



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

and

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

Second Respondents

and

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

Third Respondents

and

NOREEN MERLE CAMPBELL

Fourth Respondent

and

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

Fifth Respondent

SECOND RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION FOR INTERNET PUBLICATION

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

PART II: CONCISE STATEMENT OF THE ISSUES

2. The issue for resolution is whether the Court of Appeal was correct in determining that the Appellant (**WP**) owed to the plaintiffs, as persons in the vicinity of the South West Interconnected System (**SWIS**), 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 (or a duty expressed by reference to the risk of ignition and spread of fire "from" the delivery of electricity through its electricity distribution system). The criterion of control is but one of the key indicators of the existence of a common law duty. Here, it arose from the high degree of legal and physical control exercised by WP over the SWIS and distribution of electricity through

it; this (rather than control over the PA pole alone) being the relevant consideration. Other relevant salient criteria including WP's knowledge of the risk, and the vulnerability of persons in the vicinity of the SWIS to the risk of bushfire caused by discharges from electrical installations, indicated the existence of the duty.

- 10 3. The duty is neither inconsistent nor incoherent with the statutory scheme, which does not, by imposing certain specific statutory duties on WP, manifest an implicit intention to exhaustively confine its duties for the safe operation of the network to taking reasonable steps to ensure the safety of only those parts of the distribution network owned by it. The existence of a common law duty which may require WP to exercise its statutory powers is entirely consistent with WP's
- 20 extensive powers and obligations in the operation of the scheme, and entirely compatible with the absence of statutory allocation of responsibility to consumers with respect to property owned by them which is connected to the network.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

4. Notice is not required to be given by s 78 of the *Judiciary Act 1903*.

PART IV: STATEMENT OF CONTESTED MATERIAL FACTS

5. The following facts in addition to those identified by WP are relevant.
6. The service life of untreated jarrah poles is 15 to 25 years in ground and 15 to 40 years above ground. Termite activity and fungal rot were common causes of damage to jarrah poles (TJ [302]; CA [18]). Damage from termites and rot were known by WP to be potential causes of collapses of wooden poles, including jarrah poles, in the SWIS (TJ [55], [302], see also [131]; CA [18], see also CA [245(2)] and [261] re WP's knowledge of consumer pole failures).
7. WP knew or ought to have known that any untreated and unreinforced jarrah pole of over 25 years' service life was beyond its probable life expectancy and operating at an elevated level of in-service failure; and that any untreated jarrah pole displaying signs of rot at ground level or below ground level at the section able to be excavated for inspection was operating at elevated risk of in-service failure (TJ [302]; CA[19] and [20]).
8. WP had power to enter onto a consumer's land without the owner's consent, inspect the pole and either repair or replace the pole or place its electrical apparatus on a supporting structure: CA [174]. WP sometimes permitted its contractor Thiess to replace consumer poles: TJ [179].
- 30 WP accepted that it had power to enter Mrs C's land for the purpose of improving WP's works (including the termination pole) or maintaining them: TJ [177].

9. The expert evidence established that adequate inspection of the PA pole by a person with the relevant skills and experience would have revealed that the pole was not suitable to remain in service: **TJ [476]**. If WP had inspected the PA pole it would have determined that it was unserviceable before 12 January 2014 and required Mrs C to replace the PA pole or disconnected the supply of electricity to the PA pole and the fire would not have started: **TJ [296]**. Mrs C would have replaced the pole if told it was unserviceable: **TJ [477]**.
10. WP had a system of inspection for the 625,000 – 758,000 poles it owned, which entailed their periodic inspections, and which would have seen the PA pole inspected and treated at 4 yearly intervals and replaced after 25 years had it been owned by WP (**CA [168]; [182]**).

10 **PART V: STATEMENT OF ARGUMENT IN RESPONSE TO THE APPELLANT**

Statutory scheme

11. WP, the Electricity Networks Corporation established by s 4 of the *Electricity Corporations Act 2005* (**EC Act**), had and has functions including to manage, improve and reinforce electricity transmission and distribution systems and provide and improve electricity transmission and distribution services; and to “undertake, maintain, and operate any works, system, facilities, apparatus or equipment required” for that purpose: s 41(a) and (i), *EC Act*. As **licensee** under the *Electricity Industry Act 2004* (**EI Act**) (see s 4; **TJ [28]; CA [14]**) it was authorised to operate the distribution system in SWIS. “Distribution system” is defined by s 3 of that Act as “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”. “Operate” is relevantly defined by s 3 as including “(a) to maintain the works or system; and (b) to make any modifications necessary or desirable for the operation of the works or systems.” The distribution system is not limited to assets belonging to WP and would extend to consumer assets if used *in connection with* the transportation of electricity by WP to consumer property (such as the PA pole which supported a WP service cable, being “the link or conductor by which the distribution system delivers electricity to individual customers”: **TJ [32]**).
12. WP, by reason of its status as distribution licensee and operator of the distribution works, was a **network operator** under the *Electricity Act 1945* and an **energy operator** under the *Electricity Operators (Powers) Act 1979* (**EOP Act**), s 4.
13. The statutory scheme gave WP a high degree of power to manage the distribution works and service apparatus, regardless of ownership. WP as network operator had specific obligations

under the *Electricity Act 1945*, s 25(1)(a) to “maintain all service apparatus belonging to [it] which is on the premises of a consumer, in a safe and fit condition for supplying electricity”. It is oversimplified to contend that the obligation in s 25(1)(a) “does not extend to items that WP does not own” (WP [14]). Any contention that WP can disregard the unsafe or unfit situation of its service apparatus (such as a service cable) because the safety risk arises from it being connected to and supported by unsafe equipment not owned by it, would undermine the clear purpose of the provision: that WP’s apparatus be in a “safe and fit condition for supplying electricity”. The CA was correct to conclude that while the s 25(1)(a) obligation may not be directed to the maintenance of the PA pole, the duty to maintain the service cable may extend to taking steps to see that the PA pole is capable of safely supporting the service cable: CA [140]-[144]. The contrary conclusion would leave a lacuna in the statutory scheme in the circumstances, addressed below, where the statutory scheme imposes no maintenance or inspection obligations on consumers with respect to their service apparatus.

