

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND STEWARD JJ

ELECTRICITY NETWORKS CORPORATION
T/AS WESTERN POWER

APPELLANT

AND

HERRIDGE PARTIES & ORS

RESPONDENTS

Electricity Networks Corporation v Herridge Parties
[2022] HCA 37
Date of Hearing: 6, 7 & 8 September 2022
Date of Judgment: 7 December 2022
P5/2022

ORDER

- 1. Application for special leave to cross-appeal filed by the First Respondents with respect to grounds 2 and 3 of the proposed grounds of cross-appeal refused with costs.*
- 2. Application for special leave to cross-appeal filed by the Second Respondents refused with costs.*
- 3. Appeal dismissed.*
- 4. The Appellant pay the costs of the First, Second, Fourth and Fifth Respondents in this Court.*

On appeal from the Supreme Court of Western Australia

Representation

B Dharmananda SC with M J Sims and B K Lim for the appellant (instructed by DLA Piper Australia)

P J Dunning QC with T C Smyth for the first respondents (instructed by Slater & Gordon Lawyers)

C M Harris QC with P Mendelow for the second respondents (instructed by Hall & Wilcox)

Submitting appearance for the third respondents

J C Giles SC with E Bathurst for the fourth respondent (instructed by MinterEllison)

J T Gleeson SC with K I H Lindeman for the fifth respondent (instructed by Wotton + Kearney)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Electricity Networks Corporation v Herridge Parties

Negligence – Duty of care – Where appellant statutory corporation ("Western Power") undertook, operated, managed and maintained electricity distribution system under interconnected statutory framework – Where distribution system delivered electricity to consumers' premises – Where pursuant to statutory powers in performing statutory functions Western Power attached electrical cable and other apparatus to point of attachment pole ("PA pole") owned by and on land of fourth respondent ("Mrs Campbell") and energised her premises – Where Western Power contracted fifth respondent ("Thiess") to undertake works in vicinity of Mrs Campbell's property – Where works included removing and replacing electrical cable attached to PA pole – Where employee of Thiess did not adequately undertake inspection of PA pole to identify signs of deterioration in accordance with industry standards – Where PA pole fell to ground causing bushfire – Whether Western Power owed to persons in vicinity of distribution system duty to take reasonable care to avoid or minimise risk of injury to those persons, and loss or damage to their property, from ignition and spread of fire in connection with delivery of electricity through distribution system.

Words and phrases – "assumption of responsibility", "class of persons", "control", "duty of care", "electricity distribution system", "enter into the field", "exercise of statutory powers", "existence and content of the duty", "inconsistent or incompatible", "intervene in a field of activity", "manner of exercise of the power", "negligence", "reasonable care", "reasonable precautions", "risk of harm", "statutory authority", "statutory functions", "statutory powers".

Electricity Act 1945 (WA), ss 5, 25.

Electricity Corporations Act 2005 (WA), ss 3, 4, 41, 42, 43, 54, 56, 58, 59, 61, 63.

Electricity Industry Act 2004 (WA), ss 3, 4, 5, 6, 7, 31, 57, 58, 103.

Energy Operators (Powers) Act 1979 (WA), ss 4, 28, 43, 46, 48, 49, 54, 57, 58.

Electricity Industry (Obligation to Connect) Regulations 2005 (WA), regs 2, 4, 7.

Electricity Regulations 1947 (WA), regs 241, 242, 265.

1 KIEFEL CJ, GAGELER, GORDON, EDELMAN AND STEWARD JJ. This appeal arises from claims made by a large number of plaintiffs¹ for loss and damage resulting from a bushfire in Parkerville, Western Australia. The fire started on 12 January 2014 when a jarrah pole on the land of the fourth respondent ("Mrs Campbell"), to which the electrical cable and other apparatus of the appellant, Electricity Networks Corporation (which traded as Western Power) ("Western Power"), were attached, fell to the ground causing electrical arcing and igniting dry vegetation around the base of the pole. The pole is referred to as a "point of attachment pole" or "PA pole", being a pole at which an electricity distribution system is attached to the consumer mains.

2 The PA pole that fell was installed on Mrs Campbell's property by her late husband and was in place since at least 1983. It was made of jarrah and was 5.5m tall above the ground and embedded 1.1m into the ground. At the time of the fire, it was approximately 21cm in diameter at ground level tapering to 16cm in diameter at the tip. The PA pole failed below the ground line due to fungal decay and damage by termites.

3 Western Power operated the electricity distribution system² called the South West interconnected system ("SWIS"), which was used to deliver electricity to Mrs Campbell's property. The link by which the distribution system delivers electricity to individual consumers is called a "service cable" when above ground. The service cable is owned by Western Power. In suburban areas, the service cable typically runs from the nearest distribution pole to the front eave of the consumer's house. In regional and subregional areas, the service cable often runs from the nearest network distribution pole (a "termination pole") across the property boundary to a privately owned PA pole. From there, electricity will run to the consumer's residence, either underground or above ground.

4 Western Power's distribution system was attached to Mrs Campbell's property in the following way:

"A **service cable** owned by Western Power ran from a network distribution pole, referred to as a **termination pole**, on the road adjacent to

1 The first to third respondents to this appeal, respectively referred to as the "Herridge Parties", the "IAG/Allianz Parties" and the "RAC Parties". The RAC Parties filed a submitting appearance in this Court.

2 Electricity suppliers, not Western Power, supply electricity to consumers through the SWIS.

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Mrs Campbell's Parkerville property. The termination pole and the service cable were owned and maintained by Western Power. The service cable was the main conductor for the conveyance of electricity from the termination pole to the PA pole.

As the service cable approached the PA pole, it passed through a wedge clamp hooked onto an attachment hook which was bolted to the side of the PA pole about 25 cm from its top. The attachment hook bore the weight of the service cable. The cable then looped back out of the clamp and into the **mains connection box**. Inside the mains connection box, electricity passed from the wires of the service cable to the wires of the **consumer mains**. The mains connection box was located adjacent to the top of the PA pole and was supported in that position by a PVC conduit containing the consumer mains. The PVC conduit was secured to the PA pole. The attachment hook, mains connection box, consumer mains and PVC conduit were owned by Mrs Campbell.

Electricity was conveyed from the mains connection box by the consumer mains cable which ran, in a PVC conduit, down the side of the PA pole into the metal **switchboard enclosure**, which was attached to the PA pole and owned by Mrs Campbell. Inside the switchboard enclosure was a meter panel owned by Mrs Campbell, to which was affixed three service protection devices or fuses belonging to Western Power and a meter belonging to Western Power. Also affixed to the switchboard were three submains fuses, a mains neutral link and the mains switch belonging to Mrs Campbell.

