HIGH COURT OF AUSTRALIA

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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

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

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

NOREEN MERLE CAMPBELL
Fourth Respondent

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

FIRST RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Concise statement of the issues

2 The issue arising on the appeal is whether the Court of Appeal of Western Australia (**CA**) erred in imposing on the Appellant (**WP**), the operator of an electricity distribution network, a duty to persons in the vicinity of its network to take reasonable care to avoid or minimise the risk of injury to those persons, or 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[158]). The CA did not err in either of the ways contended by WP.

3 The apparatus described at A[5]-[6]; J[31]-[35] formed a system that was under the exclusive legal and practical control of WP. The purpose of the system was to convey electrical current from WP's network, the South West Interconnected System (**SWIS**), to the domestic premises of one of its customers, the Fourth Respondent, **Mrs. Campbell**. The 'point of attachment pole' (**PA pole**) was an indispensable part of the system. Legally, WP had expansive and exclusive powers to deal with the system. WP also exercised significant practical control over the system including (by its contractor) by negligently inspecting it prior to works it undertook in July 2013 (J[39]-[44]), and failing to detect its rotten and termite-hollowed features, which had left it with 1 to 2% of its required design bending capacity (J[49]-[51]). WP attempts to avoid control ***first*** by conflating it with the notion of ownership, which is neither useful nor principled. Ownership of the PA pole does not assist in resolving the question of control. ***Secondly***, WP seeks to rely on an unrealistic theory to the effect that the mechanism of harm was – only – the collapse of the PA pole. But the failure of the PA pole would have been of no relevant significance had it not been part of the system by which WP was negligently exercising its statutory powers to maintain and operate its electricity distribution system (J[153]), or had WP not chosen to use the PA pole to support (hold aloft) its service cable (J[154]) and other apparatus. The relevant consequence of the PA pole's fall followed from the fact that it was supporting live electricity infrastructure as it fell.

4 As to the consistency of the duty the CA discerned at J[158] with the applicable statutory regime, WP's arguments do no more than demonstrate that the duty discerned was not a statutory duty. The CA was astute to the proposition that the determination of the existence, nature and scope of a common or general law duty said to be owed by a statutory authority requires consideration of the provisions of the empowering statute at the outset (J[102]; [106]-[126]). The CA's construction of the central provision, s. 25 of the *Electricity Act 1945* (WA) (the **Electricity Act**) (J[125]), was correct: s. 25 has a limited subject-matter (the obligations of the network operator to a consumer, not the world at large) (J[137]), and by textual indication (J[138]) and history (J[139]) is non-exhaustive. In any event, s. 25(1)(a) either positively imposes a duty to inspect a point of attachment pole when necessary to maintain WP's apparatus in a safe and fit condition (J[140]-[144]), or the duty discerned (J[158]) – which could be discharged by periodic or systematic *inspection* only – was consistent with WP's contention as to a

'boundary' or 'interface' of maintenance obligation as between its assets and consumer assets (J[147], [145]). The CA was also correct to reject the unorthodox, legislative-and-other-material-first approach to the interpretation of the legislation (J[146]) WP seeks to recapitulate in this Court (*e.g.* A[73]). The 'inconsistency' issue resolves to the effect that the statutory provisions to which WP points did not, on their proper construction, exhaustively cover the field, such as to leave the common or general law no 'room' to operate. In this Court, as below, WP commences from the presumption of that which falls to be determined. The appropriate order on the Appeal is that it be dismissed, and that WP bear the costs of and incidental to it.

10 5 Subject to a grant of special leave, two issues arise on the First Respondents' cross appeal (CAB 950), and are reached only if the appeal succeeds. The ***first*** is whether the 'pre-work duty' the learned trial judge discerned as a duty of WP (TJ[297]-[304]) was a non-delegable duty. The CA erred in refusing to accept that it was (J[225]-[231]). A combination of the relational factors of WP's complete control over its infrastructure and the plaintiffs' concomitant vulnerability to or reliance on WP,[1] and the hazardous nature of the July 2013 works,[2] gave rise to a duty on WP to ensure that reasonable care was taken in the placement of conductors on supporting structures. The apparently conflicting statements of principle in the authorities of intermediate courts and this Court mentioned at J[215]-[221], as well as the public interest in a resolution of the 20 conflict and the interests of justice, generally and in this case, weigh in favour of a grant of special leave. The argument resolves to the effect that WP's control of that part of the premises on which the July 2013 works took place, combined with their correct characterisation as extra- or ultra-hazardous, has the consequence that the pre-work duty was non-delegable, and liability for the Fifth Respondent's (**Thiess**') negligence should be brought home to WP. The ***second*** issue goes to the apportionment regime.[3] Here the CA erred in two related ways. It viewed the term 'claim' in CLA s. 5AI at too high a level of generality and wrongly concluded that it directed attention to the facts, not the cause of action (J[321]-[332]). And it wrongly held that as a private nuisance action *may*, in particular circumstances (J[325]), including the present (J[329]), require a

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1 *Leichhardt Municipal Council v. Montgomery* (2007) 230 CLR 22 (***Leichhardt***) at [9] and [18] (Gleeson CJ).

2 *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 (***Burnie Port***); *AD & SM McLean Pty Ltd v. Meech* (2005) 13 VR 241 (CA) (***Meech***).

3 *Civil Liability Act 2002* (WA) (the **CLA**), Part 1F.

defendant's having failed to take reasonable care, the apportionment regime in CLA Part 1F was attracted. The question is one of general importance and on which there is a substantive difference of opinion in authority (J[330]-[331]), which would justify the grant of special leave. The point resolves to the effect that private nuisance is not a claim that arises from a failure to take reasonable care, such that CLA s. 5AK is not attracted and liability is not apportionable under CLA Part 1F and, therefore, is joint and several as between Thiess and Mrs. Campbell. The appropriate orders on the cross-appeal, if reached, are at CAB951-2; the parties should have the opportunity to bring in a minute reflecting the Court's reasoning should either of these grounds be reached, and succeed.

