



HIGH COURT OF AUSTRALIA

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Details of Filing

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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

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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

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and

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

Fifth Respondent

FOURTH RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION FOR INTERNET PUBLICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. WP's appeal concerns whether, as the Court of Appeal (CA) held, the appellant (WP) owed a duty to persons in the vicinity of the SWIS 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. The issues raised on WP's appeal are (a) whether WP exercised sufficient "control" over point of attachment poles to owe the duty as framed; and (b) whether that duty is inconsistent with the statutory scheme. Pausing there, WP's argument erroneously focuses attention on the point of attachment pole owned by the fourth respondent (**PA Pole**), and control of the PA Pole, with too much particularity overlooking the use of the pole to support WP's equipment. The fourth respondent (**Mrs Campbell**) submits that the CA was correct for the reasons it gave.

- 10 3. The application for special leave to cross-appeal filed by Mrs Campbell raises the following issues: (a) whether Mrs Campbell owed a duty to take reasonable care to "inspect and maintain" the PA Pole in a safe and serviceable condition (or whether that duty is impermissibly specific); (b) whether Mrs Campbell breached the duty of care she owed, properly identified, by failing to obtain regular inspections of the PA Pole; and (c) whether it is appropriate for the scope of Mrs Campbell's liability to extend to the harm caused to the first to third respondents, in view of the negligent inspection of the PA Pole conducted by the fifth respondent (**Thiess**) in July 2013.

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice is not required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: STATEMENT OF CONTESTED MATERIAL FACTS

- 20 5. Mrs Campbell does not contest the material facts set out in WP's statement of facts in its submissions (**AS**) and in WP's chronology. The matters that follow are additional.
6. Poles performing the function of the PA Pole are referred to in the electricity industry as a 'point of attachment pole', which identifies a pole at which an electricity distribution system is attached to the consumer mains: *Herridge Parties v Electricity Networks Corporation t/as Western Power* [2021] WASCA 111. (**J**) [2] (Core Appeal Book (**CAB**) 404); *Herridge v Electricity Networks Corporation t/as Western Power [No 4]* [2019] WASC 94 (**TJ**) [32] (CAB 19). A point of attachment pole is the first pole after the network. Some consumers own other poles (known as "consumer poles") which carry the consumers' conductors from the point of attachment pole to the
- 30 consumers' residence and are more remote from the network: J [17]; CAB 408. This case is not concerned with a consumer pole in that sense.
7. The complex configuration of WP's property and Mrs Campbell's property attached to the PA Pole is described at J [31]-[34]; CAB 411-2; see the photograph TJ [18]; CAB 24 and diagram TJ [42]; CAB 32. WP's service cable, the main conductor for

the conveyance of electricity (J [31]; CAB 411), travelled from the WP termination pole (part of WP's network) over part of Mrs Campbell's property to the PA Pole and passed through a wedge clamp hooked onto an attachment hook bolted to the side of the PA Pole, about 25cm from its top. The attachment hook bore the weight of the service cable: J [32]; CAB 411; photograph TJ [33]; CAB 28. The service cable connected with Mrs Campbell's consumer mains inside a mains connection box, which was also attached to the PA Pole: J [32]; CAB 411.