14. WP’s duty in s 25(1)(b) to “in the actual supply of electricity to the premises of a consumer take all reasonable precautions in order to avoid the risk of fire or of other damage on the said premises to the position where the electricity passes beyond the service apparatus of the network operator” focuses on safety in the context of the supply of electricity. The position where the electricity “passes beyond the service apparatus of the network operator” here requires consideration of WP’s service cable being *attached* to and supported by the consumer PA pole and passing through Mrs C’s mains connection box, and then connecting to her consumer mains which itself passes through a switchboard enclosure containing WP’s service apparatus (the meter and service protection fuses): CA [32]-[33]; TJ [33]-[34]; [104]. The trial judge found that the electricity does not pass beyond WP’s service apparatus until it has passed beyond the meter (TJ [215]). WP’s duties in supplying electricity to that point thus encompass the taking of all reasonable precautions to avoid the risk of fire or other damage on the premises.

15. WP had powers to cease supply to premises if in its opinion it was necessary to do so including because of *potential* danger, “this power being in addition to any contractual right it had to interrupt, suspend or restrict the supply of electricity”: *EI Act*, ss 31(1) and 31(4); *EC Act* s 63(1). Further, the obligation to connect a consumer to the distribution system through an extension to the system (reg 5(1)) *Electricity Industry (Obligation to Connect) Regulations 2005* relied on by WP (WP [13]) is accompanied by a power to impose requirements on the landowner on

which any part of the distribution system is to be installed “that the agreement of the owner of any land ... on which any part of the distribution system is to be installed, be obtained to anything affecting the land that is necessary for the connection to be established and maintained”: reg 5(4). This could encompass stipulations on the owner for maintenance of equipment as a condition of connection. Notice of a potentially dangerous situation – such as the risks of ageing PA poles (see [6]-[7] above) would in any event be sufficient to enliven the s 31(1) power to suspend supply to address a safety risk in the supply of electricity.

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16. In addition to its specific duties and powers with respect to maintenance and supply, WP had a range of powers to enter onto private land and deal with works or installations for purposes connected with the operation of the distribution system.
17. WP could enter onto land to construct and improve works, maintain undertakings and facilities, and carry on works requisite, advantageous or convenient to the exercise and performance of its functions as energy operator: *EOP Act* s 28(3). WP had a general power to enter onto land for the purposes of that Act, and any other Act that confers powers on the energy operator: *EOP Act* s 46. By s 49 of that Act, WP had specific powers to enter onto land to undertake various categories of work, including inspection, maintaining, replacing, or repairing any system, undertaking or related thing necessary for any supply system, and for that purpose to “do all such ... things as may be necessary or convenient for constructing, maintaining, altering, repairing, or using any supply system, undertaking or related works.” These powers authorised WP to enter a consumer’s property for the purpose of inspecting PA poles, to see that they are capable of safely supporting apparatus forming part of the distribution system, this being a purpose under the Act (specifically, to carry out works advantageous to the performance of the functions of the energy operator under s 28 of the Act). This was correctly accepted by the CA: **CA [174]-[175]**. WP does not identify a basis for its contrary assertion that it has no general statutory power to inspect consumer property to determine whether it is unsafe: **WP [19]**.
- 20
18. By contrast to WP’s statutory obligations and powers, the statutory scheme does not confer any power (nor impose any obligations) on a consumer to maintain or deal with consumer assets insofar as they are connected to WP’s service apparatus. It is an offence to alter, remove or deal in other ways with any service apparatus belonging to a supply authority used in connection with the supply of electricity (*Electricity Act 1945*, s 40(2)), or for a consumer to do or permit anything
- 30
- to be done whereby electricity escapes a service cable (s 36(1)). A consumer could not,

therefore, replace a pole nor do any work affecting WP's service apparatus without the authorisation of WP. The CA correctly held that the private owner cannot interfere with WP's electrical apparatus without WP's authority: **CA [174]**.

19. In considering WP's assertion that the statutory scheme "demarcate[s] the respective responsibilities of [WP] and the consumer at the interface" (**WP [73]**) or by reference to ownership of the equipment or the land on which it is placed **WP [74]; WP [85(b)]**, the complexity of the interaction of WP and consumer owned equipment at the site of a PA pole connection with a service cable **WP [6]; CA [31]-[35]** is relevant. More generally, it is relevant that the regulation making powers under the *Electricity Act 1945* contemplate the potential imposition of obligations on the network operator with respect to property other than that owned by WP, including potentially systems of inspection which would extend to works "in, on, over or under ... any public or private building or premises": s 32(1)(o). The *Electricity Regulations 1947*, regs 253 and 254 which impose limitations on supply to consumer electric installations newly installed, altered or expanded which have not been inspected, illustrate the potential reach of the regulations and the legislature's concern for the safety of all parts of the network regardless of ownership.