After passing from the consumer mains cable, through the meter where it was measured, and then Western Power's fuses, electricity passed through Mrs Campbell's main switch and Mrs Campbell's submains fuses. Electricity was then conveyed by an insulated and sheathed electrical cable owned by Mrs Campbell and known as the **submains cable**. The submains cable exited the switchboard enclosure through a hole in the bottom of the enclosure and continued in a PVC conduit attached to the PA pole and then underground to a distribution board near Mrs Campbell's house on the property." (footnotes omitted)

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The fifth respondent, Ventia Utility Services Pty Ltd (formerly known as Thiess Services Ltd) ("Thiess"), carried on a business of, among other things, constructing and maintaining electricity distribution system installations and was contracted by Western Power to construct, maintain and manage aspects of Western Power's distribution system. The relationship between Western Power

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and Thiess was one of principal and independent contractor. Thiess was contracted by Western Power to undertake works in the vicinity of Mrs Campbell's PA pole in July 2013 ("the July 2013 works"). Those works, part of a broader series of works, included replacing Western Power's termination pole adjacent to Mrs Campbell's property from which its service cable ran across her property boundary to the PA pole. Replacement of the termination pole required removing and replacing the service cable between the termination pole and the PA pole.

6 The trial judge found that industry practice required steps to be taken before performing works like the July 2013 works, including inspecting and sounding (striking with a hammer, axe or solid bar) the PA pole to identify signs of deterioration, as well as digging around the base of the pole to allow detection of one or both of surface decay and termite attack in the below ground critical zone. Thiess' leading hand did not perform a sounding test on the PA pole in accordance with industry standards: he did not perform the necessary hammer test adequately and he did not adequately dig around the base of the PA pole.

7 Four proceedings were brought in the Supreme Court of Western Australia by owners of properties³ damaged or destroyed by the Parkerville bushfire claiming damages for loss and damage as a result of the negligence of, or nuisance caused by, Western Power, Thiess and Mrs Campbell (collectively, "the defendants"). There were also a number of cross-claims and claims for contribution between the defendants.

8 The main issue at trial was the defendants' liability, if any, for the failure and collapse of the PA pole and the subsequent fire and damage. The trial judge found Thiess and Mrs Campbell liable to the plaintiffs in negligence and nuisance, and apportioned liability between them as 70 per cent to Thiess and 30 per cent to Mrs Campbell.

9 The trial judge relevantly found that Thiess owed the plaintiffs a duty to take reasonable care to perform its work on connected assets so that the assets were, as a result of the performance of its work, in a safe and fit condition for use in the supply of electricity and to take reasonable care to ensure that any assets on which it worked otherwise remained in a safe and fit condition for use in the supply of electricity after its work had been completed. Then, having regard to s 5B of the *Civil Liability Act 2002* (WA) ("the CLA"), the trial judge found that Thiess had breached that duty of care by failing to adequately train and supervise the line crew

3 Namely, the Herridge Parties, the IAG/Allianz Parties and the RAC Parties.

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and failing to exercise due care and skill in inspecting the PA pole in accordance with its contractual obligations to Western Power and industry standards.

10 The trial judge relevantly found that Mrs Campbell owed the plaintiffs a duty to take reasonable care to inspect and maintain the PA pole in a safe and serviceable condition, that a reasonable person in the position of Mrs Campbell would have taken the precaution of arranging for appropriate inspections of the PA pole and that, within the meaning of s 5B of the CLA, she had breached her duty because she took no steps to procure the necessary inspections, or any inspection, of the PA pole.

11 The trial judge then found, for the purposes of s 5C of the CLA, that each of Thiess' and Mrs Campbell's breaches of duty caused the plaintiffs' loss resulting from the fire.

12 All claims against Western Power were dismissed. The trial judge found Western Power owed the plaintiffs a duty of care – the "pre-work inspection duty of care": that before undertaking works on the PA pole and when undertaking those works, Western Power had a duty to take reasonable care to inspect the PA pole to ascertain whether it was in a safe and fit condition for use in the supply of electricity and if, when undertaking a pre-work inspection, or when undertaking works on the PA pole, Western Power identified that the PA pole was not in a safe and fit condition for use in the supply of electricity, a duty not to use the PA pole in or in connection with the supply of electricity. The trial judge, however, rejected the contention that Western Power had breached that duty of care by failing to supervise Thiess' line crew or otherwise ensure that the line crew inspected the PA pole in accordance with industry practice and by failing to implement systems for training or instructing the line crews to conduct pre-work pole inspections in accordance with industry practice.

13 The trial judge concluded that Western Power had taken reasonable precautions to ensure that qualified and competent personnel carried out the work, including the pre-work inspections of wooden poles, by retaining a competent, reputable and experienced contractor, namely Thiess, to carry out the work under a contract which required Thiess to engage personnel to perform the work who were competent, had all the necessary skills, training and qualifications to carry out the work in accordance with the contract, and had been inducted by Thiess and were able to perform the work without the supervision of Western Power's personnel. In sum, the trial judge found Western Power had discharged its pre-work inspection duty of care by engaging and instructing Thiess to carry out the relevant work, including the inspection of the PA pole. The trial judge was not satisfied that a reasonable person in the position of Western Power would have

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taken any additional steps to implement systems for training or instructing line crews to conduct pre-work pole inspections in accordance with industry practice. The trial judge rejected the plaintiffs' contention that the pre-work inspection duty of care was non-delegable.

14 All parties, other than Western Power, appealed or cross-appealed to the Court of Appeal of the Supreme Court of Western Australia. Western Power did not appeal the trial judge's finding that it owed the plaintiffs the pre-work inspection duty of care. The reasons for decision of the Court of Appeal were detailed and addressed many issues. It is necessary to deal only with those aspects of the Court of Appeal's reasons relevant to Western Power's appeal to this Court and to the applications for special leave to cross-appeal filed in this Court by the Herridge Parties and the IAG/Allianz Parties in respect of whether the pre-work inspection duty of care was non-delegable.

15 First, the Court of Appeal held that Western Power 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. That duty of care was broader than the duty found by the trial judge in two ways: it was broader in its temporal scope and it was not limited to occasions when work was to be, or was being, done. The Court of Appeal held that Western Power breached that broader duty of care by failing to have a system for the periodic inspection of wooden PA poles owned by consumers and used to support live electrical apparatus forming part of Western Power's electricity distribution system.

16 Western Power's sole ground of appeal to this Court challenged the imposition on it of that broader duty of care on the basis that the Court of Appeal erred "[i]n holding that [Western Power] owed a duty of care requiring it to have a system for inspecting wooden point of attachment poles owned by consumers". It was said that Western Power's "functions do not give rise to a relationship, especially as concerns control, which supports the asserted duty" and that "the asserted duty is inconsistent with the statutory scheme". In so doing, however, much of Western Power's argument on appeal was focused on that "system" of inspection. But, as has been seen, the Court of Appeal held that Western Power's failure to have such a system of inspection amounted to a *breach* of the broader duty of care. In attempting to frame the duty found by the Court of Appeal as *including* the requirement to have a system of inspection, Western Power's appeal sought to attack a duty which was not formulated below. Furthermore, the Court of Appeal's finding of breach was not raised by Western Power's Notice of Appeal, and Western Power did not seek leave to appeal that finding. The case therefore

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stands and falls on whether Western Power owed the broader duty of care. For the reasons that follow, Western Power's appeal to this Court against the imposition on it of that broader duty should be dismissed with costs.

