power company's high voltage power lines until it reached a pole on the appellant's property. The pole had a transformer attached, which transformed the electricity from high to low voltage before the electricity travelled from the pole to the appellant's premises. A branch fell across the high voltage power line causing a power surge, resulting in high voltage electricity entering the low voltage system on the appellant's property, causing damage: [5]. The Full Court found a duty of care to exist, applying the duty formulated in *Thompson*. At [28], Blow CJ observed "*It is certainly correct that such an analysis [a salient features analysis] is necessary when the circumstances of a case fall outside any accepted category of duty … In light of the High Court's decisions in Thompson and Munnings* *it is clear that the duty of an entity that transmits electricity to persons who might foreseeably suffer harm as a result of the transmission of electricity in an unintended way is an accepted category of duty*" (emphasis added; see also at [29]). See also Estcourt J at [160] and Pearce J at [271].

27. Drawing these authorities together, where WP transmitted electricity to the PA pole in circumstances where those in the vicinity of WP's transmission might foreseeably suffer harm as a result of the transmission of electricity in an unintended way (to pick up Blow CJ's language in *Brocklands*), WP owed a duty of care to such persons – as the CA found at J[9], [158] – to "*take reasonable care to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system*".

28. While the facts of the present case are not on all fours with *Thompson*, *Munnings* and *Brocklands*, the factual differences are not of significance to whether the case falls within the accepted category of duty. Specifically, as Blow CJ observed in *Brocklands* at [29], the fact that a claim relates to property damage rather than personal injury does not take the case outside the bounds of *Thompson* and *Munnings*. Further, while the duty in *Brocklands* was owed to a consumer of electricity, the duty in *Thompson* and *Munnings* was owed to persons in the vicinity of the respondents' electricity distribution activities, and so the duty is not confined to consumers. Further, while in *Thompson* the offending pole was on the respondent's land, that was not so in *Munnings*. Accordingly, the fact that the PA pole was on Mrs C's land offers no basis for distinguishing the present case.

29. It follows that the Court should conclude that the present case falls within the bounds of *Thompson*, *Munnings* and *Brocklands*, such that WP owed a duty of care to persons in the vicinity of its electricity distribution activities as found at J[9] and [158], being a previously accepted category of duty.

Even if novel, CA was correct to find duty in all the circumstances

30. Even if the present case is not controlled by WP's concession, or the duty found in *Thompson*, *Munnings* and *Brockland*, the CA was nonetheless correct to find a duty of care of the kind described at J[9] and [158] was owed by WP in all the circumstances.

Principles

31. The principles governing the question of whether a statutory authority owes a common law duty of care are relatively well settled. In *Crimmins* at [93] and, later, in *Graham Barclay Oysters* at [84]-[85], McHugh J enumerated six questions by reference to which the issue of duty should be determined. In summary, these questions concerned the reasonable foreseeability of the defendant's act or omission causing injury; the defendant's statutory power to protect a specific class, including the plaintiff, from the risk of harm; the vulnerability of the plaintiff, in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or their interests from

harm; the defendant's knowledge of the risk of harm to the specific class including the plaintiff if it did not exercise its powers; the interaction between the posited duty and the defendant's exercise of 'core policy-making' or 'quasi-legislative functions'; and other supervening reasons in policy to deny the existence of the duty of care, including because the imposition of a duty is inconsistent with the statutory scheme. Each matter will be considered in turn insofar as they are relevant in the present circumstances.

Application of principles to the facts

32. Reasonable foreseeability: It is not in dispute that the risk of harm in question, being the risk of harm by fire to persons or property in the vicinity of WP's electricity distribution system if a pole supporting an aerial electrical cable failed, was both reasonably foreseeable and not insignificant (see above at [14]).