The Court of Appeal judgment and WP concessions on duty

20. The CA, having analysed WP's statutory functions and powers, held that WP owed to persons in the vicinity of the SWIS a duty to take reasonable care to avoid or minimise the risk of injury to them, 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: **CA [158]**. As noted by the CA, this formulation of the duty was similar to WP's acceptance of a duty to take reasonable care in the operation of its electricity distribution system to deal with the risk of fire from that system: **CA [152]; [160]**. Further, WP accepted:
- (a) that at the point in time when WP attaches an aerial cable to a pole which it does not own, it has a duty to take reasonable care to see that the pole is not going to collapse at that point **CA [152]**; and
 - (b) that it had a duty to take all reasonable precautions to inspect a consumer pole at the time it attaches apparatus to, or does work on, it, and to ascertain that the pole was in a safe and fit condition for use in the supply of electricity before undertaking works on it (**TJ [220]; [297]**; conclusions not challenged on appeal: **CA [54]**).

21. WP also accepts that “a duty to ensure that a service cable when connected” (as the service cable was to Mrs C’s consumer pole at the time of the 12 January fire) “and energised” (as it was at the time of the fire) “is connected to a sound structure is a reasonable precaution to avoid fire in the actual supply of electricity to a consumer’s premises”: **WP [60]**. Ascertaining that the PA pole to which the service cable was connected was a sound structure is effectively what discharge of the duty required in the circumstances of this case.
22. Despite these concessions, WP contends that it did not owe a duty of care found by the CA, based on rejecting any relevant control over the risk of harm and on the duty being incoherent with the statutory scheme. There is no principled basis to distinguish the duty found by the CA from those accepted by WP. WP’s supply of electricity to the service cable attached to the PA pole was central to the existence of the risk. That supply was not limited to times when the service cable was being connected or serviced.

Ground 2(a) - Control

23. WP identifies “control” as critical, but focuses on it as effectively the sole relevant criterion for the existence of a duty of care. Control is of fundamental importance, but must be considered in the context of factors including foreseeability of harm, knowledge of risk and vulnerability of the plaintiffs: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [84] (McHugh J); [149-150] (Gummow and Hayne JJ); *Crimmins v Stevedoring Committee* (1999) 200 CLR 1, 40-41 [100]-[101] (McHugh J, Gleeson CJ agreeing at [3]).
24. Foreseeability of the risk of harm to life and property, through bushfire from a discharge of electricity if a wooden pole supporting a service cable failed, was not contested by WP: **TJ [201], [301]; CA [21]**. The magnitude and gravity of the risk was significant (**CA [21]**) and WP had knowledge of the risk of harm posed by wooden PA poles: see [6]-[7] above. The public in the vicinity of the SWIS was also relevantly vulnerable to harm from the risk of fire ignited by the electricity distribution and collapse of a PA pole: **TJ [411]**. They had no real means to protect themselves against harm from negligent conduct (*Crimmins* 40, [100]) in the operation of the distribution system. Analysis of the question of whether there was, as found by the CA, a degree of control on the part of WP sufficient to give rise to a common law duty, must occur against the background of these other salient features supporting the existence of a duty.
25. Having isolated for determinative significance the criterion of control, WP conflates the question of control *of the risk of harm*, with control *of the PA pole*: **WP [40], [46], [49]**. WP then

identifies “control” of the PA pole as arising from being the occupier of land on which it stood (WP [40]) or alternatively from ownership of it: WP [2]; [51]; [57]; [74]. This focus does not adequately reflect the risk of harm. The risk came not from the condition of the PA pole alone, but also the fact that it supported WP’s apparatus connected to the electrified distribution network operated by WP. The collapse of the pole, and resultant damage to the submains cable carrying electricity from the distribution network, caused a short circuit and the arcing which caused the fire TJ [81]. By focusing too narrowly on control or ownership of the PA pole, WP incorrectly curtails the breadth or extent of its common law obligations.

- 10 26. Contrary to WP [33], it does not follow from McHugh J’s approach in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 that control, for the purposes of considering whether a common law duty of care arises, necessarily involves literal *physical* control. While WP does acknowledge that legal control or a combination of legal and physical control will be sufficient (WP [34]-[39]) it also implies that “actual physical dominion” is required to constitute control WP [47]. The authorities do not support such an absolute or fixed conception of control. The relevant factor in recognising the existence of a duty is the degree of legal and/or physical control.
- 20 27. It is recognised that a duty may arise on the part of a public authority where the authority has “entered upon the exercise” of its relevant statutory powers: *Pyrenees*, 331 [177] (McHugh J referring to “entry into the field of inspection”); see also the characterisation of *Pyrenees* in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 255-6 [117] (Gummow, Hayne and Heydon JJ); 261-2 [135]-[137] (Crennan and Kiefel JJ). Noting that the existence of statutory powers alone and their exercise from time to time may not *necessarily* be sufficient to give rise to a relevant duty (*Graham Barclay* 580, [91]) the question is what is sufficient to constitute a relevant “entry into the field” or “entry upon the exercise” of statutory powers.
28. Here, there is no question that WP not only had legal and significant physical control over the operation of the SWIS, at the level of control identified by the CA (CA [154]); it had also “entered upon the exercise” of powers involving relevant control over the connection of the distribution system to Mrs C’s PA pole. In the exercise of statutory powers (see [16]-[17] above) it entered on her land, and physically connected the service cable to her PA pole (TJ [31]); in June 2013 it requested Thiess as contractor on its behalf¹ to undertake works again involving

¹ Section 4(2), *EOP Act*: the statutory authority of a person other than the energy operator to exercise powers including powers to enter upon land is dependent on the energy operator authorising the person to act on their behalf.

entry onto Mrs C’s land and work on her PA pole, **TJ [39]-[40]; CA [39]-[40]**; and importantly to inspect the PA pole before doing the work. It had also entered on the field of electrifying and keeping electrified the service cable attached to the pole, which was an important aspect of the exercise of control identified by the CA: **CA [154]**.