17 Second, the Court of Appeal upheld the finding of the trial judge that Western Power's pre-work inspection duty of care was not a non-delegable duty. If Western Power was successful in its appeal to this Court, the Herridge Parties and the IAG/Allianz Parties sought special leave to cross-appeal against that finding. Given that Western Power is unsuccessful in its appeal, and that the Herridge Parties and the IAG/Allianz Parties chose to make that application for special leave conditional, it is inappropriate to grant those parties special leave to cross-appeal in relation to non-delegability and those applications are refused with costs. It is unnecessary to address that issue further.

18 These reasons will consider the applicable principles for determining the existence or otherwise of a common law duty of care allegedly owed by a statutory authority, before turning to consider the existence and content of the broader duty imposed on Western Power, by reference to the terms, scope and purpose of the statutory framework and, in that context, the statutory functions and powers which Western Power in fact exercised.

Principles

19 There is no freestanding common law rule which fixes whether and when a common law duty of care upon a statutory authority might, or might not, arise⁴. Statutory authorities take many forms and have different functions and powers. It is wrong to treat all statutory authorities alike.

20 The starting point for analysis of any common law duty of care that might be owed by any statutory authority must always be the particular statutory framework within which the statutory authority operates⁵:

"The existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms,

4 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 343-345 [18]-[20], 376-377 [125]-[126], 385-388 [156]-[165], 411-412 [230]-[232]; cf 361 [77], 370-371 [106]-[110]. See also *Stovin v Wise* [1996] AC 923 at 937-938, 953-955.

5 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 596-597 [146] (emphasis added).

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scope and purpose of the relevant statutory regime. The question is whether that regime *erects* or *facilitates* a relationship between the authority and a class of persons that, *in all the circumstances*, displays sufficient characteristics answering the criteria for intervention by the tort of negligence."

And in formulating a common law duty, it is important to keep in mind the distinction between the existence and content of the duty (who owes the duty, whom do they owe the duty to, and what kind of risks of harm must they take reasonable care to minimise or avoid?) and questions of breach (what were the reasonable precautions required in the circumstances, and did the person discharge the duty?)⁶.

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The two propositions – that there is no freestanding common law rule which fixes whether and when a common law duty of care upon a statutory authority might, or might not, arise, and that the starting point for the analysis of any such duty is the terms, scope and purpose of the applicable statutory framework – require first that the functions of the statutory authority are identified and, second, that the statutory powers that the statutory authority in fact did exercise in performance of those functions (as well as those which it could have exercised but did not) are identified.

6 See, eg, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 30-31 [65]; *Graham Barclay* (2002) 211 CLR 540 at 585 [106], 611 [192]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 432-435 [25]-[32], 441 [54], 443-444 [64], 447 [73], 454 [98]; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 247 [85], citing *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48. See also Barker et al, *The Law of Torts in Australia*, 5th ed (2011) at 418-419 [8.1]; Luntz et al, *Luntz & Hamblly's Torts: Cases, Legislation and Commentary*, 9th ed (2021) at 145-149 [2.5.1]-[2.5.13].

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22 Generally speaking, a statutory authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so⁷: "[t]he common law does not superimpose such a duty on a mere statutory power"⁸.

23 But a statutory authority may, by its conduct, assume a responsibility to exercise the power⁹. In that case, the statutory authority may owe a common law duty which requires it to exercise a power which it is under no statutory obligation to exercise. The approach to whether a statutory authority has assumed responsibility to exercise a power, such that it can be tortiously liable for an omission to exercise that power, has sometimes been considered by reference to notions of "control"¹⁰.

24 Sometimes control, in the sense of the *ability* to assert power over another person or their property, has been expressed as though it were the sole criterion of assumption of responsibility. For example, in *Brodie v Singleton Shire Council*, the plurality emphasised that the highway authority had, by powers vested under statute, significant and exclusive power or "control" over the highway which was the source of the risk of harm, and that road users generally were not empowered to manage or change the features of public roads¹¹. There was little focus upon whether the authority had assumed responsibility for repair or whether the driver

7 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459-460. See also *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at 1067 [32]; [2004] 2 All ER 326 at 337-338. As the common law treats natural persons: see *Hargrave v Goldman* (1963) 110 CLR 40 at 66.

8 *Sutherland Shire Council* (1985) 157 CLR 424 at 483.

9 *Pyrenees* (1998) 192 CLR 330 at 345 [20]; *Gorringe* [2004] 1 WLR 1057 at 1070 [43]; [2004] 2 All ER 326 at 340. See also *Sutherland Shire Council* (1985) 157 CLR 424 at 460.

10 See, eg, *Pyrenees* (1998) 192 CLR 330 at 347 [25], 376 [124], 389 [168]; *Crimmins* (1999) 200 CLR 1 at 24-25 [43]-[46], 42-43 [104]-[107], 61 [166], 82 [227], 104 [304]-[305], 116 [357]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102]; *Graham Barclay* (2002) 211 CLR 540 at 598-599 [150]-[152]; *Stuart* (2009) 237 CLR 215 at 254 [113]-[114], 262 [138]. See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552.

11 (2001) 206 CLR 512 at 573-574 [139]-[140]; see also 559 [102]-[103].

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had relied upon that assumption of responsibility¹². The focus of the decision, reflecting the submissions made to this Court in that case, was instead upon whether public authorities enjoy a special immunity from liability in relation to highways. A majority of this Court held that they do not¹³.

25 Further, in the context of omissions, control, in the sense of the ability to exercise power, like the concept of "reliance"¹⁴, should not be treated as an overarching analytical tool in determining whether a common law duty to exercise power should be imposed on a statutory authority that has assumed responsibility to act. Each authority is governed by its own statutory framework, and the subject matter to which an exercise of its statutory powers might be directed will vary. It may be that no assumption of responsibility could arise in the absence of an ability to exercise power, but this appeal does not concern liability for a mere omission to exercise statutory power and these issues need not be further considered.

26 This appeal is concerned with the existence and content of a duty of care that is owed in the *exercise* of statutory powers. But although this appeal does not concern a failure by a statutory authority to exercise particular statutory powers – powers that the statutory authority had, and which it could have exercised but did not¹⁵ – that does not mean that those powers that were not exercised are irrelevant. As explained below, in determining the existence and content of a duty of care arising from the statute, the whole statutory regime must be considered, including powers which have not been exercised but are interconnected with powers which have been exercised.