33. Power to protect specific class from risk of harm: The statutory functions of WP under the ECs Act (in particular s 41) placed it in a position where it was engaging in an activity – the distribution of electricity – which inherently gave rise to the foreseeable risk identified above. Indeed, under regs 3, 4 and 7 of the OC Regs, WP is obliged to attach or connect premises to its electricity distribution system, and to energise those premises. However, as noted above at [18], it is uncontroversial that WP has power, on discovering a pole supporting its service cables on a consumer's land which was in danger of collapse, to interrupt, suspend or restrict the supply of electricity to that consumer, unless the consumer repaired or replaced the pole. On this basis alone, WP had "*the power to protect a specific class including the plaintiff … from a risk of harm*" (*Crimmins* at [93]). In short, it had the power to cease supplying electricity thereby preventing the foreseeable risk of harm by fire to persons or property in the vicinity of WP's electricity distribution system eventuating.

34. Moreover, WP's power to protect the specified class from the identified foreseeable risk of harm extended well beyond its ability to cease supplying electricity. For example, WP was empowered as an "*energy operator*" under s 28(3)(c) of the EOP Act to enter upon and occupy land or premises to "*improve works, maintain and conduct undertakings and facilities*" and to carry out (relevantly) "*works requisite, advantageous or convenient to the exercise and performance of the functions of the energy operator or any such function*". By this broad power, WP was able to take steps to protect the specified class from the risk of harm in question by inspecting poles on consumers' premises to which its aerial electrical cables were attached to ensure they were in serviceable condition, and, if not, either requiring a consumer to carry out improvement works, or ceasing to supply

electricity and relocating its service cables to a more secure foundation. Rights of access for the performance of WP's functions, including the maintenance of its system, also were conferred under ss 43(1); 46(1)-(2); 48; 49(c)(v), (d) and (f); and 68 of the EOP Act. More generally, under s 59(2) of the ECs Act, WP has "*all the powers it needs to perform its functions under this Act or any other written law*". Accordingly, WP has the power to do "*anything that [WP] determines to be conducive or incidental to*" the performance of its functions under s 41 of the ECs Act (see s 42(e)), including providing electricity distribution services under s 41. The protection of the specified class from the risk of harm identified above would be "*conducive or incidental to*" WP's provision of electricity distribution services. It follows that WP was empowered to protect the relevant class from the identified risk so as to support the existence of a duty of care.

35. Knowledge: There are concurrent findings to the effect that WP knew, or ought to have known, of the particular risks posed by a pole supporting an aerial electrical cable failing, including customer poles (see above at [7]). Indeed, WP had specialised knowledge of those risks beyond that which any nearby owner or occupier could be expected to possess by reason of the fact that it had some 625,000-758,000 poles of its own, around 83% of which were made of wood, which it regularly inspected (J[15]; [168]). WP also had and could be expected to have specialised knowledge of the systems reasonably available to mitigate such risks – namely what an effective system of regular inspection would comprise – over and above the knowledge of nearby owners and occupiers by reason of the fact that it undertook such a system of inspection in respect of its own wooden poles.

36. Vulnerability: As between WP and property owners and occupiers in the vicinity of its electricity distribution system, the relationship was characterised by strong vulnerability on the part of the latter. Those persons lacked WP's specialised knowledge as described above, and had no means to inspect or ensure that poles to which WP's service cables were attached on nearby properties were free from the risk of failure. Those persons were at the mercy of both the person on whose property the relevant pole stood, and WP.

37. Consistency with statutory scheme: The imposition of a duty of care on WP to take reasonable care "*to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system*" is consistent with the statutory scheme, for the reasons given in Section F below.

38. Accordingly, the CA was correct to conclude that WP owed a duty of care in the terms set out at J[9] and [158]. Further, if a "*salient features*" analysis was required, it was amply met for the reasons of Blow CJ in *Brocklands* at [31].

D. Breach

39. WP seems to put in issue by AS[2] the question of whether in discharging its duty of care, WP was required to undertake the precautions identified by the CA, namely "*to have a system for undertaking the periodic inspection of wooden point of attachment poles owned by consumers and used to support live electrical apparatus forming part of [WP's] electricity distribution system*": J[9]; [178].

40. It is uncontroversial that a common law duty imposed on a statutory authority "*only imposes a duty to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question*": *Crimmins* at [34] per Gaudron J; see also at [90] per McHugh J. Importantly, in the present context the question of what precautions WP ought to have taken must be assessed by reference to ss 5B and 5W of the CLA. It is not understood that any of these matters are in dispute.