Part III: Certification of consideration of Judiciary Act notice

6 WP asserts that notice is not required under s. 78B of the *Judiciary Act 1903* (Cth) (A[3]). The First Respondents agree.

Part IV: Material facts

7 In addition to A[5]-[9]: WP does not know how many poles are in the SWIS, but the number is likely between 625,000 and 758,000, approximately 83% of which are made of wood (TJ[31]; J[15]). In or adjacent to the SWIS are a number of 'consumer poles' (TJ[32]; J[17]), i.e. poles owned by consumers but used by WP to supply electricity to consumers. WP also does not know how many of these are in the area of the SWIS, but there are likely more than 100,000, most of which are outside densely populated urban areas (TJ[32]; J[17]). WP does not know what condition these consumer poles are in, individually or as a fleet, because it does not have a system for inspecting them (J[179]).

8 The PA pole was made of jarrah (J[31], [35]). The service life of an untreated jarrah pole is 15 to 25 years in ground and 15 to 40 years above ground (TJ[302]; J[18]). Common causes of damage to jarrah poles include termite activity and fungal rot, which have been reported as likely causes of numerous collapses of wooden poles in the SWIS area (TJ[302]; J[18]). WP knew or ought to have known that an untreated 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 (TJ[302]; J[19]).

9 The following additional facts are relevant to the First Respondents' proposed cross-appeal on WP's non-delegable duty in performing the July 2013 works. WP engaged an expert network maintenance contractor, Thiess, (TJ[36]-[37]). Pursuant

to a contractual (TJ[37]-[38]; [148]) requirement (TJ[149]), Thiess personnel attended the site on which the PA pole stood on 11 July 2013 to scope the job (TJ[40]; J[40]), on 18 July 2013 to discuss switching arrangements to isolate part of the network (TJ[40]), and on 19 July 2013, a crew attended to undertake it (TJ[41]; J[41]-[42]). The work specified in the relevant works order (TJ[40]) was to replace the termination pole (a pole across the road from the cross-arm pole adjacent to it) and a third pole further uphill (TJ[41]; J[42]). The relevant part of the job (replacing the termination pole) involved: detaching one end of the service cable from the mains connection box on the PA pole and from the attachment hook; detaching the other end of the service cable from the termination pole, and lowering it to the ground; installing a new termination pole; shifting the aerial bundled cable from between the cross-arm pole and the old and new termination poles; attaching the new service cable to the new wedge on the PA pole; and then testing the new connection (TJ[42]; J[42]) (together, the **July 2013 works**).

10 Prior to performing the July 2013 works, Thiess was obliged to perform certain safe-to-work inspections of the PA pole (TJ[150]). An employee gave evidence of having performed the necessary inspection (TJ[154]-[163]), but the learned judge doubted the reliability of his evidence (TJ[172]-[174]) and found that he did not exercise due care and skill, or undertake an adequate inspection (TJ[449], [451]-[453]; J[43]). Thiess has not challenged these conclusions.

Part V: Argument in answer to WP

Control (ground 2(a))

11 The Court has noted that the heading 'Duty of care' preceding s. 5B of the CLA 'is apt to mislead'.[4] The CLA does not provide any criteria by which a duty of care is to be discerned, pre-supposing the existence of a duty to be determined by the application of common law principles.[5] As the CA recognised, a duty is to be stated at neither such a level of abstraction that it is divorced from the facts of the case, nor so specifically that it circumvents the reasonableness analysis to be undertaken at the breach stage of the enquiry: J[148]-[149].

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4 *Adeels Palace Pty Ltd v. Moubarak* (2009) 239 CLR 420 (***Adeels Palace***) at [13]. The Court was speaking of the *Civil Liability Act 2002* (NSW), in which s. 5B is slightly differently worded, but the comment applies equally to the CLA.

5 See: *Adeels Palace* at [22]-[26]; *Department of Housing and Works v. Smith [No 2]* [2010] WASCA 25 at [69]-[77].

12 Duty has been described as a concept that 'allows the Courts to signal… relevant systemic factors going to the issue of liability'.[6] The duty concept is fundamentally relational in nature. A statement of duty necessarily (as here: J[158]) has a positive and a negative aspect: positively, it specifies when a defendant is under a legal obligation to take care; negatively, it specifies the limits of the law's demand for care.[7] The same duty may be susceptible to being stated in various, equally valid, terms. Typically, as here, the differences between competing formulations will reflect the specificity with which the foreseeable harm to be avoided is described (contrast the duty the CA discerned (J[158]), the plaintiffs' pleaded duty (J[150]), and the formulation contended for by Mrs. Campbell (J[160])).

13 Although it remains that there is no 'settled methodology or universal test'[8] for determining a duty, the Court's current approach focuses on the 'salient features' of the relation between plaintiff and defendant.[9] Authority recognises that the defendant's control over the mechanism of harm is one such potential salient feature.[10]

14 The question then becomes: what in this case was the mechanism of harm over which control was or could have been exercised? The argument WP presents at A[48], [49]-[57] turns on the proposition that the fire was caused by the failure of the PA pole (it being the 'thing that posed the risk of harm': A[49]), not by WP's service cable (A[51], last sentence). This is not the mechanism of harm, or the risk to be guarded against; rather, it was the failure of the system referred to at [3] above. The purpose of the system was the supply, from WP's network, of electrical current to Mrs. Campbell's premises. The pleaded risk of harm (6FASC [22]) in the operation of the system was that if it failed, unintended discharges of electricity from it could cause death or serious injury, and property loss and damage, from: electric shock, burning by electric current, and / or burning by electricity-discharge ignited fire. Those consequences could have

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6 J Stapleton, 'Duty of care: Peripheral parties and alternative opportunities for deterrence' (1995) 111 *Law Quarterly Review* 301 at 303, referred to in *Modbury Triangle Shopping Centre Pty Ltd v. Anzil & Anor* (2000) 205 CLR 254 at [99] (Hayne J).