- 10 8. In July 2013, at WP's direction, Thiess, a qualified and competent contractor (J [256]; CAB 471), replaced the termination pole adjacent to Mrs Campbell's property: J [39]; CAB 413. To do so, WP disconnected the electricity connected to Mrs Campbell's property (TJ [41]; CAB 31), and Thiess' employees, pursuant to a statutory power vested in WP (TJ [177]; CAB 61), entered Mrs Campbell's property. There was no finding that Thiess or WP had Mrs Campbell's permission to enter her property or perform any work on the PA Pole. As mandated by WP, Thiess inspected the PA Pole for serviceability: J [28]-[29], [41]-[43]; CAB 410-1, 414. The evidence at trial was that Mrs Campbell was aware of works undertaken by WP and its contractors along her street from time to time, and she spoke to a Thiess employee on the day of the July 2013 inspection and works, at the location of the PA Pole.¹
- 20 9. The PA Pole was unserviceable in July 2013: J [50]; CAB 416. The inspection performed by Thiess was inadequate: J [43]; CAB 414. Properly conducted, it would have identified the deficient condition of the PA Pole below ground: J [51]; CAB 416.
10. WP knew or ought to have known that an untreated and unreinforced jarrah pole (the characteristics of the PA Pole) which had been in service for over 25 years was beyond its life expectancy and operating at an elevated risk of in-service failure: J [19]; CAB 408. Mrs Campbell did not know, and a reasonable person in Mrs Campbell's position would not be expected to know, that fact: J [297]; CAB 482.
- 30 11. On 12 January 2014, the PA Pole failed below the ground line and a fire started, spreading to other properties: J [47]; CAB 415. The necessary conditions for the start of the fire were the damaged PA Pole, wind, the connection to WP's service cable and the resulting transmission of electricity: see J [47], [49]; CAB 415; TJ [110]; CAB 45.
12. The visual appearance of the PA Pole in January 2014 would have been similar to its appearance for probably more than five years: J [50]; CAB 416; TJ [125]; CAB 49.

¹ Western Power Incident Report, statement of Mr Darko Milanovic, pages 3 to 8 (ETB 814); Affidavit of Mrs Noreen Campbell sworn 30 November 2015 (ETB 56), paras 23 to 25.

There was no finding that a reasonable layperson ought to have identified any deficiency in the PA Pole from its external appearance.

Part V: MRS CAMPBELL'S ARGUMENT IN ANSWER TO WP

13. **Introduction:** The CA was correct to find WP owed the duty the CA identified, for the reasons it gave. As WP conceded that it had not taken any steps to perform that duty insofar as the duty extended to taking care in respect of the condition of the PA Pole, breach followed from the finding of duty. WP challenges that conclusion on two grounds. Due to the importance of the statutory scheme to WP's argument, these submissions are directed first to that scheme before addressing WP's grounds.
- 10 14. By way of overview, WP's argument, on both grounds, suffers from four deficiencies. *First*, it is premised on an illusory distinction, on the facts, between WP's infrastructure and the PA Pole to which WP attached its property, including the overhead cable, and which was required to hold that property aloft and safe. *Secondly*, it ignores the role of WP's property, attached to the PA Pole, in creating the risk of harm. *Thirdly*, it misconstrues s 25 of the *Electricity Act (EA)*. *Fourthly*, it fails to grapple with the inconsistencies between its arguments and the duties WP concedes it owes. Because WP used the PA Pole to hold aloft its overhead cable but took no action to seek to determine whether it was or remained safe to do so (WP did not contend that the inspection by Thiess was performance of the duty found by the CA), WP breached
- 20 the duty it owed, whether framed as WP conceded or as found by the CA.
15. **Statutory scheme:** WP is a statutory corporation established by s 4(1)(b) of the *Electricity Corporations Act 2005 (WA) (ECs Act)* but is not an agent of the State (s 9 *ECs Act*) and its affairs, the performance of its functions and its policies are governed by its board (s 5 *ECs Act*). WP's functions with respect to the geographic area known as the SWIS are set out in ss 41 and 42 of the *ECs Act*. Those functions include managing electricity transmission and distribution systems, providing electricity transmission and distribution services, and maintaining any works, system, facilities, apparatus or equipment required for such purposes: ss 41(a), (i) *ECs Act*; also ss 56, 58, 61 as to the exercise of those functions. In performing its functions, WP must act
- 30 in accordance with prudent commercial principles and endeavour to make a profit, consistent with maximising its long-term value: *ECs Act* s 61(1); see also s 42(d).
16. The price at which WP provides a transmission and distribution service is regulated by the *Electricity Networks Access Code 2004 (WA) (Code)*. The Code requires the Economic Regulation Authority to approve access arrangements for WP's network,

including prices set with the objective of giving WP the opportunity to earn revenue which meets the forward-looking and efficient costs of providing covered services, including a return on investment commensurate with the commercial risks involved: cll 5.1, 6.1 and 6.4; also regarding price lists cll 4.36; 7.3; J [115]-[118]; CAB 431.