41. Section 5B(2) of the CLA provides that in determining whether a reasonable person (here, a reasonable statutory authority) would have taken a particular precaution against the risk of harm, it is necessary to consider (a) the probability that the harm would occur if care were not taken; (b) the likely seriousness of the harm; (c) the burden of taking precautions; and (d) the social utility of the activity that creates the risk of harm.

42. These matters are each dealt with at J[167]. The conclusions arise out of concurrent factual findings, and are wholly correct. Specifically, as noted above at [6], the courts below found that the probability that harm would occur if point of attachment poles are not inspected is "*high, approaching certainty over time, given the known limited lifespan of wooden poles*" (J[167]), the likely seriousness of the harm is grave (J[167]), and the social utility in the distribution of electricity "*is obvious*" (J[176]), though performance of that function is not incompatible with the periodic inspection of wooden poles supporting critical infrastructure (J[176]). Finally, as to the burden of taking the relevant precaution, the reasoning at J[170]-[173] is unimpeachable and does not appear to be contested.

43. WP does, however, seem to take issue with the finding that it had power to enter a consumer's property for the purpose of inspecting point of attachment poles (see J[175] and AS[80]-[84]). It is accepted that, as Gummow, Hayne and Heydon JJ observed in *Stuart* at [112], "*[t]here can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability*…" However, as

the CA observes at J[175], the powers of entry conferred by s 49 of the EOP Act, and in particular sub-s 49(d), are exercisable for the purposes of that Act, which include the power of entry conferred by s 28 for the carrying out of works advantageous to the performance of the functions of the energy operator. As explained above at [34], and by the CA at J[175], "*[e]ntering onto land to inspect a pole to see that it is capable of safely supporting apparatus forming part of [WP]'s electricity distribution system is work which is advantageous to the performance of [WP's] functions of maintaining and operating its electricity distribution system.*" The Court should therefore conclude that WP had the power to perform the inspections.

44. Accordingly, having regard to s 5B(2) of the CLA and noting that no issue has been raised by WP in respect of s 5W, no error has been identified in the CA's finding that, in order to discharge the duty of care it owed to the plaintiffs, WP was required "*to have a system for undertaking the periodic inspection of wooden point of attachment poles owned by consumers and used to support live electrical apparatus forming part of [WP's] electricity distribution system*": J[9], a system it did not have J[179].

E. Duty of care extends to PA pole

45. As explained above at [10], the question of whether WP's duty required it to take reasonable steps in respect of the PA pole is a question to be dealt with at the breach stage, as this is a factual question going to the standard of care required of WP in all the circumstances. However, if this question is to be dealt with at the duty stage (which is not accepted), having regard to the factors of reasonable foreseeability, power, knowledge, vulnerability and consistency with the statutory scheme dealt with above, this Court should conclude that the duty of care owed by WP extended to taking reasonable steps to avoid or minimise injury and loss or damage to property *up to the point at which there is a complete handover of responsibility by WP to the consumer to whom electricity is being distributed*. Until that handover of responsibility, the relevant risk remains reasonably foreseeable, there remains vulnerability on the part of property owners and occupiers in the vicinity, and WP retains power to protect the specified class from the risk of harm. This is also consistent with the statutory regime, and in particular s 25(1)(b) of the E Act, which requires WP to take reasonable precautions in the "*actual supply of electricity to the premises of a consumer ... to the position on the said premises where electricity passes beyond the service apparatus of the network operator*".

46. More specifically, by attaching its service cable to the PA pole, WP ensured that for at least a portion of the time electricity was transferred through infrastructure supported by

the PA pole – namely at least up until the time when electricity passed beyond WP's meter and fuses into Mrs C's main switch and Mrs C's submains fuses (primary judgment [35]) – electricity had not yet passed *beyond* its service apparatus. It follows that there was not a complete handover of responsibility by WP to Mrs C *prior to* WP's supply of electricity via the PA pole. As such, the PA pole was (and other point of attachment poles on consumer premises are) a point of shared responsibility.