7 See: Barker et al., *The Law of Torts in Australia* (5th ed., 2012), p. 456.

8 See: *Harriton v. Stephens* (2006) 226 CLR 52 at [62] (Kirby J); *Tame v. New South Wales; Annetts v. Australian Stations Pty Limited* (2002) 211 CLR 317 (***Tame and Annetts***) at [249]-[250] (Hayne J); *Stuart v. Kirkland-Veenstra* (2009) 237 CLR 215 (***Stuart***) at [132]-[133] (Crennan J and Kiefel J, as her Honour then was).

9 *Perre v. Apand Pty Ltd* (1999) 198 CLR 180 at [11]-[15]; [100]-[133]; [196]-[221]; [330]-[348] and [406]-[413]; *Caltex Refineries (Qld) Pty Ltd v. Stavar* (2009) 75 NSWLR 649 at [101]-[109] and the authorities collected by Allsop P (as his Honour then was).

10 *Graham Barclay Oysters Pty Ltd v. Ryan* (2002) 211 CLR 540 (***Graham Barclay***) at [20] (Glesson CJ); *Stuart* at [136]-[137].

followed from any number of failure modes. But among them was the failure (fall) of the PA pole holding live electricity infrastructure aloft.

15 The system failure that occurred here would have had no relevant consequence had the PA pole not been part of the apparatus transmitting electrical current from WP's network to Mrs. Campbell's property. Its failure was only consequential because of the arcing that took place as the submains cable was wrenched through the hole at the bottom of the switchboard enclosure. The occurrence of the harm was conditional upon *both* the failure of the PA pole and the flow of current (J[19]-[21]; [152]). The CA was accordingly correct to focus its 'control' analysis on WP's control of the SWIS, including where the service cable was placed; what structure would be used to support it; and whether it was electrified (J[154], [155]).[11]

Analytical framework – authority on the 'control' criterion

16 Authority recognises that a relation said to give rise to a duty of care will need to be evaluated by reference to the degree and nature, or 'measure' of control exercised over the risk of harm that has eventuated.[12] As Crennan J and Kiefel J (as her Honour then was) pointed out in *Stuart*, questions about the degree of a public authority's control over the risks to which a plaintiff was exposed will usually be answered by reference to the applicable statute.[13] It is accordingly the statute that is key. [14]

17 In *Graham Barclay*,[15] McHugh J drew a distinction between the fisheries legislation in issue in that case and the roads legislation in issue in *Brodie*.[16] The contrast is useful. His Honour explained that in *Brodie*, the roads legislation empowered the Council to design or construct roads and to carry out repairs on them – powers the councils frequently used – thus, it was the combination of power, direct control and the undertaking of functions, that gave rise to the duty of care. The situation was to be contrasted to that in *Graham Barclay*, where the supervision, management and control

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11 Although there is some tension in the reasoning in J[154], the penultimate sentence, '[WP] did not have control over the PA pole itself', ought to be read in light of its surrounds in J[154]-[155], such that the CA's notion of the PA pole *itself* is subservient to the notion of the role the PA played in WP's system.

12 *Stuart* at [113] (Gummow, Hayne and Heydon JJ); [136]-[137] (Crennan J and Kiefel J, as her Honour then was).

13 *Stuart* at [138].

14 *Graham Barclay* at [20]-[28] (Gleeson CJ); [78]-[85] (McHugh J); [150]-[154] and [165]-[185] (Gummow and Hayne JJ); [246]-[252] (Kirby J); [310]-[327] (Callinan J).

15 *Graham Barclay* at [94].

16 *Brodie v. Singleton Shire Council* (2001) 206 CLR 512.

for which the fisheries legislation provided, was insufficient to found the requisite control in the public authority parties.[17] In view of the provisions noted at [19] below, here WP's position was more akin to the road authority's in *Brodie* than any of the public authority parties' in *Graham Barclay*. The CA did not err in compelling WP to 'take physical control' of the system, or the PA pole (*c.f.* A[55]). WP already had that control.[18] Only WP had the power to supervise the SWIS; only WP had the power (or the expertise) to manage the SWIS, including the system; and, on pain of criminal sanction, only WP had the power to control the components comprising the SWIS, or the system, including as to replacement, repair, maintenance, or inspection (for and anything other than visual inspection from the ground). WP's reliance on *Turano*[19] (A[37], [41]) is misconceived, but illustrates the point. The 'absence of any report' that would have prompted the water authority to take action was key to the reasoning in that case. But there the tree was not part of the water authority's plant, and there was no suggestion that the water authority knew (or should have known) that its infrastructure was waterlogging trees' root systems and putting them at risk of collapse. But here, WP was using the PA pole as part of its system for delivering domestic power supply to Mrs. Campbell, *and* there is an uncontested factual finding that it knew or should have known that the PA pole, and poles like it, were beyond their expected service lives and at risk of collapse (*see*: [8] above).

18 It should be accepted (A[38]) that authority gives some content to the 'control' criterion relevant to the discernment of duty.[20] However the cases identified at A[38] provide illustrations, not fixed categories.

Indicia of WP's control of the mechanism of harm

19 Amongst WP's statutory functions was to manage, plan, develop, expand, enhance, improve and reinforce electricity distribution systems and to provide electricity distribution services (*Electricity Corporations Act 2005* (WA) (**EC Act**), s. 41(a)), and

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17 *Graham Barclay* at [32], [39] (Gleeson CJ); [58] (Gaudron J); [94], [99] (McHugh J); [154]-[155], [185] (Gummow and Hayne JJ); [251] (Kirby J); [323], [327] per Callinan J.

18 A[55] is also incorrect to characterise the duty the CA discerned (J[158]) as 'unpleaded'; *see* [25] below.

19 *Sydney Water Corporation v. Turano* (2009) 239 CLR 51 at [50]-[52].