27 When a statutory authority has entered into the exercise of its statutory powers, the question is whether the relationship between the statutory authority and a class of persons affected by the manner of exercise of the power was such as

12 cf *Sutherland Shire Council* (1985) 157 CLR 424 at 461-463.

13 *Brodie* (2001) 206 CLR 512 at 570-574 [129]-[140], 589-591 [197]-[202].

14 *Pyrenees* (1998) 192 CLR 330 at 343-345 [18]-[20], 376-377 [125]-[126], 385-388 [156]-[165], 411-412 [230]-[232]; cf 361 [77], 370-371 [106]-[110]. See also *Stovin* [1996] AC 923 at 937-938, 953-955.

15 cf *Sutherland Shire Council* (1985) 157 CLR 424 at 443, 460-461, 479, 501-502; *Graham Barclay* (2002) 211 CLR 540 at 574 [78]; *Stuart* (2009) 237 CLR 215 at 225 [11], 253 [108], 256 [118]. See also *Crimmins* (1999) 200 CLR 1 at 18 [25].

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to give rise to a duty of care. The focus of the analysis is upon the relevant legislation – the powers that have been exercised in the performance of the authority's statutory functions – and the positions occupied by the parties. If such a relationship is created, then "the common law imposes a duty in tort which operates *alongside* the rights, duties and liabilities created by statute"¹⁶. A duty cannot arise where it would be inconsistent or incompatible with the statutory powers or duties imposed on the statutory authority or it would be incoherent with the statutory framework¹⁷.

28 Where a statutory authority which, consistent with its express functions, in fact "ent[e]r[s] into the field"¹⁸ of exercising specific powers in the discharge of its functions¹⁹, the exercise of power is sometimes also described in terms of "control": the assumption of control²⁰; the taking "advantage of ... control"²¹; or the "control exercised"²². However described, it is the identification of the statutory authority's powers that it in fact exercised that is critical because it is the manner of the exercise of those powers to which a common law duty of care may attach²³. Having identified the powers that were in fact exercised by the statutory authority

16 *Graham Barclay* (2002) 211 CLR 540 at 597 [147] (emphasis added); cf 597-598 [149].

17 *Crimmins* (1999) 200 CLR 1 at 13 [3], 19 [27], 39 [93], 42 [104], 45 [112], 46 [114], 76 [213]; *Sullivan v Moody* (2001) 207 CLR 562 at 580 [50], 581 [55]-[56], 582 [60], [62]; *Graham Barclay* (2002) 211 CLR 540 at 597-598 [147], [149]; *Stuart* (2009) 237 CLR 215 at 254 [113].

18 *Pyrenees* (1998) 192 CLR 330 at 372 [115]. See also *Graham Barclay* (2002) 211 CLR 540 at 576 [81]; *Stuart* (2009) 237 CLR 215 at 261 [135].

19 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220; *Sutherland Shire Council* (1985) 157 CLR 424 at 458, 484, 501; *Pyrenees* (1998) 192 CLR 330 at 391-392 [177]; *Stuart* (2009) 237 CLR 215 at 255-256 [117].

20 *Howard v Jarvis* (1958) 98 CLR 177 at 183; *Stuart* (2009) 237 CLR 215 at 249 [90].

21 *Burnie* (1994) 179 CLR 520 at 556.

22 *Stuart* (2009) 237 CLR 215 at 254 [113]; see also 261 [136].

23 See *Cox Bros (Australia) Ltd v Commissioner of Waterworks* (1933) 50 CLR 108 at 119; *Caledonian Collieries* (1957) 97 CLR 202 at 220; *Pyrenees* (1998) 192 CLR 330 at 391-392 [177]; *Graham Barclay* (2002) 211 CLR 540 at 576 [81].

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in the performance of its functions, the question is: does the common law impose on the statutory authority a duty of care as to the manner of its exercise of those statutory powers (or performance of its statutory duties)²⁴? And in answering that question, it is often helpful to ask whether the statutory authority has exercised its powers to "intervene in a field of activity" in a manner which has increased the risk of harm to persons whom it had the power to protect²⁵.

29 Put in different terms, a statutory authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others where a common law duty of care attaches to the manner of the exercise of those powers²⁶.

30 As has been observed, a statutory authority which enters upon the exercise of its statutory powers with respect to one of its functions may be subject to a common law duty to exercise those powers with reasonable care. However, the reasonable precautions that are required to discharge that common law duty in the exercise of those powers will often depend upon the nature of the powers which are to be exercised and the circumstances in which they will be exercised. Further, an absence of a continuation of the exercise, or an absence of further exercise, of those or any interconnected powers "may be difficult to separate from the

24 *Sutherland Shire Council* (1985) 157 CLR 424 at 458, 484; *Pyrenees* (1998) 192 CLR 330 at 391-392 [177].

25 *Graham Barclay* (2002) 211 CLR 540 at 576 [81], citing *Knightley v Johns* [1982] 1 WLR 349 at 357-358; [1982] 1 All ER 851 at 857-858, *Marshall v Osmond* [1983] QB 1034 at 1038, *Sutherland Shire Council* (1985) 157 CLR 424 at 460 and *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004 at 1031, 1042. See also *Thompson v Bankstown Corporation* (1953) 87 CLR 619 at 628-629, 637; *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1 at 5, 10-11, 17-18, 28-29, 41, 49; *Sutherland Shire Council* (1985) 157 CLR 424 at 479.

26 See *Sutherland Shire Council* (1985) 157 CLR 424 at 459-460; *Pyrenees* (1998) 192 CLR 330 at 391-392 [177]. See also *Caledonian Collieries* (1957) 97 CLR 202 at 220, quoted in *Sutherland Shire Council* (1985) 157 CLR 424 at 436, 484, *Pyrenees* (1998) 192 CLR 330 at 391 [177], *Crimmins* (1999) 200 CLR 1 at 29 [62] and *Stuart* (2009) 237 CLR 215 at 256 [117].

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exercise which has already occurred and that exercise [or failure to exercise] may then be said to have been performed negligently"²⁷.

31 The two propositions – that there is no freestanding common law rule which fixes whether and when a common law duty of care upon a statutory authority might, or might not, arise, and that the starting point for the analysis of any such duty is the terms, scope and purpose of the applicable statutory framework – are consistent with the observations of Mason J in *Sutherland Shire Council v Heyman*²⁸ that when a statute sets up a "public authority" and arms it with statutory functions and appropriate powers for the attainment of certain objects in the public interest, including policy making and discretionary functions, it is preferable to express and analyse any duty that it allegedly owes in the exercise of its functions or powers by reference to those broader considerations²⁹. The distinction between "policy making" functions and "operational" functions has been criticised³⁰, and no rigid distinction can be drawn. But those broader considerations are considered as part of the statutory framework which informs the existence and content of the duty in those cases³¹. In any event, this appeal is not concerned with a public authority or public utility of the kind examined in *Sutherland Shire Council*. Western Power had no policy making functions. As will be seen, Western Power was a profit making enterprise obliged to undertake, operate, manage and maintain an electricity distribution system.