47. In this way, WP made use of the PA pole within *WP's* electricity distribution system. With the consent of Mrs C, WP used the PA pole as the support which enabled the handover of electricity from WP to Mrs C. This was enough to bring the PA pole within WP's duty of care. The fact that the PA pole was on Mrs C's land and served dual functions – *both* supporting WP's electricity distribution system *and* supporting Mrs C's electricity system from the point at which electricity passed beyond WP's meter and fuses – does not change the position. It simply means that, as explained above, the PA pole was a point of *shared* responsibility.

48. If the PA pole is unable to perform its function as a support for WP's system, there are a range of foreseeable ways in which the electricity which WP is distributing might escape and cause harm. That escape might occur after the electricity has passed to Mrs C's control, but depending upon how the PA pole fails, it could just as easily cause electricity to escape from WP's service apparatus attached to the pole. This again goes to demonstrate the parties' shared use and responsibility for the PA pole.

49. Importantly, the duty of care is not limited temporally to the time at which WP *installed* its service apparatus on the PA pole or *performs work on* the PA pole, which is the tenor of WP's submissions: AS[60]. There is no rationale – having regard to the factors giving rise to the duty of care – for imposing such a limitation on the duty. Further, such a limitation sits uncomfortably with the findings in *Thompson*, *Munnings* and *Brocklands*.

50. Accordingly, even if these questions are addressed at the duty stage of the analysis (rather than breach where they more properly belong), the Court should conclude that WP's duty of care extended to taking reasonable care to avoid or minimise injury to persons in the vicinity of its electricity distribution system, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system, *up to the point at which there is a complete handover of responsibility by WP to the consumer to whom electricity is being distributed*. This framing of the duty is at a sufficiently high level of generality, such that the necessary factual questions remain open at the breach stage: *Graham Barclay Oysters* at [106] per

McHugh J. Relevantly for present purposes, that point occurred at a point in time *after* electricity had been supplied through WP's service apparatus attached to the PA pole, and so the scope of the duty extended to taking reasonable care to avoid the risks associated with the failure of the PA pole.

F. Response to WP contentions

Ground 2(a): Control

51. WP contends that it did not exercise sufficient "control" over the PA pole so as to give rise to a common law duty of care of the kind found by the CA. Even if this contention is to be dealt with at the "*duty*" stage (which is not accepted), it must be rejected.

52. *First*, the submission that WP lacked sufficient control to found a common law duty of care is directly inconsistent with WP's concession that "*in the operation of its electricity distribution system, it owes a duty to exercise reasonable care to deal with the risk of fire from that system*": J[152]. In light of this concession, the starting point must be that WP accepts that it does, at least, have sufficient "*control*" in the relevant sense to found a duty of care of the kind conceded. Accordingly, all that could be in issue on Ground 2(a) is whether or not that control was sufficient to support the duty of care as found by the CA, to the extent of any difference between that formulation of the duty conceded by WP. As explained above at [22], there is no substantive difference between WP's conceded duty and that found by the CA. It follows that Ground 2(a) must be dismissed.

53. *Secondly*, WP's submission on control proceeds from a false premise, being a mischaracterisation of the concept of "control" in this area. Specifically, while at AS[39] WP refers to the "*requisite 'control'*" as being focused on "*physical or legal dominion over the risk of harm that eventuated*", over the course of AS[40]-[66] there is a measure of slippage in WP's description of the concept of "*control*", leading WP ultimately to submit that the requisite form of "*control*" is "*physical control*": AS[47]; [60], [63], [64]. It is not correct to characterise the element of "*control*" in this context as restricted to physical control over a source of harm. Rather, "*control*" in this context simply refers to control "*over the relevant risk of harm*": *Graham Barclay Oysters* at [150]; *Stuart* at [113] and [115]; *Crimmins* at [43]. In certain factual contexts, control *may* reduce to physical control over a source of harm. However nowhere in the authorities is physical control mandated as a threshold requirement to a duty of care arising.