29. In *Graham Barclay* McHugh J referred to the situation where an authority “has used its powers to intervene in a field of activity and increased the risk of harm to persons” as ordinarily giving rise to a duty of care: 576, [81]; see also 580, [91]. The operation of the SWIS by WP, the connection by WP of a service cable to the PA pole owned by Mrs C and the continuing use of that service cable to distribute electricity all increased the risk of unintended discharges of electricity and ignition of fire and thus harm to the plaintiffs.
30. *Stuart* does not establish that any more significant or absolute entry onto the exercise of statutory power is required, cf **WP [44]-[45]**. *Stuart* involved a materially different situation in that the preconditions for the exercise of relevant statutory power in that case did not exist, so the power was never enlivened: at [5], [58], [63] (French CJ); [149]-[150] (Crennan and Kiefel JJ). This case is more akin to the circumstances in *Crimmins*, relevantly summarised in *Stuart*, [115]: “*The Authority had or should have had knowledge of the special risks to which the workers were subject and could control (or at least minimise) those risks by the exercise of its statutory powers*” and thereby had control over the source of risk of harm.
31. WP was the public authority charged with responsibility for the safe operation of the electricity distribution system in the SWIS. It had a combination of statutory powers and duties arising in discharging this specialist function. Members of the public in the vicinity of the system had no relevant control over the operation of the system. WP’s powers gave it a significant and special measure of control over the risk of ignition of fire from the system, which was enough to require the reasonable exercise of the powers to avoid or minimise the risk: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 559 [102] (Gaudron, McHugh and Gummow JJ); *Graham Barclay* at 598, [151] (Hayne and Gummow JJ). Unlike the Council in *Graham Barclay* (598-599, [152]), WP did exercise significant control over the distribution system and supply of electricity and over what consumer assets would support its infrastructure; more specifically from time to time it also exercised physical control over the PA pole and at all times it had control over the supply of electricity to the service cable.

No error in Court of Appeal’s approach

32. WP’s contention that the CA erred in analysing control by reference to WP’s control over the electricity distribution system in the SWIS, and over the connection of its service cable to the PA pole (**WP [46]**) is founded on several incorrect premises.
33. *First*, WP wrongly contends that it was control over the PA pole which was the relevant consideration. The criterion of control relates to control over the risk of harm that eventuated: *Graham Barclay* 597, [149], 598 [152]. The risk of harm was not the pole alone; it was not the collapse of the pole of itself which was likely to cause damage to the plaintiffs (cf a pole collapsing and destroying property or injuring a passer-by). The source of the harm was the pole as connected to the service cable, which was receiving electricity from the distribution system. To focus on the pole alone is artificially narrow and removed of relevant context. It ignores the factual findings as to the source of the ignition of the fire which caused the harm: see **TJ [81]** and also [25] above.
34. *Second*, WP assumes that control, as a feature indicating the existence of a common law duty, requires “actual physical dominion” (**WP [47]**), despite the recognition in the authorities that elements of legal and / or physical control will be relevant.
35. *Third*, WP suggests that the CA’s conclusion as to control and the existence of duty was based merely on WP having control of its service cable (**WP [49]; [51]**). The CA properly considered whether WP had a relevant degree of control over the risk of harm which eventuated: it concluded that while WP did not have control over the PA pole specifically, it had power to enter onto private land to construct works and maintain facilities (implicitly including the pole); control over where the service cable was placed and what structure would be used to support it, and whether the service cable was electrified: **CA [154]**.
36. Further, contrary to the submission that WP had *no* control over the “thing that posed the risk of harm” (**WP [49]**), assuming that to be the PA pole, WP did have a significant degree of ability to control the PA pole in the performance of its functions, including powers to work on (or direct a contractor to work on) the PA pole when connecting and disconnecting the service cable; as well as powers to enter the land to inspect the pole: **CA [175]**.
37. *Formulation of the duty*: WP also takes issue with the CA’s formulation of the duty as one to guard against a fire “in connection with” the delivery of electricity through its distribution network rather than “from that network itself”, first because it “elided the distinction between that which

WP ‘controlled’ in the requisite sense and that which it did not” (WP [51]). This involves an artificial analysis which wrongly elevates control to the exclusive feature determinative of the existence of duty; and relies on a strict division, not based in the statutory scheme, between parts of the distribution network owned by WP over which it had control and elements not owned by it over which it is contended to have none. The “distribution system” WP was licenced to operate encompasses “any apparatus, equipment, plant or buildings used, or to be used, *for or in connection with*, the transportation of electricity”. It is not limited to parts of the system owned by WP: *EI Act*, s 3.