17. WP has the powers it needs to perform its functions under the *ECs Act* or any other written law: *ECs Act*, s 59(2). WP has powers under the *EOP Act* to unilaterally enter a consumer's premises and inspect, maintain, install and replace its infrastructure and consumer property such as the PA Pole: ss 28(3)(c), 43(1), 46, 48, 49 *EOP Act*; CA J[119]-[126]; CAB 432-4. In contrast, where WP installs infrastructure on a consumer's property, the consumer's ability to deal with his or her property is attenuated. The consumer has no control over the exercise of WP's powers described above. Nor can the consumer unilaterally replace a point of attachment pole supporting WP's infrastructure: the consumer commits an offence if he or she removes or wilfully interferes with the supply system or works the property of WP, or if he or she interrupts the supply of energy by WP: s 75 *EOP Act*; see also r 19(1) *Electricity Regulations 1947* (WA) (*E Regs*); s 74 of *EOP Act*; J [124]; CAB 433.
18. WP also has statutory obligations; relevantly, s 25 of the EA (reproduced J [125]; CAB 434) imposes two statutory duties on WP. In summary, those are: (a) an obligation to "at all times maintain" all of WP's service apparatus on a consumer's premises "in a safe and fit condition for supplying electricity" (s 25(1)(a)); and (b) in the actual supply of electricity to a consumer's premises, to "take all reasonable precautions" to avoid the risk of fire to the position "where the electricity passes beyond the service apparatus of the network operator" (s 25(1)(b)). Service apparatus is defined with the effect that WP's service cable (and, relevantly to s 25(1)(b) but not s 25(1)(a), the PA Pole as equipment used "in connection with" the service cable) comprises service apparatus: s 5(1) EA; reproduced at J [126]; CAB 434; also J [141]; CAB 438.
19. WP's obligation at the time of the fire to connect consumers to its network under the *Electricity Industry (Obligation to Connect) Regulations 2005* (WA) (*OC Regs*), introduced decades after Mrs Campbell's premises were originally connected, is subject to several conditions or limitations (cf AS [13], [47]). That obligation only arises where the customer has agreed to pay the cost of making that connection in a way that is "sustainable" and accords with "good industry practice as it would be applied by a prudent distributor": *OC Regs* r 5(4)(b). Where premises are required to be attached to a distribution system, WP is obliged to extend the distribution system

to a “suitable connection point”: *OC Regs* r5(5). WP must not supply electricity to any premises unless it has ensured that all of its service apparatus that will be used for supplying electricity to the premises is safe to use; nor where the connection is likely to cause a consumers’ electric installations to become unsafe: r 242 of the *E Regs* (see also s 58 of the *EOP Act*). Contrary to AS [13], [47], there was no obligation on WP to attach its service cable to any structure (including the PA Pole) of unknown structural integrity. The content of the *E Regs* in 1968, about 40 years before the July 2013 works and the fire but applicable when electricity was connected to Mrs Campbell’s property (then owed by her and her late husband), similarly do not assist WP’s argument. Those regulations did not contain an obligation to supply (cf AS [47]). The 1968 *E Regs* also contained similar conditions on the supply authority connecting supply, or disconnecting supply, where the consumer point of attachment was unsound, and for the supply authority to determine the most suitable position for service leads: 1968 *E Regs* rr 184, 186, 188, 203, 242, 245, 246, 271, 272.

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20. Finally, in the period prior to January 2014, WP could interrupt, suspend or disconnect the supply of electricity to a consumer in a number of circumstances (contrary to AS [13], [47], not only in the case of danger or potential danger). It could do so where: (a) in WP’s opinion, it was necessary to do so because of an accident, emergency or “other avoidable cause” (s 31 *Electricity Industry Act 2004* (WA) (*EI Act*); s 63 *ECs Act*); (b) the consumer was operating electrical equipment in a manner that, in WP’s opinion, would interfere with supply to others (r 265 *E Regs*); (c) in the circumstances set out in s 58 of the *EOP Act*, including where the continued supply would adversely affect any supply system or be unsafe to property (s 58(c), see also s 58(d)(i)); (d) where it appeared to WP that an emergency situation existed (s 48 *EOP Act*; see also s 57 *EOP Act*); and (e) in accordance with contractual rights (s 31(4)(c) *EI Act*).