54. In the present context, WP's emphasis on the need for physical control is misplaced. The duty of care found by the CA (and defended by Thiess) is a duty "*in relation to the reasonably foreseeable risk of harm from fire resulting from the exercise of [WP's]*

statutory function of operating and maintaining its electricity distribution system": J[158]. Accordingly, the "*risk of harm*" over which WP must have a measure of control is the "*risk of harm from fire resulting from the exercise of [WP's] statutory function of operating and maintaining its electricity distribution system*". WP plainly has power to control that risk, given it is vested with "*all the powers it needs to perform its functions under [the ECs Act] or any other written law*" (s 59(2) of the ECs Act); its functions include operating and maintaining its electricity distribution system (s 41 of the ECs Act); and WP was performing the function of transmitting electricity to Mrs C at the time of the fire. WP's focus on its control over the *PA pole* is a symptom of its erroneous conflation of the duty of care the CA found it to owe (appropriately focused upon a risk identified at a higher level of generality than the failure of the PA pole), and the reasonable precautions the CA concluded it ought to have taken to discharge its duty (which *did* relate to the inspection of wooden point of attachment poles owned by consumers and used to support live electrical apparatus forming part of WP's electricity distribution system). When issues of duty and breach are disentangled, there can be no doubt that WP exercised sufficient control over the relevant risk to found a duty.

55. In any event, and contrary to AS[59], [51], [54], [65], for the reasons explained above at [33]-[34], WP did have extensive powers to protect the relevant class against the risk of harm from the failure of the PA pole. The fact that Mrs C's power extended to physical control of the PA pole is of no moment as explained above.

56. Indeed, the consequences of Mrs C's physical control of the PA pole should not be overstated. It was not open to Mrs C to treat the PA pole in an unfettered way as she would an ordinary fixture on her land: see [19] above. For practical purposes, she would inevitably need to engage with WP as the person who is distributing electricity onto and through the apparatus attached to the PA pole to ensure the safe continuity of the supply from WP to her premises. This further confirms that the PA pole was an area of shared responsibility, over which both Mrs C and WP had "*control*" in the relevant sense.

57. *Thirdly,* and importantly, the submission at AS[44] to the effect that the "*mere ability to exercise statutory power*" does not constitute the degree of "*control*" necessary to found a duty of care is wrong both having regard to the authorities and also in principle. One can immediately see from the cases of *Thompson* and *Munnings* that a statutory power to act was sufficient to found a duty in circumstances where the relevant statutory authorities, while exercising their electricity distribution functions, had not in fact exercised their powers over the risks of harm that came to pass by reason of their carrying out that

function. Further, and more fundamentally, while the distinction between a statutory authority exercising a power and failing to exercise a power may well be relevant at the breach stage, as a matter of principle no distinction should be drawn between a circumstance where a statutory authority has *in fact* exercised a power and where the authority has the *ability* to exercise the very same power but had not in fact done so prior to the relevant risk of harm coming to pass, for the purpose of assessing whether a duty of care *exists*. Whether or not a particular power was exercised prior to a risk coming to pass may depend on factual considerations wholly disconnected to the foreseeable risk of harm and, therefore, may well be entirely arbitrary for the purposes of the duty analysis. There is no conceptual reason to refuse to impose a duty of care on a statutory authority who has control over the relevant risk of harm, on the basis that the authority's control was not in fact exercised. AS[44], [52]-[55] should be rejected.

58. The extrapolation at AS[57] is a mischaracterisation of the effects of the CA's findings. It ignores the fact that "*control*" is not the only limiting factor on the existence of a duty of care; considerations of reasonable foreseeability, vulnerability and inconsistency with the statutory regime amongst others also operate to restrain the bounds of any duty of care that may be imposed. Further, such a statement ignores the strict limitations on the reasonable precautions required to be taken by a statutory authority by reason of ss 5B and 5W of the CLA. In light of those provisions, it could not be said that the effect of the CA's judgment is to impose on public utilities a duty to "*systematically exercise any statutory power available to it which may reduce or avoid the risk of harm…*"

59. Accordingly, WP's complaints in respect of control are without merit, and Ground 2(a) of the appeal should be rejected. WP had sufficient control to satisfy that aspect of the variety of considerations that gave rise to the duty of care found by the CA.