20 The exception is the citation at A[31] of the passage of *Tame and Annetts* at [185]. This passage is due great weight, but it is nevertheless *obiter*. The Court's actual decision in *Tame and Annetts* followed not from control but from the foreseeability of the psychiatric harm in issue ([29], [41] (Gleeson CJ); [120]-[121], [144] (McHugh J); [232]-[233] (Gummow and Kirby JJ); [300], [304] (Hayne J), [331], [361] (Callinan J)); and later consideration of the quoted passage by one of its participants, Kirby J, emphasised that reasonableness in all the circumstances, rather than reasonable foreseeability, was the 'touchstone' for the imposition of a duty: *Graham Barclay* at [244].

for any of the purposes mentioned in s. 41 to undertake, maintain and operate any works, system, facilities, apparatus or equipment required for that purpose (s. 41(i); J[107]). It also had extensive powers to enter onto private land to construct works and maintain facilities, including providing structures to support those facilities: *Energy Operators (Powers) Act 1979* (WA) (**EOP Act**), ss. 28(3)(c); 43(1) and 49 (J[119]-[122]). It therefore had significant legal, as well as practical control over its network and, as the CA noted (J[124]), there are countervailing provisions creating offences in relation to any other person's interference with the constituent parts of that network: EOP Act, s. 75. WP's 'dominion' over the risk of harm was, for practical purposes, complete (*c.f.* A[39]). Contrary to A[40], Mrs. Campbell never had actual control of (*c.f.* responsibility for: J[294]-[295]) the PA pole. A[46] overstates the effect of the passages of CA reasoning cited.[21]

20 It was in that context that the CA reasoned that WP had made two choices: to exercise its statutory functions to operate the distribution system that conveyed electricity to Mrs. Campbell's property (J[153]); and to use the PA pole to support the service cable it was using to deliver electricity to the property (J[154]). (Thus the CA's characterisation of the case as one of negligent exercise of a public authority's statutory powers and functions, rather than negligent failure to exercise a statutory power or function: J[155]). The argument in A[13] and [46]-[47] is that this was in truth no choice at all: first, because if a consumer met certain minimum requirements, WP (or its predecessors) had an obligation to connect; and secondly, because it had no entitlement to suspend the connection 'in the absence of an *actual* opinion as to danger or potential danger' (A[47]).

21 Of the provisions of the '1968 E Regs'[22] relied on at A[47]: reg. 183 forbids connection of an electrical installation to a public electricity supply system other than by a person licensed under the applicable Wiring Rules; reg. 202 preserves the obligation of an owner or occupier of premises to comply with the regulations and the Wiring Rules even after installation; regs. 206 and 254 provide certain powers and discretions to the supply authority in installing (and charging for) service leads; reg. 253 provides for the

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21 J[154] illustrates the CA's reasoning that although WP did not have control of the PA pole 'itself', it did have control over where its service cable was to be placed, how it was to be supported and whether it was to be electrified; J[226]-[227] deals with control in the sense of occupation of property, a concept relevant to non-delegable duty; at [294] deals with *concurrent* duties of care owed by WP and Mrs. Campbell.

22 *Electricity Act Regulations 1947*, produced in consolidation in the *Gazette* of 21 August 1968 (No. 78).

supply authority's inspection of an installation prior to connection to supply mains, and a fee structure if further inspections are required; and reg. 186 provides the supply authority an immediate power of disconnection where an inspector is of the opinion that the installation is dangerous or likely to become dangerous. None of these provisions is of any apparent relevance to WP's argument. A more squarely relevant provision may be reg. 219.[23]

22 The provisions of the 'OC Regs',[24] which provide certain obligations of retailers and distributors to connect or attach customer premises to a distribution system are also not of any obvious assistance to WP's argument. These provisions provide certain obligations to ensure, broadly speaking, minimal barriers to a customer's premises' connection to electricity. But they do not instruct or limit WP or its predecessors on how the obligations are to be discharged. And WP did in fact exercise significant practical control over the configuration of the apparatus on and adjacent to Mrs. Campbell's property: A[8]; J[39]-[45]. These provisions do not tell against the conclusion the CA reached as to the choices it identified WP having made, or the degree of control WP had over the actual mechanism of harm (J[153]-[159]).

23 The vice in WP's argument as to the limited circumstances in which it could discontinue supply is in its focus on an '*actual* opinion' (A[13], [47]), as if that criterion imposes a high threshold or is otherwise burdensome (for instance, in that it could only be reached on close inspection of a given installation). The provisions from which WP seeks to draw this restrictive rule (s. 31(1) of the *Electricity Industry Act 2004* (WA) and s. 63(1) of the EC Act) do not in fact have that effect. Those provisions provide WP discretionary powers to 'interrupt, suspend or restrict the supply of electricity provided by [WP] if in [WP's] opinion it is necessary to do so because of an accident, emergency, potential danger or other unavoidable cause.'

24 The purposive categories provided are distinct. Either provision would support the formation of an opinion that, for example, any premises which had or potentially had a wooden consumer pole, or wooden consumer pole of a particular age, on it posed a 'potential danger' so as to enliven the interruption or suspension power in one or other

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23 'All poles carrying electric cables are to be maintained in good condition, and to be of sufficient strength to support the cables and, with a view to preventing injury (as in the case of wooden poles by rot, white ants, etc.) are to be examined every twelve months, and any pole found to be unsound shall be made safe or replaced'.

24 *Electricity Industry (Obligation to Connect) Regulations 2005* (WA), which did not feature in the CA.

of those sections. On the uncontested factual findings as to WP's knowledge of the likely service lives of wooden poles, and its knowledge of termite action and fungal rot damage as a likely cause of pole collapse in the SWIS area (TJ[302]; J[18]-[20]), there was an ample basis on which WP could (and should) have reached the requisite opinion.