32 These reasons speak of the common law imposing a duty of care on a statutory authority. That language recognises that the common law and statute

27 *Pyrenees* (1998) 192 CLR 330 at 392 [177], citing cf *Sutherland Shire Council* (1985) 157 CLR 424 at 479, *Fellowes v Rother District Council* [1983] 1 All ER 513 at 522 and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 763.

28 (1985) 157 CLR 424.

29 *Sutherland Shire Council* (1985) 157 CLR 424 at 457-458, 469; see also 500. cf *Pyrenees* (1998) 192 CLR 330 at 358-359 [67]-[68], 392-395 [179]-[184]; *Crimmins* (1999) 200 CLR 1 at 36-38 [84]-[90].

30 *Pyrenees* (1998) 192 CLR 330 at 358-359 [67]-[68], 393-394 [180]-[182]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 484-485 [138]-[140]; *Crimmins* (1999) 200 CLR 1 at 37 [86].

31 *Stovin* [1996] AC 923 at 946-947.

interact and operate concurrently³². As these reasons emphasise, the *starting point* of any inquiry about whether or when a statutory authority owes a common law duty to take reasonable care will be the statute and, where the authority has entered the field, what statutory powers it has exercised and in what circumstances. Holding that the statutory authority in this case owed a common law duty to exercise those powers in the discharge of its functions with reasonable care is consistent with and required by the principles of negligence that apply more generally, whether to natural persons, bodies corporate or other commercial enterprises³³. Here, we are concerned with a statutory authority which has exercised its statutory powers in the discharge of its statutory functions and in so doing has created relationships which give rise to a common law duty of care.

- 33 It is the functions and powers of Western Power, in the context of the terms, scope and purpose of the statutory framework, that are addressed next.

Statutory framework and Western Power

- 34 The Electricity Networks Corporation, trading as Western Power, was established in 2006 as a statutory corporation by s 4(1)(b) of the *Electricity Corporations Act 2005* (WA)³⁴. Pursuant to an interconnected statutory framework, Western Power undertook, operated, managed and maintained the SWIS electricity distribution system, which was used to deliver electricity to consumers³⁵ premises, including Mrs Campbell's property.

32 See *Brodie* (2001) 206 CLR 512 at 532 [31].

33 Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at 177-178, 215.

34 *Electricity Corporations Act*, s 4(1)(b) read with the definition of "Electricity Networks Corporation" in s 3(1). Section 4(1)(b) commenced by proclamation on 1 April 2006: *Electricity Corporations Act*, s 2(2)(a); *Western Australian Government Gazette*, No 53, 31 March 2006 at 1153.

35 The consumers were customers of the Electricity Generation and Retail Corporation (trading as Synergy), a different statutory corporation, which generated and sold electricity to customers by using Western Power's electricity distribution system.

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Western Power's functions

35 Western Power's principal functions, set out in Subdiv 3 of Div 1 of Pt 3 of the *Electricity Corporations Act*, relevantly included³⁶:

"(a) to *manage*, plan, develop, expand, enhance, improve and reinforce *electricity transmission and distribution systems* and provide and improve electricity transmission and distribution services;

...

(d) to provide services that improve the efficiency of electricity supply and the management of demand on *electricity transmission and distribution systems*;

...

(i) to *undertake, maintain and operate* any works, system, facilities, apparatus or equipment required for any purpose mentioned in this section."

36 Western Power was also given specific statutory functions to do anything that it determined to be conducive or incidental to the performance of those functions³⁷ and to do anything that it was authorised to do by any other written law³⁸. That last provision is important. It recognises that the *Electricity Corporations Act* is but one part of the relevant and interconnected statutory framework. It will be necessary to notice some features of that framework.

37 Western Power's functions in the *Electricity Corporations Act* were subject to a number of specific statutory provisions in that Act. First, the fact that Western Power had a function given to it by the *Electricity Corporations Act* did not impose a duty on it to do any particular thing and, subject to that Act and any

36 *Electricity Corporations Act*, s 41 (emphasis added).

37 *Electricity Corporations Act*, s 42(e).

38 *Electricity Corporations Act*, s 42(f).

direction given to Western Power under that Act, Western Power had a discretion as to how and when it performed the function³⁹.

38 Second, Western Power was required⁴⁰ to perform its functions in accordance with its strategic development plan⁴¹ and its statement of corporate intent⁴² as existing from time to time and, significantly, in performing its relevant functions, it was also required to do so in accordance with "prudent commercial principles" and to "endeavour to make a profit, consistently with maximising its long term value"⁴³.

39 Third, the performance of Western Power's functions was relevantly limited to the geographical area of the SWIS electricity distribution system⁴⁴, which was defined to mean⁴⁵:

"the interconnected *transmission and distribution systems*, generating works and associated works –

- (a) located in the South West of the State and extending generally between Kalbarri, Albany and Kalgoorlie; and
- (b) into which electricity is supplied by one or more of the electricity generation plants at Kwinana, Muja, Collie and Pinjar,

as expanded *or altered from time to time*".

40 In sum, Western Power was a statutory corporation, a commercial body with a profit making purpose and with no policy making functions, which was

39 *Electricity Corporations Act*, s 56.

40 *Electricity Corporations Act*, s 58.

41 *Electricity Corporations Act*, Pt 5, Div 1.

42 *Electricity Corporations Act*, Pt 5, Div 2.

43 *Electricity Corporations Act*, s 61(1).

44 *Electricity Corporations Act*, s 43(1).

45 *Electricity Corporations Act*, s 3(1) definition of "South West interconnected system" (emphasis added).

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required to act on prudent commercial principles endeavouring to make a profit from its prescribed statutory functions, including, relevantly, that of undertaking, operating, managing and maintaining the SWIS electricity distribution system as well as any works, system, facilities, apparatus or equipment required for those purposes.

Licence to construct and operate and obligation to connect distribution system

41 Although the *Electricity Corporations Act* identified Western Power's functions, among others, as undertaking, operating, managing and maintaining a distribution system, s 7(3) of the *Electricity Industry Act 2004* (WA) provided that Western Power could not construct or operate that distribution system except under the authority of, relevantly, a distribution licence⁴⁶. A distribution licence authorised the licensee – Western Power – to construct and operate one or more distribution systems, or to operate one or more existing distribution systems⁴⁷. Under the *Electricity Industry Act*, "operating" a distribution system included maintaining the works or system and making modifications necessary or desirable for the operation of the works or system⁴⁸. At the relevant time, "distribution system" was defined in the *Electricity Industry Act* to mean "any apparatus, equipment, plant or buildings used, or to be used, for, or in connection with, the transportation of electricity at nominal voltages of *less than 66 kV*"⁴⁹. "Apparatus" was not defined in the *Electricity Industry Act*, but was relevantly defined in two other Acts within the statutory framework to mean "any apparatus, equipment, plant, or appliance in which [energy or electricity] is capable of being, or is, or is intended to be transmitted, distributed, used,

46 The licensing requirements applied to Western Power as a "person" despite the fact that it, in supplying electricity, was performing a function under the *Electricity Corporations Act: Electricity Industry Act*, s 6.