Ground 2(b): Inconsistency

60. By Ground 2(b) WP contends that the duty found by the CA is "*inconsistent with the implicit negative proposition in the applicable statutory scheme that, on consumer premises, WP has no other duty to maintain property or guard against fire beyond that specified in the E Act, s 25(1)*": AS[69]. This proposition should be rejected for the reasons that follow.

61. It is uncontroversial that the common law will not impose a duty of care on a statutory authority that is expressly or impliedly inconsistent with the applicable statutory regime: *Crimmins* at [27] per Gaudron J. Importantly, however, as Gummow and Hayne JJ observed in *Graham Barclay Oysters* at [148], "*the discernment of an affirmative*

legislative intent that a common law duty exists is not, and never has been, a necessary pre-condition to the recognition of such a duty."

62. WP's argument in this Court that s 25(1) exhaustively governs WP's duty to "*guard against fire*" by negative implication, is directly inconsistent with its concession that it owes a *common law* duty of care to exercise reasonable care to deal with the risk of fire: J[152]. The argument should be rejected on that basis alone.

63. In any event, applying orthodox principles of statutory construction, no negative implication of the kind contended for arises from s 25 of the E Act. This is essentially for the reasons given by the CA at J[135]-[147], but which may be elaborated as follows.

64. *First*, there is nothing in the express terms of s 25(1) to suggest that the legislature there intended exhaustively to regulate a network operator's maintenance obligations in respect of its service apparatus located on the premises of any consumer.

65. *Secondly*, while not determinative, it is relevant to note that WP's discharge of the common law duty of care found by the CA would in no way be inconsistent with WP complying with its obligations under s 25(1) of the E Act.

66. *Thirdly,* as the CA observes at J[137], s 25 is concerned with the obligations of a network operator towards consumers, being "*any person to whom electricity is supplied*" (s 5(1)). There is no reason to infer that the legislature intended s 25 *exhaustively* to regulate not only relations between network operators and *consumers*, but between network operators and *any persons in the vicinity of its electricity distribution system*. The narrow subject-matter of s 25 of the E Act thus weighs strongly against a negative inference being drawn that would render the duty of care found by the CA inconsistent with s 25 of the E Act.

67. *Fourthly*, the contention that s 25(1) should be construed as exhaustively setting out a network operator's maintenance obligations in respect of its service apparatus on the premises of any consumer is inconsistent with the range of express statutory obligations imposed on network operators in legislative instruments related to the E Act. For example, reg 242 of the E Regs obliges a network operator to ensure "*that all the network operator's service apparatus that will be used for supplying electricity to the premises is installed and maintained in accordance with this Act and is safe to use*" and further "*the connection of the supply of electricity does not cause, or is unlikely to cause, any consumers' electric installations to become unsafe*". Further, regs 253-254, impose certain inspection obligations on network operators "*[f]or the purpose of ensuring the safety of consumers' electric installations and consumers' apparatus which forms part of the consumers' electric installation to which the supply relates, and of monitoring the*

work of electrical contractors and other persons licensed under the Act". And s 14 of the EI Act requires network operators to provide for an "*asset management system*" as a condition of a distribution licence, being a system setting out "*measures that are to be taken by the licensee for the proper maintenance of assets used in the supply of electricity and in the operation of … any … distribution system*". The array of statutory obligations imposed on network operators in respect of the maintenance of their service apparatus, including on the premises of any consumer, is a strong contextual indication that the legislature did not intend for the obligations in s 25 to be construed exhaustively.