25 The complaint at A[51] and [64], regarding the CA's use of the phrase 'in connection with' in its formulation of duty at J[158], is not of substance. The CA did not elide a distinction between what WP controlled and what it did not (*c.f.* A[51], [64]). Rather, it correctly identified the mechanism of harm as more than simply the PA pole. The CA formulation of duty appropriately reflects the level of abstraction at which a duty is to be stated (J[148]-[149]),[25] as the Court's rejection of a more abstract formulation (J[160]) demonstrates. The formulation also appropriately avoids conflating the duty and breach stages of the enquiry: J[159]. WP's argument that the phrase 'blurs' (A[51]) the distinction drawn in s. 25(1)(a) of the Electricity Act demonstrates no more than that the duty stated at J[158] is a common law rather than a statutory duty. *That* distinction should not be blurred: the statute is not the source of a common law duty; rather, it is the foundation or setting for it.[26] The phrase 'in connection with' is not impermissibly 'open-ended' (*c.f.* A[51], [64]); in an appropriate case, the appropriate limiting mechanisms would arise at the breach (and, perhaps, legal causation) stages. As A[51] implicitly accepts, this is an argument more appropriately considered in the context of WP's inconsistency argument.

26 A[56]-[57] misconceives the effect of the CA's reasoning. The CA was plainly aware of the proposition that the mere existence of a statutory power, coupled with the reasonable foreseeability of the harm, is insufficient to ground a duty (A[41]; J[104]-[105], [108]). The 'special and significant' control the CA identified was of the SWIS (J[152], [153], [156]). The concerns in A[57] arise only where the mechanism of harm is differently identified (i.e. as the PA pole, only). The existence of a duty to warn (A[58]) is not a helpful analytical path in this case, albeit that on one view WP did embark on that course (though its brochure was in error not delivered to Mrs. Campbell: J[36]-[38]).

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25 *Graham Barclay* at [192] (Gummow and Hayne JJ); *CAL No 14 Pty Ltd v. Motor Accidents Insurance Board* (2009) 239 CLR 390 at [68] (Hayne J).

26 *Stuart* at [130] (Crennan J and Kiefel J, as her Honour then was).

27 The arguments raised in A[52]-[58] conflate the CA's breach analysis with its duty analysis, and arise only if it is accepted that the mechanism of harm was the PA pole only. The particular risk of harm here was that there would be an uncontrolled discharge of electricity due to the point of attachment of WP's apparatus not being sound or justifiable; *c.f.* A[55]. The 'significant and special' aspects of WP's control was that it was uniquely placed to assess the soundness and appropriateness for purpose of the infrastructure to which it chose to link its network. It was the only entity lawfully able to make that link. The ownership of structures WP chose to link to (like the PA pole) is not to the point (*c.f.* A[57]).

10 28 A[60], last sentence,[27] demonstrates the correctness of the CA approach and what is incoherent and irrational in the WP approach. If it may be accepted (as WP accepts) that there is an obligation to ensure a sound or efficacious connection to the consumer apparatus of the power supply via the WP apparatus at the time of connecting and energising due to the risk of fire (J[152]), then that obligation remains for so long as energisation continues. That is so because the risk of fire is due to the power supply being liberated in an uncontrolled way due to the connection of the energy to the consumer apparatus being an unsound or inefficacious one. WP knew enough of the service life and ubiquitous use of such PA poles to hold an 'actual opinion as to … potential danger' (A[47]) of continuing to energise them without checking as they
20 would inevitably become unsound or inefficacious over time. The risk cannot be confined, in point of time, to the instant at which the connection is first made.

Inconsistency (ground 2(b))

29 In *McKenna*,[28] five members of the Court referred to the 'difficulties' in determining the existence, nature and scope of a duty identified in *Sullivan v. Moody*,[29] the fourth category of which was 'the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships'. It is this principle, as stated in a number of cases (A[67]),[30] on which WP relies (A[30]). WP's argument is in essence that the statutory provisions to which it refers were

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27 [The pre-work inspection duty] 'is not an asset management duty or a general duty to inspect consumer property regularly'.
28 *Hunter and New England Local Health District v. McKenna* (2014) 253 CLR 270 at [17].
29 (2001) 207 CLR 562 at [50].
30 *Graham Barclay* at [213], [243].

exhaustive of its obligations, such that there was no 'room' (A[85]) remaining for the imposition of the common law duty the CA imposed.

30 At a level of principle, this argument faces formidable difficulties. An argument that given legislative provisions cover the field such as to forbid the imposition of a common law duty is *a priori* unconvincing. As Prof. Stapleton has pointed out, the House of Lords in *Donoghue v. Stevenson*[31] did not take the Sale of Goods Act then in force to be a definitive statement of a seller's duties, to the exclusion of the common law. Here, as in the context of consumer protection legislation, the Legislature has 'laid down *strict* obligations in limited contexts, a strategy consistent with an interpretation that it was intended to provide a basic level of protection above which further and more extensive duties… could develop at common law'.[32]

31 At a methodological level, as recognised in the CA (J[103]), the decisions of this Court[33] and others[34] that provide the applicable analytical framework speak in terms of 'coherence' and 'consistency'.[35] There are examples of other descriptions; for instance McHugh J in *Graham Barclay*[36] spoke of 'undermining the effectiveness' of the duties imposed by the statute.

32 The first limb of WP's argument, then, rests on a conflation. Contrary to A[68], in *Graham Barclay* [78] McHugh J did not, and did not seek, to apply the 'alter, impair or detract from' test associated with *The Kakarki*[37] and currently used by the Court as the analytical framework applicable to s. 109 of the Constitution.[38] It may be that in some cases, application of these differing criteria would have similar results. But it would be a novel step (and one that should not be taken) for the Court to hold, as WP invites it to,

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31 [1932] AC 562.

32 J. Stapleton, 'Duty of care and economic loss: A wider agenda' (1991) 107 *Law Quarterly Review* 248 at 268.

33 *Pyrenees Shire Council v. Day* (1998) 192 CLR 330 (***Pyranees***); *Graham Barclay Oysters Pty Ltd v. Ryan* (2002) 211 CLR 530; *Crimmins v. Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (***Crimmins***); *Stuart v. Kirkland-Veenstra* (2009) 237 CLR 215.

34 For example: *Southern Properties (WA) Pty Ltd v. Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287 (***Southern Properties***).