- 10 38. Secondly, WP contends that the formulation of the duty would impose on a public utility “a duty of care the boundaries of which would be hard to identify with any precision”: WP [51]. The duty found by the CA differs from the duty accepted by WP primarily in referring to risks “from” the distribution system and risks “in connection with it”. When it is recognised that the distribution system operated by WP is not strictly limited to apparatus owned by WP, the distinction loses any force. Importantly, in the present case, even if the concept of the risk arising from the risk of ignition and spread of fire “from” the delivery of electricity or “in connection with” it is relevantly different, it is a duty that plainly arose and was breached in these circumstances: the risk of fire arose from the combination of the collapse of the pole and the fact that the service cable connected to it, was electrified and supplying electricity. Both the pole and the cable formed part of the distribution network.
- 20 39. The duty affirmed by the CA was not a duty to “take physical control” by using discretionary power of WP [55]. It was a duty based in part of the control already exercised by WP, in connecting the service cable to the supporting PA pole, and supplying electricity through the service cable. WP could take reasonable care to minimise the risks involved in these aspects of its function in delivering electricity through the distribution system in different ways and was not compelled to use any particular statutory power – it could have a periodic system of inspection of PA poles, based on its inspection system of its own assets (par [10] above) or a variation on it; it could cease the supply of electricity through service cables connected to any unstable PA poles until replaced by the owner. The exact method of managing the risk are matters for WP; here

the breach was held to be the failure to have *any* inspection system of consumer poles supporting its electrical apparatus: CA [179]-[180].

Ground of Appeal 2(b): Asserted inconsistency or incoherency of duty

40. A public authority will be subject to a duty at common law only if the existence of that duty is consistent (*Crimmins* [3], [114]) or compatible (*Crimmins* [18], [203]; *Sullivan v Moody* (2001) 207 CLR 562, [55]) with the relevant statutory scheme. A duty may be incompatible with the scheme not only where duties are expressly excluded or there is a direct clash of obligations, but when the duty would undermine the effectiveness of the duties imposed by statute, or where the legislation is intended exhaustively to state the duties of the authority to the exclusion of the common law: *Graham Barclay* 574, [78]. The discernment of an *affirmative* legislative intent that the public authority be subject to a common law duty is not a pre-condition to the recognition of such a duty (*Graham Barclay*, 597 [148]).
41. It goes too far to say that *Graham Barclay* establishes that inconsistency will arise if the common law duty “would alter, impair, or detract from *negative implications* of the statutory scheme” (cf **WP [68]**). The concept of excluding the common law based on implied limitations on what are already *negative implications* is complex and not a useful extension or elaboration of existing authority. The passage of *Graham Barclay* apparently relied on by WP refers to circumstances where the legislation “cover[s] the field” and excludes common law duties, or where a duty is inconsistent with or undermines the effectiveness of duties imposed by statute. Justice McHugh’s reference to the legislation “covering the field”, cites the observations of Gaudron J in *Crimmins*, 18-19, [26]-[27], where her Honour referred to the statute operating “in the milieu of the common law”, which applies to a statutory body unless excluded. Her Honour acknowledged that the common law may not only be excluded by express provision, but also where “the nature or purpose of the powers and functions conferred, or some of them, may be such as to give rise to an inference that it was intended that the common law should be excluded either in whole or part...”.
42. Reliance on authority from other contexts does not advance WP’s position cf WP [68]. In the context of s 109, indirect inconsistency involves the “implicit negative proposition” that nothing other than what the law provides with respect to a particular subject matter is to be the subject of legislation: *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428, [35]. Given that the existence or otherwise of such an implicit negative proposition comes back to an analysis of

the statutory scheme to determine whether it “evince[s] an intention to deal completely and therefore exhaustively with the law governing a subject matter” (*Outback Ballooning*, [35]) use of that concept does not enhance the existing guidance on inconsistency of a common law duty with statute.

43. The CA did not limit itself to the question of whether the common law duty could be obeyed simultaneously with the statutory scheme (cf **WP [69]**) but considered in detail WP’s contention that the statutory scheme was incompatible, because s 25 was an exhaustive statement of the duty of care owed by a network operator. The CA closely analysed s 25 and its effect (**CA [136]-[145]**) in concluding it was not an exhaustive statement of WP’s duties, and considered other aspects of the statutory scheme and its enforcement: **CA [146]**.
- 10 44. The CA did not err in its interpretation of s 25, cf **WP [71]**. The s 25(1)(a) obligation is to “maintain” the relevant apparatus “in a fit and safe condition”, which is entirely consistent with an obligation to “keep” the apparatus in the stipulated condition. Further, on any interpretation of “maintenance”, for the service cable to be in a “fit and safe condition” would require maintenance to ensure it is held reliably off the ground. If the means of support of WP’s service cable is unsound, even the narrower interpretation of the word “maintenance” would require work on the cable to provide alternative or improved support, if the cable is to be in fit and safe condition. This construction still gives full force to the limitation of the maintenance obligation to apparatus “belonging to” WP: cf **WP [74]-[75]**.
- 20 45. Neither the legislative text nor the legislative history supports a legislative intention to limit WP’s duties arising out of the performance of its statutory functions to an obligation to maintain its own infrastructure network, such as PA poles (cf **WP [72]**). To the contrary, the legislative scheme at the time of the Hansard relied on by WP (**WP [73]**) expressly acknowledged and preserved rights of action against the operator at law and in equity.
46. The *Electricity Act 1945* second reading speech of November 1945 is said by WP to establish that the legislative intention was to “limit the public authority’s duty by negative implication” and to “demarcate the respective responsibilities of the authority and the consumer”. In fact, as recognised by the CA (**CA [139]**) the *Electricity Act 1945* as enacted introduced, in addition to the administrative remedy in s 25(2), a proviso in s 25(2)(b) which expressly preserved the operation of other rights of action against the Authority. That section qualified section (b) which
- 30 authorised the Commission to assess an amount of damages:

Provided that

(ii) the assessment of damages by the Commission and the payment of same **to the person aggrieved shall not preclude such person from taking and pursuing any action or other proceeding at law or in equity against the supply authority** in respect of damage suffered by him in consequence of the default committed by the supply authority.