68. The crux of WP's submission in respect of s 25(1)(a) appears at AS[72], where WP contends that s 25(1)(a) of the E Act contains a "*negative proposition implied by the limited extent of this statutory maintenance obligation*" being a negative implication that the network operator "*is not required to maintain service apparatus that belongs to the consumer*". The thrust of this submission seems to be that, because s 25(1)(a) in terms only imposes an obligation on a network operator in respect of service apparatus "*belonging to*" the *network operator*, it should be inferred that any common law obligation in respect of service apparatus belonging to the *consumer* was intended to be excluded. The submission should be rejected. It is far from clear that the obligation imposed by s 25(1)(a) is so limited, noting the definition of "*service apparatus*" extends to a "*system*" which may well encapsulate property for which a network operator and a consumer have shared responsibility, such as the PA pole. In any event, the fact that a common law duty of care goes *further* than the obligations imposed by the applicable statutory regime does not – without more – found an inconsistency, as the CA correctly observed at J[137]. It cannot be assumed that the legislature intended to confine WP's obligations to those in s 25(1) of the E Act, by reason of the fact that the obligations imposed by that sub-section are limited. In light of the matters set out above at [63]-[67], the better construction of s 25(1) is that no such negative implication arises.

69. WP's reliance upon the Second Reading Speech at AS[73] to support its submission that s 25 was intended to "*demarcate the respective responsibilities of the authority and the consumer at the interface*" does not assist, as the Second Reading Speech does not rise as high as WP contends. While the Speech emphasises that the E Act is intended to resolve ambiguities as to the extent of supply authorities' responsibilities, it does not reveal any legislative intention for the Act *exhaustively* to demarcate responsibilities of network operators to the exclusion of the common law.

70. In any event, even if the submission at AS[72] as to the negative inference to be drawn from s 25(1)(a) were accepted, no inconsistency would arise with the duty of care found by the CA, noting that the formulation of the *duty* does not make reference to precautions that ought be taken by WP in discharging that duty. At most such a construction might bear upon the *reasonable precautions* that are required to be taken by WP in order to comply with the duty of care; specifically, WP could not be required to carry out *maintenance* of consumers' service apparatus in order to discharge the duty of care. Such a conclusion does not assist WP, as the CA's finding at J[145] as to the reasonable precautions WP was required to take to discharge its duty did not extend to carrying out maintenance of consumers' service apparatus. As such, even if a negative implication of the kind for which WP contends were found by this Court, relief would not issue, as neither the CA's findings as to duty nor breach would be called into question.

71. WP's submission that s 25(1)(b) "*also contains a number of implied negative propositions*" at AS[76] must be rejected for similar reasons to those set out above. The fact that the obligation imposed by s 25(1)(b) is limited in certain respects does not itself support an inference that the legislature intended this provision to exclude any common law duty that goes *further* than the provision. This is particularly so in circumstances where s 25 is concerned with the relationship between a network operator and a *consumer* rather than persons in the vicinity of the distribution system as explained above.

72. WP's ultimate contention in respect of inconsistency is summarised at AS[85]. None of the submissions in that paragraph should be accepted. Specifically:

a. No conflicting asset management systems: The CA duty does not "*erec[t] a parallel asset management system as to other people's assets*". Rather, the *discharge* of the duty requires WP regularly to inspect those wooden consumer poles to which WP has attached its own service apparatus. Such inspection is for the specific purpose of avoiding or minimising the risk of injury to certain persons, and loss or damage to their property, from the ignition and spread of fire in connection with the exercise of WP's delivery of electricity through its electricity distribution system. This is a different and narrower task to the "*asset management system*" WP is required to provide as a condition of its distribution licence, and does not in any way conflict with WP's obligations under s 14 of the EI Act, in the sense of there being an impossibility of obedience. No inference can be drawn from the statutory materials that the legislature intended to exclude the possibility of WP having parallel obligations in respect of its own service apparatus and that of consumers by reason of the operation of a common law duty of care.

b. No violation of legislative demarcation of responsibility: s 25(1) does not specifically address "*the demarcation of responsibility at the interface between WP and the consumer*". Indeed, the provision does not purport to regulate a consumer's obligations at all. In any event, even if s 25 is to be construed as demarcating responsibility as between a network operator and a consumer, it says nothing about the relative responsibilities of a network operator and persons who own or occupy property in the vicinity of a network operator's distribution services, being the class of persons to whom the duty of care found by the CA is owed. As such, the duty of care – being directed towards a class other than consumers – does not involve any "*violation*" of a legislative "*demarcation of responsibility*" between network operators and consumers. Moreover, such a "*violation*" would only be of concern if there were a negative implication that s 25 was intended to operate exhaustively, which there is not for the reasons given above.