35 *Pyrenees* at [22]; *Crimmins* at [3]-[5], [18], [34], [114]; *Sullivan v. Moody* at [60], [62]; *Graham Barclay* at [213]; *Southern Properties* at [95].

36 *Graham Barclay* at [78].

37 *Victoria v. The Commonwealth (**The Kakarki**)* (1937) 58 CLR 618 at 630 (Dixon J).

38 *Dickson v. The Queen* (2010) 241 CLR 491 at [13]-[17], [22]; *Work Health Authority v. Outback Ballooning Pty Ltd* (2019) 266 CLR 428 (***Outback Ballooning***) at [29]-[35]; *Masson v. Parsons* (2019) 266 CLR 554 at [49]-[52].

that jurisprudential concepts evolved in the context of s. 109 are applicable (or appropriate) to the task of discerning the consistency of a proposed common law duty with a given statutory scheme (A[68]). The exercise differs. Necessarily, a s. 109 question involves the construction of two competing texts.[39] The 'consistency' exercise the CA correctly undertook here involves the construction of one text only, for the purpose of drawing a conclusion as to whether it is exhaustive, such that duty imposed by another *body* of law (the common or general law) can exist.

33 The next step in WP's argument focuses on an 'implicit negative proposition' (A[68], [69], [76]), a 'negative proposition' (A[72]) or a 'negative implication' (A[72], [77]), which is 'that [WP] is not required to maintain service apparatus that belongs to the consumer. The Parliament intended that a consumer's service apparatus would be maintained by the consumer' (A[72]).

34 The textual method by which this implicit negative proposition or implication is to be derived is elusive. Section 25(1)(a) (J[125]) cannot be the location (*c.f.* A[71]). It embodies a positive obligation. If the paragraph implies anything, it is via its 'safe and fit condition…' criterion, and it is to ensure that WP's *own* service apparatus is safely attached to anything supporting it. This conclusion can be reached by a 'maintain' / 'keep' construction (J[143]); it is also consistent with the view taken of statutory *powers* to maintain infrastructure.[40] The suggestion (A[71]) that the adjectival phrase 'belonging to the network operator' marks the 'outer boundary of the maintenance obligation imposed' is unconvincing. *All* of the words of a provision are to be given meaning.[41] A construction that draws a bright line between service apparatus 'belonging to' WP and such apparatus not belonging to it (A[71], [74]): elides all words after the final comma in s. 25(1)(a) (*c.f.* A[75]); and ignores the 'service apparatus' definitional provision, s. 5(1) (J[126]): J[141]. The more convincing construction of these words is the one at J[143].

35 The negative proposition cannot be founded in an assumption imputed to the Legislature (*c.f.* A[73]). Selecting an assumption as an interpretive starting point is akin to

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39 *Bell Group v. Western Australia* (2016) 260 CLR 300 at [50]-[52]; *Outback Ballooning* at [29]-[35], [78] and [104]-[108].

40 *Sevenoaks, Maidstone, and Turnbridge Railway Company v. London, Chatham and Dover Railway Company* (1879) 11 Ch D 625 at 634-5 (Jessel MR) (TJ[198]).

41 *Project Blue Sky v. ABA* (1998) 198 CLR 355 at [71].

reasoning from the Legislature's 'intention', a reasoning process the Court has deprecated.[42] Had the Legislature wished to give effect to such an assumption, it could have specified that (for instance) the obligations embodied in s. 25 were exhaustive as to the matters they dealt with. This is a familiar drafting technique.[43] But that result cannot be reached by starting with remarks made in *Hansard* and working backwards to the statutory text (*c.f.* A[73]).[44]

36 The negative proposition WP contends for also cannot reside in s. 25(1)(b). The arguments advanced at A[76]-[77] arise only if it is accepted that s. 25 is exhaustive. It cannot be. It does not express itself to be. Its subject matter is limited to the obligations as between the network operator and the consumer, not to the network operator and the world at large (J[137]). A[78] is correct to note that s. 25(1)(b) contemplates the risk posed by fire, but the contemplation is confined: it is of the *risk* of fire *on the said premises*, not in their vicinity.

37 WP is also critical of the adoption of a 'simultaneous compliance' criterion (A[69]-[70]). But its arguments hinge on the acceptance of its negative proposition analysis, which should not be accepted.

38 As to the CA's treatment of s. 25(2) of the Electricity Act (J[138]-[139]), WP's proposition that nothing can be inferred from it (A[79]) is not correct. The CA was right to observe that the administrative remedy was another textual indication that s. 25 was not exhaustive, and did not purport to regulate WP's relations with 'persons not associated with premises supplied with electricity who may be harmed by fire emanating from the network operator's equipment on the premises' (like the plaintiffs): J[138].

39 In the end, WP's 'negative' argument is incoherent. It reasons either backwards from apparently inconvenient (to it) consequences (A[71], [72], [75], [77], [80], [84], [85(a)], [85(d)]); overstates the restrictions placed on it by the relevant statutory provisions (A[81], [82], [83], [84]); and overstates the effect of those provisions, for instance in that they impose specific narrow obligations, a point WP seeks to make out by elevating particular phrases (A[71], [74]-[75] ('belonging to'); A[76] ('actual supply of electricity to')) out of context. These arguments are only convincing if one accepts that the

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42 *Lacey v. Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44].

43 For example: *Migration Act 1958* (Cth), s. 422B and parallel provisions; *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57 at [53]-[54]; [90]; [126]-[127]; [183].

44 *Saeed v. Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [33].

provisions WP mentions are exhaustive. In other words, WP's argument assumes a fallacious premise, and seeks to reason from it.