47. Section 25 was otherwise substantively the same. Subsection 2(b) was repealed in 1996, but as acknowledged by the CA (**CA [139]**), nothing in the repeal of that part of s 25(2) could have the effect of making the Act exhaustive in defining the authority’s legal liability.
- 10 48. Finally, of the following features of the statutory scheme WP identifies as establishing that there was “no room for the common law duty of care”, none are persuasive.
49. “Conflicting” asset management systems / “superadded” duty of individual inspection: WP asserts at **[85(a)]** that the common law duty “erects a parallel management system as to other people’s assets, not worked out by the regulator or subjected to the public interest test” and would require consumer apparatus to be individually inspected regularly by WP in circumstances where the statutory scheme does not: **[85(d)]**. These matters do not contradict the potential existence of a duty.
50. *First*, the extent of any asset “management” required to discharge WP’s common law duty is limited to inspection, and inspection of assets so closely interconnected with its electricity
20 distribution system that they pose the risk of the ignition of fire by that system. WP already had an asset management system with respect to its own assets, and an extensive regime of periodic inspection for its own wooden poles: **CA [168]-[173]**, par [10] above. There is no basis on which a system of inspection of consumer poles could be regarded as “conflicting” with the existing asset management system. Even if it constitutes an extension of actions under its existing asset management program, it is neither conflicting nor incompatible.
51. *Second*, the fact that the regulator granted the licence on terms which did not include obligations as to consumer assets (**WP [11]; [85(a)]**) cannot negate the existence of a common law duty if it is otherwise consistent with the statutory scheme. The question is whether a common law duty would be inconsistent with the statutory scheme, not with a regulator’s activity under it.
- 30 52. *Third*, to the extent that reliance on these factors involves an implicit invocation by WP of concern for the imposition on public funds (see also **WP [55]**), no issue as to limitations on budgetary resources (cf *Crimmins* [79]) was relied on by WP or was relevant in this case. WP did

not rely on the defences offered by the *Civil Liability Act 2002* s 5W (limitations on financial resources) and 5X (defence applicable to policy decisions): **CA [164]**.

53. “Violation” of legislative “demarcation of responsibility at the interface”: The CA correctly rejected WP’s submission to this effect: **CA [147]**. The assertion of a demarcation of responsibility at the “interface” between WP and the consumer appears to have no foundation other than s 25 of the *Electricity Act 1945*. Given that WP’s obligation under s 25(1)(a) to “maintain” its own service apparatus in fit and safe condition may, where apparatus such as an electrified service cable is connected to and supported by a consumer pole, involve at least an assessment that the pole is sufficiently stable to safely support the cable (**CA [142]-[144]**; [13] above) this is a weak foundation for a demarcation. Importantly, other features of the statutory scheme did not observe any limitation of WP’s responsibility by reference to consumer owned assets, notably the definition of “distribution system” (extending to “apparatus, equipment, plant or buildings to be used, for or in connection with, the transportation of electricity”) which WP had the licence to operate and maintain: see *EC Act* s 41(i); *EI Act* s 3 (definitions of “distribution system” and “operate”); s 4(c) (the distribution licence).
54. Importantly, WP also identifies no basis on which the statutory scheme operated so as to permit only the works inspection duty found by the trial judge and accepted on appeal and not challenged by WP, which extends to consumer assets, but not the duty to take reasonable care in connection with the delivery of electricity through the distribution system, discharge of which may require inspection of the very same consumer assets.
55. “Inconsistency” with conditional power to disconnect: The fact that WP’s statutory powers to disconnect or interrupt supply are conditioned on it being of the opinion that there is, inter alia, a *potential* danger, did not require additional steps to be taken to “form the requisite opinion” in circumstances where WP already knew that wooden poles over 25 years old were at risk of in-service failure (**TJ [302]**; **CA [19]**), and was or should have been aware that the service life of poles declined from 15 years onwards (**TJ [301]-[302]**; **CA [19]**).
56. Making discretionary functions “obligatory”: the fact that the common law duty may require WP to exercise discretionary statutory functions does not exclude the existence of a duty. It is orthodox that while foreseeability of harm and existence of relevant powers on the part of a public authority do not alone give rise to a common law duty, there are circumstances in which a public body invested with discretionary statutory power may breach a common law duty of care

if it fails to exercise the power for the benefit of an individual or class of individuals: *Graham Barclay* at [78], citing *Sutherland Shire Council v Hayman* (1985) 157 CLR 424, *Pyrenees; Crimmins; Brodie*. The circumstances as to why WP was in that position were clearly identified by the CA: **CA [152]-[161]**. The requirement that WP exercise its distribution system functions by reference to factors such as prudent commercial principles (s 61(1) *EC Act*) is not inconsistent with a concern for safety, including a duty to take reasonable care to avoid or minimise the risk of injury to persons from the spread of fire in connection with the delivery of electricity through the system.