47 *Electricity Industry Act*, s 4(1)(c) read with s 3 definitions of "licence" (para (c)) and "distribution licence".

48 *Electricity Industry Act*, s 3 definition of "operate".

49 *Electricity Industry Act*, s 3 definition of "distribution system" (emphasis added). "[T]ransmission system" was defined in the same terms but where nominal voltages were 66 kV or higher: *Electricity Industry Act*, s 3 definition of "transmission system".

consumed or converted, and includes any meter, fitting, or connection"⁵⁰. A distribution licence was required to be designated to apply to one or more areas of the State specified in the licence⁵¹ and a distribution licence did not authorise Western Power to supply services for the purpose of the supply of electricity to a prescribed customer by a person other than, relevantly, the Electricity Generation and Retail Corporation⁵².

42 Next, Div 3 of Pt 3 of the *Electricity Industry Act*, headed "Connection to distribution system", included s 58(1), which provided that regulations may make provision for and in relation to the connection of premises owned or occupied by a customer to a distribution system⁵³. Section 58(2) provided that, "[w]ithout limiting subsection (1)", the regulations may "require the holder of a distribution licence ... to connect premises of a prescribed class to the holder's distribution system"⁵⁴, prescribe the circumstances in which that obligation arises⁵⁵ and provide that it is a condition of every distribution licence that the holder of the licence must comply with that obligation⁵⁶.

43 The *Electricity Industry (Obligation to Connect) Regulations 2005* (WA), made under s 58 of the *Electricity Industry Act*, imposed obligations upon a

50 *Energy Operators (Powers) Act 1979* (WA), s 4(1) definition of "apparatus"; *Electricity Act 1945* (WA), s 5(1) definition of "apparatus".

51 *Electricity Industry Act*, s 5(1).

52 *Electricity Corporations Act*, s 54(2). At the relevant time, "services" was defined to mean the conveyance of electricity and other services provided by means of network infrastructure facilities, and ancillary services: *Electricity Corporations Act*, s 54(1) definition of "services" read with *Electricity Industry Act*, s 103 definition of "services".

53 *Electricity Industry Act*, s 58(1) read with s 57 definitions of "connect" and "premises".

54 *Electricity Industry Act*, s 58(2)(b).

55 *Electricity Industry Act*, s 58(2)(c).

56 *Electricity Industry Act*, s 58(3)(b).

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"distributor", defined to include a holder of a distribution licence⁵⁷, to "attach"⁵⁸ a premises to a distribution system and to "energise"⁵⁹ a premises attached to a distribution system. "[A]ttach" was defined to mean "to do all that is needed to connect premises to a distribution system except energise the premises"⁶⁰. "[E]nergise" was defined to mean "to complete a connection by establishing, at the meter through which electricity is to be supplied to a customer's premises, a voltage that is capable of being sustained under the expected load conditions"⁶¹.

44 Before turning to the powers exercised in performance of Western Power's functions it is important to recognise that Western Power was also an "energy operator" for the purposes of the *Energy Operators (Powers) Act 1979* (WA)⁶². By s 43(1) of that Act, Western Power took over the assets of its predecessor in title and was given a right of access to those assets "for the purposes of the performance of [Western Power's] functions". The assets were relevantly described as "any works or other things" that had "been placed upon, in, over or under any land" by Western Power's predecessor in title⁶³.

Western Power's powers in the discharge of its statutory functions

45 The critical feature of this appeal is that Western Power stepped into the arena; it exercised specific statutory powers in performing its statutory functions of undertaking, operating, managing and maintaining the SWIS electricity distribution system as well as any works, system, facilities, apparatus or equipment

57 *Electricity Industry (Obligation to Connect) Regulations*, reg 2 para (a) of the definition of "distributor". Western Power was the holder of a distribution licence.

58 *Electricity Industry (Obligation to Connect) Regulations*, regs 4, 5.

59 *Electricity Industry (Obligation to Connect) Regulations*, reg 7.

60 *Electricity Industry (Obligation to Connect) Regulations*, reg 2 definition of "attach".

61 *Electricity Industry (Obligation to Connect) Regulations*, reg 2 definition of "energise".

62 *Energy Operators (Powers) Act*, s 4(1) para (a) of the definition of "energy operator" read with the definition of "electricity corporation".

63 *Energy Operators (Powers) Act*, s 43(1).

required for those purposes, and had attached Mrs Campbell's premises to Western Power's distribution system *and* energised those premises⁶⁴.

46 So, what were the statutory powers that Western Power had in fact exercised in performing its statutory functions of undertaking, operating, managing and maintaining the SWIS electricity distribution system as well as any works, system, facilities, apparatus or equipment required for those purposes?

47 Under s 59(2) of the *Electricity Corporations Act*, Western Power was given all the powers it needed to perform its functions under the *Electricity Corporations Act* – including, relevant to this appeal, s 41 of the *Electricity Corporations Act*⁶⁵ – or any other written law. And for the purpose of performing any function, Western Power was also given specific power, among other things, to acquire, hold, manage, improve, develop and dispose of any real or personal property⁶⁶; to enter into any contract or arrangement⁶⁷; to appoint agents or engage persons under contracts for services to provide professional, technical or other assistance to it⁶⁸; and to carry out any investigation, survey, exploration or boring⁶⁹. These specific powers did not limit the general powers of Western Power under s 59(2) or the other powers of Western Power under the *Electricity Corporations Act* or any other written law⁷⁰. Finally, it had specific power under s 49(d) of the *Energy Operators (Powers) Act* relevantly to "cause any distribution works or service apparatus or related things to be supported by affixing or annexing them to or against any part of a house, building or other structure".

48 In sum, Western Power connected Mrs Campbell's premises to its distribution system by affixing elements of its system (namely, its service cable, fuses and meter) to the PA pole, and energised her premises. In order to perform

64 See [4] and [43] above.

65 See [35] above.

66 *Electricity Corporations Act*, s 59(3)(a).

67 *Electricity Corporations Act*, s 59(3)(b).

68 *Electricity Corporations Act*, s 59(3)(f).

69 *Electricity Corporations Act*, s 59(3)(h).

70 *Electricity Corporations Act*, s 59(5).