40 WP accepts that it has certain obligations as to the safety and efficaciousness of a consumer apparatus connection at the time of connection (J[152]). WP also accepts that it has a duty to exercise reasonable care to deal with the risk of fire from its system (J[152]). And WP is given all the powers it needs to perform its statutory functions, referred to at [19] above (EC Act s. 59(2); J[107]). In that context, it is curious that WP seeks to limit its own ability to act by reference to the purpose for which certain powers are given (A[81]). Like WP's preferred conception of the mechanism of harm in this case (the PA pole only), its conception of EOP Act ss. 28 and 49 is unduly narrow. A[81] final sentence reveals the vice. WP seeks to conflate the carrying out of its ample statutory purposes with attending to apparatus *owned by* it. There is no justification for the importation of a limiting principle of ownership. WP has chosen to conduct its network (and, inferentially, to seek to achieve its statutory objects) by allowing or requiring a large number of consumer poles to be inserted into it. The statutory activities it is bound to undertake are unaffected by the 'ownership' status of the apparatus by which it transmits power from its network to its customers.

Part VI: Argument on the First Respondents' Notices of Cross-appeal

41 The grounds in the First Respondents' notice of cross appeal only arise (subject to a grant of special leave) if WP's appeal succeeds (CAB 950).

Grounds 2 and 3 – the pre-work duty was a non-delegable duty of WP

42 Separately to the duty raised on the appeal, at trial the judge discerned a different, narrower, duty (TJ[297]), which was before or when undertaking works on the PA pole, to take reasonable care to inspect it and ascertain whether it was in a safe and fit condition for use in the supply of electricity. His Honour held that the duty was delegable (TJ[309]-[337]) and that WP discharged the duty discerned by engaging and instructing Thiess to carry out the relevant work, including inspection (TJ[359]). This issue was not reached in the CA (J[205]), but the CA nevertheless indicated it agreed with the judge (J[207], [235]).

43 On the reasoning in *Leichhardt*,[45] there are two bases on which WP's duty in respect of the July 2013 works ought to have been (but were not: J[230]-[231]) held to be non-delegable: the works involved extra-hazardous works; and they were performed in circumstances that raised a special relationship of transcendence, vulnerability and reliance between the plaintiffs and WP.

44 The learned judge's identification of the activity said to be extra-hazardous was, with respect, confused. The pleaded activity was undertaking works on or inspecting the PA pole,[46] but TJ[334]-[337] appeared to focus on the overhead transmission of electricity. J[231] resolves the issue to the effect that even when the pleaded activity is correctly identified, it is not extra hazardous. This is not a convincing characterisation of the July 2013 works. Works involving modification to distribution poles and wires requires pre-works testing to ensure de-energisation. It applies loads to potentially (or in this case, actually) compromised overhead structures (the poles); requires manual handling from elevated platforms; and ultimately results in the re-establishment of live electrical infrastructure. The judge's (TJ[336]) and the CA's analysis (J[232]) were also affected by an erroneous conception that the applicable test for an extra- or ultra-hazardous activity required consideration of the allegedly dangerous activity, when undertaken with reasonable care. The correct conception is of the risk presented by the activity being undertaken *without* reasonable care.[47] The risk presented by the July 2013 works (fire, shock, electrocution) is plain. In fact, one such risk eventuated. The correct characterisation of the works is extra- or ultra-hazardous.

45 The next limb of the argument turns on the relation between the plaintiffs and WP. Authority is to the effect that the mere undertaking of an extra- or ultra-hazardous activity is not sufficient for the imposition of a non-delegable duty. Some extra relational factor is required.[48] The relational factor here arises from the imbalance between WP and the plaintiffs. J[225]-[229] rejects this argument on the basis that the authorities on which it relied (*Burnie Port* and *Meech*) involved the relevant activities being undertaken on land owned, occupied or controlled by the defendant. This is too narrow a conception of the special relationship, and in J[226]-[229] involves a

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45 *Leichhardt* at [9], [18].
46 6FASC [26].
47 *Meech* (horse agistment); *Burnie Port* (welding); *Commonwealth v. Introvigne* (1982) 150 CLR 258 (supervision of primary school students).
48 *Kondis v. State Transport Authority* (1984) 154 CLR 672 at 687 (Mason J).

misconception of the transcendent control (which was over apparatus on Mrs. Campbell's property in July 2013, not the SWIS generally). The provisions noted at [19] above gave WP: (a) ownership-like rights in relation to (or actual ownership) of the electrical infrastructure it dealt with in undertaking the July 2013 works; and (b) the complete effective and exclusive control of an owner or occupier, at least for the duration of the works, of the land on which the installations stood, and adjacent to it. That proposition can be tested in this way: had either Mrs. Campbell or any of the plaintiffs noticed a defect in Thiess' performance of the July 2013 works, or the way the infrastructure on Mrs. Campbell's land was left, what could they have done? Certainly, they could not have undertaken 'self help': EOP Act s. 75 would have made any such attempt an offence. Their only remedy would have been to contact Thiess, or WP, and seek remediation of the works. It was for WP to decide whether to act under EC Act s. 41, EOP Act ss. 28, 43 or 49, or its other statutory powers, so that whether, and if so when, any remediation works occurred was entirely a question for WP. As WP accepts (A[54]-[55]), performance of its statutory duties could not be compelled by *mandamus* (or otherwise). In any event, the decisive considerations are the magnitude of the risk of an accident and the magnitude of the risk of foreseeable injury that might follow from one, not the status of an occupier of the land *per se*: *Meech* at [22]-[23] (Nettle JA). The magnitude of each of those risks here (and the inability of the plaintiffs to take any steps against them) were sufficient to raise the necessary relation. The Court should hold that WP had a duty to ensure that Thiess exercised reasonable care in undertaking the July 2013 works.