PART VI: STATEMENT OF ARGUMENT ON THE CROSS APPEAL

10 The basis of a non-delegable duty

57. In *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 29 [9]-[10] Gleeson CJ identified two classes of non-delegable duty, both of which turned on the terms of statute which governed the exercise of the relevant statutory powers or duties: strict non-delegable duties involving powers which can only be performed by a particular person or entity; and a second category:²

20 *... the case where the engagement of a third party to perform a certain function is consistent with the exercise of reasonable care by a defendant, but the defendant's legal duty is not merely to exercise reasonable care but also (if a third party is engaged) to ensure that reasonable care is taken. In such a case, the third party's failure to take care will result in breach of the defendant's duty. The legal consequence is that the circumstance that the third party is an independent contractor does not enable the defendant to avoid liability.*

58. Non-delegability of the second kind arises where it appears from the terms of the statute that the legislature intended the repository of the power or duty to have a responsibility for ensuring the exercise of reasonable care even if a third party were engaged to perform the function: *Leichhardt* at [10]; see also [20]. Past authorities recognising the features which give rise to non-delegable duties assist in this process of statutory construction.

59. In *Kondis v State Transport Authority* (1984) 154 CLR 672, 685-687 Mason J referred to established categories of non-delegable duties (hospital and patient; school authority and student; occupier and invitee, master and servant re safe system of work), noting at 687:

30 *In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.*

² His Honour also acknowledged a third category of non-delegable duties that arises from the conduct of extra-hazardous activities, [18].

60. In *Burnie* (1994) 179 CLR 520, 551 the majority, having cited Mason J’s observations in *Kondis*, adverted to the relationship between the dangerous nature of an activity conducted on premises and the special vulnerability to danger of persons outside the premises if reasonable precautions are not taken by the person in control of the premises or undertaking the dangerous activity or allowing another person to undertake it. A situation of both dangerous activity and the statutory power to undertake and control the risks arising from that activity, where others are vulnerable to such risks and have no ability to control them, points to a non-delegable duty, the ultimate answer being dependent on the statutory scheme.

The Trial Judge and Court of Appeal’s conclusions on non-delegable duty

- 10 61. The Trial Judge held that before undertaking works on the PA pole, and when undertaking those works, WP owed to the plaintiffs 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 (“**works duty**”) (TJ [297], [338]). This was not challenged on appeal.
62. The Trial Judge, however held that the works duty was not a non-delegable duty (TJ [305]-[339], especially at [336] – [337]). On appeal, the plaintiffs contended that the duty was non-delegable both on the basis of its hazardous nature and by reference to the special degree of control of WP, lack of ability of landowners in the vicinity of the infrastructure to address the risk, and reliance by them combined with the potentially catastrophic consequences of any negligence: CA [215]-[215]. The CA upheld the finding that the works duty was not a non-delegable duty (CA [225]-[235]). In doing so the CA erred in:
- 20 a. focusing too narrowly on WP not being in control or occupation of Mrs C’s land (CA [226] to [227]);
- b. holding that there is nothing in the legislative scheme to suggest that Parliament intended to impose a duty on WP to ensure that reasonable care was taken in the exercise of its functions, including the works duty (CA [229]); and
- c. failing to have regard or sufficient regard to the special vulnerability and dependence of the plaintiffs on WP to discharge the works duty with reasonable care and the catastrophic consequences if such duty was not discharged with reasonable care.

Court of Appeal finding that WP was not in occupation or control of Mr C’s land (CA [229])

- 30 63. While control of “premises” may be sufficient to give rise to a non-delegable duty, this is not the only circumstance in which such a duty will arise: see eg *Kondis*, 687-688. Control over an

activity conducted on the premises may introduce a foreseeable risk of danger in respect of which a person outside of the premises is especially dependent upon reasonable precautions being exercised, and especially vulnerable to danger if they are not.

64. Whilst it is accepted that the circumstances of the present matter do not fall directly within the circumstances in *Burnie Port Authority*, the CA erred in focussing on the fact that WP did not have control over the *land* on which Thiess performed the July 2013 Works (CA [225], [226] and [229]). The important question was the control over the activity causing the risk of harm; in the case of the works duty the activity was July 2013 works, which involved removal and replacement of the service cable connected to the PA pole on Mrs C's land: TJ [42], [153]; CA [42]. WP had the statutory powers to enter onto the land for this purpose, and had authorised Thiess to undertake the works: CA [39]-[40].

The statutory scheme gave WP relevant duties and powers of control

65. Under the statutory scheme WP was licensed to operate the distribution system, extending to all apparatus or equipment used in connection with the transportation of electricity, and which included maintaining the system and making any modifications necessary or desirable for its operation: see [11] above. In addition to the high degree of control over and responsibility for the system, WP had the specific safety related duties under s 25(1) of the *Electricity Act 1945* which, properly construed, extended to taking steps to see that the PA pole supporting a service cable was capable of safely supporting it: CA [140]-[144]; see [13] and [44] above. Importantly, given the nature of the works duty, WP also had:
- a. duties and powers with respect to the supply of electricity through the system: see the discussion of s 25(1)(b) and the powers to interrupt supply at [14]-[15] above; and
 - b. powers to carry out works on consumer apparatus, and on private land: [17] above.
66. In contrast to the extensive statutory duties and powers which WP could exercise in doing works on a consumer apparatus, a consumer had no statutory duty to maintain its own PA pole, nor was there any statutory penalty for any failure to do so ([18] above). The owner of the pole only had a common law duty of care to third parties in their vicinity to exercise reasonable care to ensure that their consumer poles remained serviceable. The allocation of statutory powers to WP, including safety related powers and duties, by contrast to the absence of power on the part of the public, was indicative of the particular responsibility conferred on WP for the safe operation of the system, including when doing works on it.