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21. **Duties of care conceded by WP and that found by CA:** WP conceded, in the operation of its electricity distribution system, it owes a duty to exercise reasonable care to deal with the risk of fire from that system (**Conceded System Duty**) and, at the time WP attaches an aerial electrical 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 in time (J [152]; CAB 441) (**Conceded PA Pole Duty**). The CA found 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 those persons, and of loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its

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electricity distribution system: J [158]; CAB 443. Other than the illusory distinction WP posits between its property and other persons' property which WP uses – here, the PA Pole to hold aloft its property – there is no relevant distinction between the Conceded System Duty and the duty the CA held was owed. Neither the conception of control nor s 25 of the EA support that distinction or support that distinction as being determinative of the scope of the duty.

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22. **Ground of appeal 2(a): Control:** WP elevates control to the sole limiting criteria relevant to whether it owed the duty found by the CA: eg AS [31]. That approach is erroneous. The analysis of whether a common law duty is owed involves several
- 10 considerations other than reasonable foreseeability, which differ in significance in different factual circumstances: for example, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [112]-[113]. Control should not be considered in isolation; the existence of a duty of care is a multifaceted enquiry: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 [149]. Further, the authorities in which it was found that a statutory authority did not owe a relevant duty, relied on by WP (eg *Graham Barclay; Sydney Water Corp v Turano* (2009) 239 CLR 51), stand in contrast to the circumstances here. WP's argument about "control" fails for the following reasons.
23. *First*, this is not a case of non-exercise of a discretionary power simpliciter (J [154]-[157]; CAB 442). WP has exercised its statutory powers to use property owned by
- 20 some landowners to hold aloft parts of its electricity distribution system, and it is that exercise of power which engages an obligation to maintain the condition of its system, including those parts held up by consumer property, to allow it to safely convey electricity. In particular, in performing its statutory function WP used the PA Pole to hold aloft its service cable and other equipment it owned to transmit electricity (J [31]-[35], [42], [154] and [174]; CAB 411-2, 414, 442, 448) and depended on the PA Pole for the continuing safe condition of its infrastructure: J [143]; CAB 439. In the context of the statutory scheme identified above, it is artificial to suggest that WP's control extended only to the point its property attached to the PA Pole, because WP was not the legal owner of the PA Pole. As the CA held, it is use and not ownership which is
- 30 important in considering WP's duty: J [154], [174]-[175]; CAB 442, 448.
24. *Secondly*, WP's power is not a discretionary power simpliciter. WP is subject to a statutory duty (or duties) which informed the exercise of its powers, created by s 25 EA. In relation to a corporation which has statutory powers and duties, the statutory regime is important, often critically so: *Sullivan v Moody* (2001) 207 CLR 562 [62].

The CA's reasons in addressing WP's statutory power followed a conventional approach, consistent with that proposition, in determining the duty the CA held WP owed: J [135]-[161]; CAB 437-43. As addressed in pars 34-37 below, properly construed s 25 of the EA imposes a duty to inspect and deal with a point of attachment pole where necessary to maintain service apparatus belonging to WP in a safe and fit condition for supplying electricity: J [140]-[144]; CAB 438-9. That duty is imposed in the context of broad powers that confer on WP the ability to determine how to connect the transmission network to Mrs Campbell's premises, and to inspect, maintain and replace the PA Pole (J [154]; CAB 442; par 17). While WP has a discretion as to when and how those powers are exercised, s 25 of the EA conditions the exercise of WP's statutory powers or limits the discretion (cf AS [49]-[50]).