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those acts, Western Power exercised statutory powers pursuant to its functions to undertake, operate, manage and maintain its distribution system⁷¹, which was essential for the broader purpose of Western Power providing electricity distribution services⁷². Western Power affixed its apparatus to the PA pole at various points, and continued to use those apparatus, pursuant to broad powers to perform its functions⁷³ and specific powers to cause its distribution system to be supported by affixing it to or against any structure⁷⁴ and its duty to connect and energise premises with power⁷⁵. Put in different terms, Western Power exercised its powers in the performance of its functions. It had to enter into the field⁷⁶ or step into the arena – it had the responsibility to undertake, operate, manage and maintain the SWIS electricity distribution system, and it did.

49 But that is not all. The statutory framework expressly recognised that Western Power required access to land or premises to perform its functions of undertaking, operating, managing and maintaining the SWIS electricity distribution system. Western Power was therefore given the power to enter and re-enter land or premises on which any works, apparatus or system (including any meter, fitting or connection) used by Western Power for the purpose of distributing energy to a consumer were lawfully situated⁷⁷. Significantly, in this context, s 46(9) of the *Energy Operators (Powers) Act* provided Western Power with a broad right of access for the purposes of performing its functions:

"The owner or occupier of any land, premises or thing supplied with energy by an energy operator or in, on or over which any *works* of the energy operator are lawfully situate shall be *deemed to have given consent to the energy operator to enter and re-enter thereon or therein at all reasonable times for the purposes of the performance of its functions* in relation to any

71 *Electricity Corporations Act*, s 41(a), (i).

72 *Electricity Corporations Act*, s 41(a).

73 *Electricity Corporations Act*, s 59(2).

74 *Energy Operators (Powers) Act*, s 49(d).

75 *Electricity Industry Act*, s 58(1); *Electricity Industry (Obligation to Connect) Regulations*, regs 4-8.

76 *Pyrenees* (1998) 192 CLR 330 at 372 [115].

77 See *Energy Operators (Powers) Act*, ss 28(3)(c), 46, 49(c)-(d), 57.

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such supply or *works* and no notice under this Act is required unless an agreement in writing entered into by that owner or occupier with the energy operator in relation thereto otherwise provides." (emphasis added)

"[W]orks" was defined to include "any works, excavation, construction, or thing *used or intended to be used for the purposes of a supply system* or undertaking"⁷⁸. A "supply system"⁷⁹ included "distribution works", which were relevantly defined to mean "any works, apparatus or system, utilised or capable of being or intended to be utilised for the purpose of ... distributing energy to consumers and includes any other equipment or plant used in conjunction therewith, and any part thereof"⁸⁰. And as we have seen, "apparatus" was defined in the *Energy Operators (Powers) Act* broadly to mean "any apparatus, equipment, plant, or appliance in which energy is capable of being, or is, or is intended to be transmitted, distributed, used, consumed or converted, and includes any meter, fitting, or connection"⁸¹.

50 In direct terms, Western Power exercised its powers in performing its statutory functions of undertaking, operating, managing and maintaining the SWIS electricity distribution system and any works, system, facilities, apparatus or equipment required for those purposes. In the exercise of those powers, Western Power's service cable, fuses and meter were on Mrs Campbell's land and, in particular, attached to her PA pole and those apparatus remained there as Western Power exercised its powers in performing its statutory functions of undertaking, operating, managing and maintaining the SWIS electricity distribution system. Western Power exercised those powers continuously.

51 Western Power's exercise of those powers therefore created a relationship between it and all other persons within the vicinity of its electricity distribution system. And a critical feature of that relationship was that Western Power exercised those powers in a manner which created or increased the risk of harm to those persons – persons it had the power to protect. The PA pole only posed the risk that it did because Western Power had attached its live electrical apparatus to it. Identification of the precise point at which Western Power's transportation of

78 *Energy Operators (Powers) Act*, s 4(1) definition of "works" (emphasis added).

79 *Energy Operators (Powers) Act*, s 4(1) definition of "supply system".

80 *Energy Operators (Powers) Act*, s 4(1) definition of "distribution works".

81 *Energy Operators (Powers) Act 1979*, s 4(1) definition of "apparatus".

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electricity using its distribution system was made to, or received by, the consumer⁸², Mrs Campbell, was and is not determinative or necessary.

52 Western Power had a duty to take reasonable care in the exercise of its powers, and the content of that duty relevantly required it 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 – an electricity distribution system which it undertook, operated, managed and maintained in the discharge of its functions and powers by placing its apparatus on Mrs Campbell's land. The common law imposed that duty in tort on Western Power which operated alongside the rights, duties and liabilities created by statute⁸³.

53 Western Power's contentions did not grapple with the fact that it had stepped into the arena and exercised specific statutory powers in performing its statutory functions; or that, even though the PA pole was owned by Mrs Campbell, it was Western Power's activities arising from the exercise of those functions and powers that gave rise to the risk of harm if the pole collapsed. Thus, although Western Power appeared to accept that it had a duty to exercise reasonable care to minimise the risk of fire arising from its distribution system, it then sought to limit that duty to harm arising only from its own property over which it exercised physical control. It sought to further obscure the analysis by framing the relevant risk as the risk of harm "posed by the PA pole" or "the PA pole's potential failure". Western Power's focus then on whether it had a common law duty to exercise a statutory power to inspect, maintain or warn consumers about consumer-owned poles was also necessarily misplaced.

54 Western Power's contentions focused incorrectly on the question of control or ownership of the PA pole, rather than Western Power's activities arising from the exercise of its statutory powers in the discharge of its statutory functions that gave rise to the risk of harm. Western Power's functions and powers were not constrained according to whether its activities would involve works on the land or on things annexed to the land. It had deemed consent from the owner or occupier in relation to both⁸⁴. Indeed, although the submissions on this appeal proceeded on the assumption that the PA pole was a chattel owned by Mrs Campbell separately

82 See, eg, *Electricity Act*, s 25(1)(b), addressed at [56] below.

83 *Graham Barclay* (2002) 211 CLR 540 at 597 [147].

84 *Energy Operators (Powers) Act*, s 46(9).

from her ownership of the land, there might be serious questions about the correctness of that assumption⁸⁵.

55 Next, contrary to Western Power's contentions, the broader duty was not inconsistent or incompatible with the statutory functions and powers imposed on it⁸⁶. It is not necessary to that finding of duty to point to the numerous other powers which Western Power could have exercised, but did not, to take reasonable precautions to prevent the risk of harm from the ignition and spread of fire in connection with its electricity distribution system. Those powers went to questions of breach which were not in issue in this appeal⁸⁷. It is, however, important to consider the other powers in asking whether that duty of care was incoherent with the broader statutory framework⁸⁸. It was not.

56 So, for example, in addition to the statutory functions and powers which were exercised by Western Power and to which reference has already been made⁸⁹, the duty is not inconsistent or incompatible with s 25 of the *Electricity Act 1945* (WA), headed "Duties as to supply of electricity", which imposed two duties on Western Power as a network operator. First, a strict or absolute duty⁹⁰ to maintain certain apparatus in a safe and fit condition for supplying electricity which applied to *service apparatus*⁹¹ belonging to Western Power which was on

85 See *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at 712-713; *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 at 553-554; *N H Dunn Pty Ltd v L M Ericsson Pty Ltd* (1979) 2 BPR 9241 at 9243-9244, 9246. cf *Anthony v The Commonwealth* (1973) 47 ALJR 83 at 89.