Ground 4: private nuisance is not a claim arising from a failure to take reasonable care

46 CLA s. 5AK(1) (J[310]) provides for the Court to 'apportion' damage or loss to a concurrent wrongdoer defendant based on what the Court considers just having regard to the extent of that defendant's responsibility for the damage or loss. Section 5AK(1) applies only to an 'apportionable claim', a term defined in CLA s. 5AI (J[311]) as a claim for economic loss or damage to property 'arising from a failure to take reasonable care'. The Court has explained the policy being pursued by these provisions.[49] CLA

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[49] *Hunt & Hunt v. Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [15]-[17].

s. 5AJ(4) does not have the effect of expanding the definition of an 'apportionable claim' in s. 5AI so as to collapse into that category a claim that is not already within it.[50]

47 The CA's first error (J[321]-[322]) was to construe the term 'claim' or 'apportionable claim' at too high a level of generality and to characterise the 'claims' at the foundation of the proceedings as '*for*… damage to property' (CA[322]) rather than *in* negligence or *in* private nuisance. This reflected the CA's conflation of 'claim' and 'action' in s. 5AI (J[321]-[323]). The preferable approach is that the nature of the 'claim' for the purposes of s. 5AI is to be determined not only by the pleading and not only by the facts found, but 'on the essential character of the plaintiff's successful cause of action'.[51]

10 The essential character of the private nuisance cause of action is that it is actionable without proof of negligence.[52]

48 As the CA recognised by reference to *Marsh v. Baxter*[53] (J[324]), fault of some kind is almost always necessary to private nuisance. J[325] approaches the decisions in *Hargrave*[54] on the footing that 'in some circumstances' establishment of the nuisance cause of action may require a plaintiff to establish a defendant's failure to take reasonable care. That is true, but those circumstances need to be identified with precision. Private nuisance, which remains a cause of action distinct from negligence,[55] comprises three distinct categories: creation;[56] failure to abate (as in *Hargrave*); and the 'inevitable consequence' of an exercise of statutory authority.[57]

20 49 This was a 'creation' case: Thiess created the unreasonable interference with the landholder subgroup's interests in land by failing to inspect the PA pole properly and then leaving it in the unsafe state it did in July 2013 (J[329]); and Mrs. Campbell created it by continuing to receive electricity supply by it when it was not in a safe and fit condition for that use (J[328]). In that case, the applicable rules are that: negligence is

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50 *Selig v. Wealthsure Pty Ltd* (2015) 255 CLR 661 at [37] (French CJ, Kiefel J (as her Honour then was), Bell and Keane JJ); [54] (Gageler J).

51 *Perpetual Trustee Company Limited v. CTC Group Pty Ltd (No 2)* [2013] NSWCA 58 at [23] (Macfarlan JA); *Rahme v. Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550 at [135]-[137].

52 *Pantalone v. Alaouie* (1989) 18 NSWLR 119; *Fennell v. Robson Excavations Pty Ltd* [1977] 2 NSWLR 486.

53 (2015) 49 WAR 1 at [765]-[770].

54 *Hargrave v. Goldman* (1963) 110 CLR 40 (***Hargrave HC***); *Goldman v. Hargrave* [1967] 1 AC 645 (***Hargrave PC***).

55 *Burnie Port* at 556 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); at 578 (Brennan J).

56 As in the examples cited in Barker et al., *The Law of Torts in Australia* (5th ed., 2012), pp. 185-6.

57 *Melaleuca Estate Pty Ltd v. Port Stephens Council* [2006] NSWCA 31 at [48]-[57].

not a necessary element of the action;[58] and that the necessary fault is (mere) foreseeability.[59] No question of 'negligence in the special sense' arises. That criterion arises only in the third category of a private nuisance case.[60]

50 J[329] and [333] suggest an erroneous emphasis on the pleaded case, rather than the essential elements of the cause of action. The actual result the judge (TJ[552]) and the CA (J[329]) reached reflect reasonable foreseeability, which on the applicable authorities, was the element to be satisfied. The correct outcome was that the private nuisance claims were made out, but the application of CLA s. 5AK was not: the private nuisance claim was not one arising from a failure to take reasonable care. Thiess and Mrs. Campbell's liability cannot be apportioned under CLA Part 1F and is accordingly joint and several.

Part VII: Time estimate

51 The First Respondents estimate three hours will be required for the presentation of argument on the appeal, together with submissions in support of the grant of special leave to raise the cross appeals and argument in support of them.

Dated 2 June 2022

Peter Dunning
(07) 3218 0630
dunning@callinanchambers.com.au

Tom Smyth
(03) 9225 7237
tom.smyth@vicbar.com.au

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58 *Hargrave HC* at 62 (Windeyer J). *Hargrave PC* did not consider the issue, their Lordships being of the view that negligence provided a sufficient basis for resolution: *Hargrave PC* at 656G.

59 *Overseas Tankship (UK) Ltd v. Miller Steamship Co Pty Ltd (The Wagon Mound) (No 2)* [1966] 3 WLR 498 at 508 (Lord Reid); *see too*: *Gales Holdings Pty Ltd v. Tweed Shire Council* [2013] NSWCA 382 a [132], [139], [280].

60 *Southern Properties* at [121]-[123] (McLure P).

ANNEXURE A

STATUTUES AND STATUTORY INSTRUMENTS REFERRED TO IN THE FIRST RESPONDENTS' SUBMISSIONS

	Statute	Version	Relevant Dates
1.	*Civil Liability Act 2002* (NSW)	6 July 2009	6 July 2009 to 18 May 2010
2.	*Civil Liability Act 2002* (WA)	04-a0-07	13 September 2013 - 13 April 2016
3.	*Electricity Act 1945* (WA)	08-a0-04	13 December 2013 – 28 March 2022
4.	*Electricity Act Regulations 1947* (WA)	Government Gazette, 21 Aug 1968, (No. 78) pp 2475-2544	23 April 1968 – 1 November 1991
5.	*Electricity Act Regulations 1947* (WA)	06-a0-02	8 November 2013 – 14 April 2015
6.	*Electricity Corporations Act 2005* (WA)	01-k0-04	1 January 2014 – 17 July 2014
7.	*Electricity Industry Act 2004* (WA)	02-i0-03	1 January 2014 – 28 March 2018
8.	*Electricity Industry (Obligation to Connect) Regulations 2005* (WA)	00-a0-11	4 October 2005 – 5 November 2021
9.	*Energy Operators (Powers) Act 1979* (WA)	05-d0-03	1 January 2014 – 13 June 2019
10.	*Migration Act 1958* (Cth)	Compilation 152	1 September 2021 - present