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25. *Thirdly*, the positive acts taken by WP, and the distribution network it accepts it controls, are necessary conditions to the risk of harm. It is when consumer property is relevantly used by WP (to support its infrastructure and use the transmission network so arranged) and WP "enters upon the exercise" (*Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [177]) of its statutory powers that the risk of harm, the ignition and spread of fire, connected with that use arises: J [154], [158], [164], [178]; CAB 442, 443, 445, 448. As McHugh J observed in *Graham Barclay* at [81] "if the authority has used its powers to intervene in a field of activity and increased the risks of harm to persons, it will ordinarily come under a duty of care". WP wrongly focuses on the role of the PA Pole in the risk of fire to the exclusion of the necessary condition – the discharge of electricity – created by WP's continued attachment of its equipment, the purpose of which is to transmit electricity, to the pole: AS [51], cf AS [48]-[49], [54], [56]. WP conflates the risk of harm with the risks to the PA Pole (for example, AS [54] where the risk of harm is incorrectly stated as "the condition of consumer property").

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26. *Fourthly*, WP knew or ought to have known of the specific risk that poles like the PA Pole might collapse and, when attached to its network and "in-service", may start a fire: J [19]-[21]; CAB 408-9; cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 [165]. That eventuality was "readily foreseeable" to WP, and its statutory functions, duties and powers are conferred in that context: J [157], [167]; CAB 442, 445.

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27. *Fifthly*, WP places significant weight on being a public authority, including to erroneously elevate the criterion of control. True it is that WP is a statutory corporation. However, that tells one little about the duty it owes in the circumstances. WP operates a business, which has a profit-making object and which is operated in a

rule-based market which includes an object of providing a reasonable return on investment: see par 15. It is not a statutory authority of the same character as a local council or the State, as considered in cases such as *Graham Barclay*. The types of “political judgment” or policy decisions there referred to do not arise in the same way: *Graham Barclay* at [6] Gleeson CJ; cf AS [55]. In that context, it is unsurprising that WP did not rely upon s 5W of the *Civil Liability Act (WA) (CLA)*: J [201]; CAB 455.

28. *Sixthly*, WP’s argument regarding control is inconsistent with the duties it concedes. As to the Conceded PA Pole Duty, it is correct that WP is physically at the location of the PA Pole, at least by its contractor, at the time it attaches the service cable: cf AS [60]. That temporal distinction, whether viewed through the lens of duty or control, is not of significance in circumstances where WP’s use of the PA Pole for “actual supply” (and the resulting risk of harm) remains the same from or soon after the point of time at which the cable is attached to the PA Pole. As to the Conceded Systems Duty, AS [63]-[64] overlooks the relationship between the PA Pole and WP’s electricity distribution network. WP depended on or used the PA Pole for the operation of part of its network. It is the attachment of the overhead cable to the PA Pole and use of that cable in supplying the distribution service that creates the relevant risk of harm and attracts the duty WP otherwise concedes. The distinction based on ownership which WP draws is without foundation: cf AS [51].

20 29. *Seventhly*, AS [46]-[47] makes much of the CA’s use of the word “chose”. The CA’s characterisation was correct. WP’s submissions proceed on a mischaracterisation of the statutory scheme; its obligations and powers are not as stated in AS [47]. WP’s obligation to connect electricity supply was confined in material respects. WP was not obliged to supply, and had powers to cease supply, in a variety of circumstances: pars 19-20. WP is not compelled to use its network to supply power in an unsafe way; unsurprisingly, unsafe supply is not an obligation created by statute: J [157]; CAB 442. Further, decisions were made to attach an overhead cable, and again to attach a new cable in June 2013, to the PA Pole which are sensibly described as to “chose”.

30 30. AS [52], [53], [57], [58], [60] involve a misreading of J [178]; CAB 448. J [178] posits performance of WP’s duty by inspecting and maintaining where appropriate (to maintain its equipment in a safe and fit condition by attaching it to a sound structure), or to inspect and require the landowner to install a fit for purpose structure. WP’s criticism of the CA positing alternative ways of WP discharging its duty is erroneous. The CA did not impose a duty to inspect or warn; it identified two of perhaps many

ways the duty identified in J [9]; CAB 406 and J [178]; CAB 448 may be performed.