86 See fn 17 above.

87 See [16] above.

88 *Crimmins* (1999) 200 CLR 1 at 13 [3], 19 [27], 39 [93(6)], 42 [104], 45 [112], 76 [213]; *Sullivan* (2001) 207 CLR 562 at 580 [50], 581 [55]-[56], 582 [60], [62]; *Graham Barclay* (2002) 211 CLR 540 at 597-598 [147], [149]; *Stuart* (2009) 237 CLR 215 at 254 [113].

89 See [45]-[50] above.

90 *Electricity Act*, s 25(1)(a).

91 *Electricity Act*, s 5(1) definition of "service apparatus" read with the definition of "apparatus", would read: any apparatus, equipment, plant, or appliance in which

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the premises⁹² of any consumer; and, second, a duty⁹³ to take all reasonable precautions to avoid the risk of fire or other damage on a consumer's premises "in the actual supply of electricity to the premises of a consumer ... to the position on the said premises where the electricity passes beyond the *service apparatus*" of Western Power.

57 Nor is the duty incompatible with reg 242 of the *Electricity Regulations 1947* (WA), which imposed a constraint on Western Power, as a network operator⁹⁴, not to supply electricity to any premises unless, among other things, it had ensured that all of its service apparatus that would be used for supplying electricity to the premises was installed and maintained in accordance with the *Electricity Act* and was safe to use⁹⁵ and that the connection of the supply of electricity to the premises did not cause, or was unlikely to cause, any consumers' electric installations to become unsafe⁹⁶.

58 Another example of the duty not being inconsistent or incompatible with Western Power's statutory powers is to be found in s 31(1) of the *Electricity Industry Act*, under which Western Power had the power to interrupt, suspend or restrict the supply of electricity (which included transport through a

electricity is capable of being, or is, or is intended to be transmitted, distributed, used, consumed or converted and includes any meter, fitting, or connection; or any works, apparatus or system which is or is capable of being or is intended to be used for the purpose of conveying, measuring, or controlling electricity supplied from any distribution works to the position on any premises at which delivery of the electricity is, is capable of being, or is intended to be, made to the consumer, and includes any part of the service apparatus, and any other equipment or plant used in conjunction therewith, whether or not the property of a supply authority or Western Power.

92 *Electricity Act*, s 5(1) definition of "premises": "any land, street, structure, or other place, and may include a vehicle or other thing in or in connection with which electricity is or is to be supplied".

93 *Electricity Act*, s 25(1)(b) (emphasis added).

94 *Electricity Regulations 1947*, reg 241(1) definition of "network operator" included any person lawfully operating distribution works and service apparatus.

95 *Electricity Regulations 1947*, reg 242(1)(a).

96 *Electricity Regulations 1947*, reg 242(1)(b).

distribution system⁹⁷) if, in its opinion, it was necessary to do so because of, among other things, potential danger. In doing so, Western Power was required to take reasonable steps to minimise the extent or duration of any interruption, suspension or restriction⁹⁸. That power was in addition to, and did not limit, the powers Western Power, as licensee, had under the *Electricity Act* or the *Electricity Corporations Act* in relation to the interruption, suspension or restriction of the supply of electricity⁹⁹ or ss 48 and 57 of the *Energy Operators (Powers) Act*¹⁰⁰, which relevantly provided certain powers in the event of emergencies. Where s 31 of the *Electricity Industry Act* did not apply to the activity that was interrupted, suspended or restricted, s 63 of the *Electricity Corporations Act* gave Western Power that power without an obligation to take reasonable steps to minimise interruption. That power was also in addition to, and did not limit¹⁰¹, ss 48 and 57 of the *Energy Operators (Powers) Act* (which have just been addressed), or s 58 of that Act, which provided that, subject to certain stated circumstances, Western Power as an energy operator was not bound to supply energy to any person, body or authority, including if in its opinion that supply would interfere with or adversely affect any supply system or would appear to be unsafe or dangerous to life or property¹⁰².

59 On the question of coherence of the duty of care with the statutory framework, Western Power had ample power to discharge its duty of care. Some of

97 *Electricity Industry Act*, s 3 definition of "supply".

98 *Electricity Industry Act*, s 31(3). Western Power was not liable for any loss or damage that arose from such an interruption, suspension or restriction, subject to specific identified exceptions including to the extent that the interruption, suspension or restriction resulted, among other things, from a negligent act or omission of Western Power or an officer or employee of Western Power: *Electricity Industry Act*, s 31(2).

99 *Electricity Industry Act*, s 31(4)(a).

100 *Electricity Industry Act*, s 31(4)(b).

101 *Electricity Corporations Act*, s 63(4).

102 *Energy Operators (Powers) Act*, s 58(2)(c).

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those powers have been addressed¹⁰³. Examples of other powers included: the power to enter land or premises and improve works and maintain undertakings and facilities if requisite, advantageous or convenient to the exercise of Western Power's functions¹⁰⁴; the power to enter any land, premises or things not under Western Power's control or management without consent where notice has been given¹⁰⁵; the power to enter land, premises or things, relevantly, to maintain any supply system, undertaking or things¹⁰⁶; the power to do all things necessary, relevantly, for maintaining or repairing any supply system, undertaking or related works¹⁰⁷; the power to enter land without notice to clear or remove vegetation if Western Power was of the opinion that an occupier of land had not complied with their duty to do so¹⁰⁸; and the power, relevantly, to require a consumer to make adjustments to the manner of operating electrical equipment if in Western Power's opinion the consumer's operation of that equipment would interfere with supply to other consumers¹⁰⁹.

Conclusion and orders

60 For those reasons, the applications for special leave to cross-appeal filed by the Herridge Parties and the IAG/Allianz Parties, seeking to contend that the pre-work inspection duty of care was a non-delegable duty, are refused with costs. The appeal is dismissed with costs.

103 See, eg, *Electricity Corporations Act*, s 59(2)-(3), (5) (see [47] above), s 63 (see [58] above); *Electricity Industry Act*, s 31(1), (4) (see [58] above); *Energy Operators (Powers) Act*, s 43(1) (see [44] above), s 46(9) (see [49] above), s 58(2)(c) (see fn 102 above).

104 *Energy Operators (Powers) Act*, s 28(3)(c).

105 *Energy Operators (Powers) Act*, s 46(2).

106 *Energy Operators (Powers) Act*, s 49(c).

107 *Energy Operators (Powers) Act*, s 49(f).

108 *Energy Operators (Powers) Act*, s 54(2).

109 *Electricity Regulations*, reg 265.