Special vulnerability and dependence

67. Vulnerability and dependence are common facets of the existence of non-delegable duties *Kondis* at 687 (Mason CJ). However the CA did not directly engage in this context with the extreme vulnerability of neighbouring landowners, and their reliance on WP as the distribution licensee and network operator in operating and working on the system.
68. In relation to the works duty, WP had the duty to inspect the PA pole before undertaking work, and conduct the work so as to ensure the PA pole was in a safe and fit condition for use in the supply of electricity: **TJ [297]**. This work involved some danger, and potentially extreme hazard if reasonable care was not exercised, given that it involved working on an electricity distribution system. WP's position was relevantly different to that of the Council in *Leichhardt*, 33 [18], where it was acknowledged that road works could in some cases involve extra-hazardous activity, but that was not the case with the relevant footpath works.
69. Further, in addition to WP's powers with respect to the system, it had specialist knowledge with respect to risks in the system, including the limited service life of untreated jarrah poles; and the risks of collapse posed by termite damage and fungal rot ([6]-[7] above).
70. Landowners in the vicinity, including the Second Respondents:
- a. had no ability to prevent or minimise the risk of an unintended discharge of electricity which occurred on Mrs C's land;
 - b. were thereby acutely vulnerable to the grave risks of harm to human life and property (**TJ [302]; CA [157]**) from any fire caused by such discharge; and consequently
 - c. were dependent, for the protection of their person, property and economic interests on WP, the entity charged by statute with operating and maintaining the electricity distribution system, exercising reasonable care to conduct pre-work inspections.
71. This combination of extreme vulnerability of the plaintiffs and dependence on WP in the context of a dangerous activity was such as to make WP's works duty non-delegable.

Heightened vulnerability if broader duty is overturned

72. In the event that this Court was to overturn the CA finding as to WP's duty of care, so that WP would not, in discharge of the duty, have been obliged to conduct routine inspections of consumer poles at regular intervals, that increase the risk of fires caused through unintended discharges of electricity and thus the vulnerability of members of the public in the position of

the adjoining land-owners, due to the higher probability of consumer poles being past their safe service life or otherwise being structurally compromised by rot and/or termites.

Special leave to cross appeal ought be granted

73. This cross appeal raises a question of a special nature requiring the attention of the High Court or it would do injustice to determine the appeal alone: *Director of Public Prosecution v United Telecasters Sydney Pty Ltd* (1990) 168 CLR 594, 602 and justifies the grant of special leave pursuant to rule 42.08.4 of the *High Court Rules 2004*.

74. The question is: What are the circumstances in which acute vulnerability and dependence of a class of persons on a statutory authority to exercise reasonable skill and care gives rise to a non-delegable duty? There is no clear demarcation of when a “special” responsibility or duty arises to ensure that reasonable care is taken by an independent contractor: *Leichhardt*, [23], and the facts of this appeal are conducive to the provision of further guidance on this unresolved area of the law. Further, it would do injustice to determine the appeal of WP without addressing the cross-appeal. If the appeal is upheld, and WP does not have the duty accepted by the CA, the vulnerability of members of the public to the catastrophic risks associated with in service failure of consumer poles would be significantly increased.

Orders sought:

75. The Second Respondents seek the orders set out in the Notice of Cross-Appeal, par 4.

PART VII: ESTIMATE OF TIME FOR PRESENTATION OF ORAL ARGUMENT

76. The Second Respondents estimate 2 hours for oral argument, including cross-appeals.

Dated: 1 June 2022



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ANNEXURE A

STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN THE SECOND RESPONDENTS' SUBMISSIONS

Statute	Version	Relevant Date(s)
1. <i>Electricity Act 1945</i> (WA) s 25(2)(b)	Original	9 January 1946
2. <i>Electricity Act 1945</i> (WA) s 25(2)(b) – deleted	Reprinted as at 26 February 1997	11 November 1996
3. <i>Electricity Act 1945</i> (WA) s 25(1)(a), s 25(1)(b), s 25(2), s 32(1)(o), s 36(1), s 40(2)	08-a0-04	13 December 2013 – 28 March 2022
4. <i>Electricity Operators (Powers) Act 1979</i> (WA) s 4(2), s 28(3), s 46, s 49	05-d0-03	1 January 2014 – 13 June 2019
5. <i>Electricity Industry Act 2004</i> (WA) s 3, s 4(c), s 31(1), s 31(4)	02-i0-03	1 January 2014 – 28 March 2018
6. <i>Electricity Corporations Act 2005</i> (WA) s 3, s 4, s 41(a), s 41(i), s 61(1), s 63(1)	01-k0-04	1 January 2014 – 17 July 2014
7. <i>Electricity Act Regulations 1947</i> (WA) reg 253, reg 254	06-a0-02	8 November 2013 – 14 April 2015
8. <i>Electricity Industry (Obligation to Connect) Regulations 2005</i> (WA) reg 5(1), reg 5(4)	00-a0-11	4 October 2005 – 5 November 2021
9. <i>Civil Liability Act 2002</i> (WA) s 5W, s 5X	03-j0-04	1 January 2013 – 12 September 2013;
	04-a0-07	13 September 2013 – 13 April 2016