31. *Finally*, the “floodgates” type argument in AS [57] is built on several false premises. WP misstates the degree of control present and found by the CA, and the duty found by the CA cannot be applied by analogy to other statutory authorities. The duty found is expressly based on (a) the unique statutory setting in which WP operates, including bespoke powers and express statutory duties; and (b) the particular facts, including WP’s arrangement of its network in a way in which it sometimes connects its overhead cables to private point of attachment poles without a programme for inspection of those poles (J [168]-[173]; CAB 446-7) where WP’s regulated charges have the consequence that the cost of an inspection programme was fully recoverable: J [173]; CAB 447. And if a similar duty might be owed by another authority, WP’s speculation that it could only be discharged by the authority “systematically exercis[ing] any statutory power available to it” with respect to the condition of the “consumer’s property... in the vicinity of the authority’s infrastructure” is disconnected from both the facts and the particular statutory setting of this case.
32. **Ground of appeal 2(b): Inconsistency: Summary:** Ground 2(b) fails because it (1) requires an incorrect approach to inconsistency; (2) adopts an erroneous construction of s 25 of the EA; and (3) is not supported by the features of the broader legislative scheme, including those relied on by WP.
33. Erroneous approach to inconsistency: WP argues that “negative propositions” arise from the statutory scheme, in particular s 25 of the EA, which are inconsistent with the duty found to be owed by the CA. WP argues that the negative propositions arise although the statutory scheme and the duty are not directly inconsistent, nor is the statutory scheme intended to be an exclusive set of laws on particular issues: AS [68], [72], [77], [86]. WP’s approach erroneously results in a common law duty of care being rejected where not co-extensive with a statutory duty, on the basis that the statutory duty carries an implied negative proposition that the common law duty not to travel beyond its bounds. That proposition should be rejected: (a) both logically and as a matter of modern legislative technique the existence of an obligation does not deny the existence of a different albeit not inconsistent obligation; and (b) it attributes a statutory intention not apparent from the language used by parliament, or the object of the legislation demonstrated by extrinsic material.
34. Proper construction of s 25 of the EA: WP’s argument depends on its construction of s 25 of the EA, in particular the proposition that s 25 does not require WP to take any

steps with respect to point of attachment poles. For the following reasons, consistent with the CA’s reasoning (J [140]-[144]; CAB 438-9), WP’s construction is incorrect.

35. AS[71]-[75] are predicated upon the error identified J [143]; CAB 439. Section 25(1)(a) requires WP to “at all times *maintain*” its service apparatus in a particular state (“a fit and safe condition”). WP conflates an obligation to “at all times maintain” its service apparatus (including the service cable) with an obligation of different content, to perform “maintenance” on its service apparatus: cf “maintenance obligation” AS[71]-[75]. WP’s construction impermissibly departs from the language used in the legislation. “Maintain”, both grammatically and read with the sense of the section, means “keep”. As the CA observed, maintain has its English language meaning (“in the ordinary sense of ‘keep’”): see the *Macquarie Dictionary* definition of “maintain” (“2. to keep in due condition, operation, or force; keep unimpaired; 3. to keep in a specified state, position, etc”). That s 25(1)(a) cannot be read as WP contends is also shown as WP’s construction would have the improbable result that it owes a duty to “at all times” perform “maintenance” on its property. Similarly, a word when used on multiple occasions in a section usually will be construed to have a consistent meaning. The word “maintain” in s 25(1)(c) and (d) of the EA is used in the sense of “keep”, and has the same meaning where used in s 25(1)(a).

36. While it is true that it is WP’s service apparatus that it must “maintain” in the identified state, that is not to the point. As the CA held, the aerial service cable will not be kept in a fit and safe condition if attached to a pole incapable of supporting it: J [143]; see also J [144]; CAB 439. There is no error in that reasoning.