c. No inconsistency with conditional power to disconnect: There is no inconsistency between the duty of care found by the CA and WP's conditional power to disconnect a consumer's electricity supply; indeed, as explained above the existence of such a power is a factor weighing in favour of the imposition of such a duty of care (as the power means that WP is able to control the relevant risk of harm).

d. No inconsistency arising out of superadded duty of inspection: As explained above, the fact that the statutory scheme may not itself require consumer apparatus to be inspected by WP does not reveal a legislative intention to *exclude* a common law duty of care, the discharge of which requires steps going beyond the statutory scheme.

e. Making discretionary functions obligatory: the broad contention that the posited common law duty of care "*cuts across the overarching feature of the scheme, that WP's functions are discretionary and are to be exercised in accordance with principles identified in the ECs Act*" is misconceived. *First*, it is misleading to describe the WP's functions as necessarily "*discretionary*"; while certain of WP's powers are discretionary, WP is subject to a range of mandatory duties, such as those set out in the OC Regs. *Secondly*, the fact that a common law duty of care requires the exercise of a discretionary power is not itself a basis for concluding that the common law power is inconsistent with the statutory regime; as McHugh J observed in *Graham Barclay Oysters* at [78], "*A public authority invested with a discretionary statutory power may be in breach of a common law duty of care if it fails to exercise the power for the benefit of an individual or class of individuals. In these cases, failure to exercise the power given constitutes actionable negligence that sounds in damages*" (see also *Crimmins* at [80]). *Thirdly*, to the extent

that WP suggests that the common law duty found by the CA somehow converts statutory discretions into mandatory statutory obligations giving rise to an inconsistency, the submission is wrong in law. As McHugh J observed in *Graham Barclay Oysters* at [80], "*it invites error to think that the common law has converted the discretionary statutory power into an affirmative duty to exercise the power. The common law cannot interfere with the exercise of the discretion and require the authority to enforce the power. To attempt to do so would bring the common law into conflict with the legislative intention that the exercise of the power be discretionary. The common law avoids the conflict by holding that in the circumstances the failure to exercise the power is a breach of a common law duty existing independently of the statute.*" Thus the fact that the common law duty may require WP to exercise certain discretionary statutory powers does not "*cut across*" any statutory discretion so as to give rise to an inconsistency. It imposes a wholly independent duty on WP.

73. It follows that the asserted duty is not inconsistent with the statutory scheme, and ground 2(b) of the Notice of Appeal should be dismissed.

PART VI: NOTICE OF CONTENTION OR CROSS-APPEAL

74. Thiess does not rely upon a notice of contention or notice of cross-appeal.

PART VII: TIME ESTIMATE

75. Thiess estimates that it requires 2 hours for oral argument, including on the proposed cross-appeals.

Dated: 1 June 2022

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ANNEXURE A

STATUTES REFERRED TO IN THE FIFTH RESPONDENT'S SUBMISSIONS

	Statute	Version	Relevant Dates
1.	*Civil Liability Act 2002* (WA)	04-a0-07	13 September 2013 - 13 April 2016
2.	*Electricity Corporations Act 2005* (WA)	01-k0-04	1 January 2014 - 17 July 2014
3.	*Energy Operators (Powers) Act 1979* (WA)	05-d0-03	1 January 2014 - 13 June 2019
4.	*Electricity Industry Act 2004* (WA)	02-i0-03	1 January 2014 - 28 March 2018
5.	*Electricity Regulations 1947* (WA)	06-a0-02	8 November 2013 - 14 April 2015
6.	*Electricity Act 1945* (WA)	08-a0-04	13 December 2013 - 28 March 2022
7.	*Electricity Industry (Obligation to Connect) Regulations 2005* (WA)	00-a0-11	4 October 2005 - 5 November 2021