37. Section 25(1)(b) imposes on WP a duty, in the “actual supply of electricity”, to “take all reasonable precautions in order to avoid the risk of fire or other damage on the [consumer’s] premises...” to the point at which electricity passes beyond the service apparatus of WP. On Mrs Campbell’s property, that point was the meter or fuses attached part way up the PA Pole: TJ [215]-[216]; CAB 71. The trial judge held that duty may require WP to inspect a consumer pole in some circumstances, including when attaching apparatus to, or performing work on, the pole. The suggestion in AS [76] that s 25(1)(b) is “focused on cables” and discharged by insulation is wrong, and contrary to the trial judge’s correct reasoning. Further, s 25(1)(b), which is directed to different although sometimes overlapping periods of time, equipment, subject and required standard compared to s 25(1)(a), does not confine s 25(1)(a) nor create a “negative proposition” contrary to the CA’s construction: cf AS [77]. It is

complimentary of the duty created by s 25(1)(a) but does not confine that duty.

38. No negative proposition in s 25 of the EA: In any event, s 25 of the EA does not exhaustively prescribe WP's duties with respect to its distribution network (as is apparent from the duties WP concedes): J [137]-[139], [145]; CAB 437-8, 439. WP's reliance on the second reading speech referred to AS [73] does not derogate from that conclusion. The quoted passage is directed to removing the definition of "service apparatus" from the EA as then enacted. The Minister was not directing attention to points of attachment which support a service provider's infrastructure. Further, the definition of "service apparatus" was later reintroduced in terms that expressly extend to "equipment or plant used in connection" with WP's equipment "whether or not the property" of WP, language which means the PA Pole is "service apparatus": J [126]; CAB 434. Further, the passage referred to is not directed to the critical issue, whether an obligation to maintain WP's service apparatus in a safe condition requires acts with respect to consumer property to which that apparatus is attached.
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39. Legislative scheme - Nature of WP powers: WP's powers are conferred in the context of its functions, which requires that WP's functions be considered (cf AS [81]): ss 41 to 42 *ECs Act*. Those functions include managing electricity transmission and distribution systems, providing electricity transmission and distribution services, "maintain[ing]... any works, system, facilities, apparatus or equipment required" for those purposes and doing things incidental to those functions: ss 41(a), (i), s 42(e) *ECs Act*. As WP uses the property of consumers (here, the PA Pole) to physically support service cables, WP's functions extend to maintaining property needed to keep its own infrastructure in a safe condition. AS [82]-[83] misstates the ambit of ss 49(c) and (d) of the EOP Act. The definition of "supply system" includes "service apparatus", which in turn is defined in a manner that includes the PA Pole and extends beyond WP's property: s 4 *EOP Act* (see also "apparatus" J [122]; CAB 433). Contrary to AS [83], s 49(d) is not confined to WP's ("its") distribution works and service apparatus. Rather, ss 28(3)(c) and 49 of the EOP Act confer expansive powers on WP to inspect, maintain and replace *inter alia* the PA Pole: see also ss 43(1), 46, 48, 68.
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40. Other aspects of the legislative scheme: WP relies upon several other aspects of the legislative scheme pertaining to it, but those do not ultimately support WP's argument.
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41. Licensing scheme (AS [85](a)): The existence of a licensing scheme, which includes as a condition an asset management system of unknown content and the ambit of which is determined by the regulator and not Parliament, cannot be a source of implied

negative prohibition on duties such as the duty found by the CA. Had Parliament intended the licensing scheme to define duty, there would be no need for s 25 of the EA. Nor would WP owe the duties it accepts it owes. Further, it is improbable that the legislature intended that the required “asset management system” exclude property used to hold aloft WP’s assets.

- 10 42. *Alleged demarcation of responsibility*: AS [85](b) erroneously assumes the conclusion expressed in that paragraph regarding the proper construction of s 25 of the EA. For the reasons already identified, that construction is incorrect. No generalised demarcation of responsibility exists for the reasons given above and at J [136]-[147]; CAB 437-40. Moreover, Parliament extended the operation of its statutory scheme to point of attachment consumer property (see, for example, the powers described above and the definition of “service apparatus” s 5 EA; s 4 EOP Act).
- 20 43. *Disconnection powers (AS [80], [84],[85](c))*: AS [80], [84] and [85](c) rely on an erroneous summary of WP’s connection obligations and disconnection powers: see pars 19-20, 29; and misstate the CA’s formulation of the duty. That duty does not require WP “take steps to consider whether it should form the requisite opinion” to disconnect supply. WP could discharge its duties in several ways, including without inspections (eg, regularly replacing point of attachment poles at consumers’ expense once the poles reach an identified age). There is also a material difference between an obligation to take steps to form an opinion as to whether to exercise a power, and an obligation to take steps that may result in such an opinion being formed: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [26].
44. *Function of Energy Safety inspectors (AS [84], [85](d))*: Inspectors designated by the Director of Energy do have the power to inspect consumers’ properties. So too does WP: ss 28(3)(c), 43(1), 46, 48, 49, 68 EOP Act. Overlapping powers is a feature of the legislative scheme, but is not inconsistent with the duty found by the CA.
- 30 45. *Discretionary powers (AS [85](e))*: That when and how WP exercises its powers is discretionary in the conditioned sense identified earlier in these submissions does not reveal inconsistency. Once WP uses apparatus for the purpose of delivering electricity to consumers, the exercise of its powers is not solely discretionary but is subject to, at least, the duty created by s 25 of the EA.
46. *Effect of the conceded duties*: WP’s argument is irreconcilable with the duties it concedes it owes. If s 25 of the EA or any other aspect of the statutory scheme revealed that WP did not owe a duty with respect to point of attachment poles, WP would not

owe the Conceded PA Pole Duty. If the scheme was an exhaustive statement of WP's obligations, WP would not owe either conceded duty.

47. **Orders:** The appeal should be dismissed with costs. If the appeal is allowed and cross-appeal dismissed, Mrs Campbell agrees WP's proposed orders are appropriate.

Part VI: MRS CAMPBELL'S CROSS-APPEAL

48. **The approach below to Mrs Campbell's duty:** The trial judge held that Mrs Campbell owed a duty "to take reasonable care to inspect and maintain the PA pole located on her property in a safe and serviceable condition": TJ [503]; CAB 144. The trial judge held that duty was owed to a class of persons who were or whose property or economic interest were located in areas over which fire could spread from Mrs Campbell's property: TJ [422]; CAB 128. The CA considered the trial judge in substance correctly formulated the duty, although without the inspection obligation, concluding that "a duty expressed in terms of a duty to maintain the pole in a safe and serviceable condition is not pitched at an inappropriate level of abstraction": J [291]; CAB 480. In the alternative, it reformulated the duty as "a duty to those in the vicinity of the pole to take reasonable care to avoid the foreseeable risk of harm to their persons or property from fire resulting from a failure of the pole": J [294]; CAB 481.

49. **Ground 1: Duty:** Mrs Campbell accepts she owed a duty to exercise reasonable care to prevent harm by the ignition on and spread of fire from her property: cf J [276], also [294] first sentence; CAB 476, 481. However, the duty formulated by the trial judge and accepted by the CA was cast at the wrong level of abstraction in two respects. *First*, a duty to "inspect and maintain" the PA Pole in a safe condition is formulated in terms of breach, requiring Mrs Campbell to prevent the harm which occurred by finding and preventing the source of the danger. *Secondly*, framed at an appropriate level of abstraction, the duty should not have been confined to the PA Pole but referable to Mrs Campbell's property as a whole. So conceptualised the duty does not, with a hindsight bias, unduly focus on the PA Pole and the now known events. Further, the duty so formulated correctly frames the enquiry required by s 5B of the CLA: see at the stage of breach by reference to risk of harm, *Tapp v Australian Bushmen's Campdraft & Rodeo Association* [2022] HCA 11; (2022) 96 ALJR 337 at [106]-[109].

50. **Duty formulated in terms of breach:** A duty of care that is formulated retrospectively as an obligation to avoid the particular act or omission said to have caused loss, or to avert the particular harm that eventuated, is erroneous and obscures the enquiry as to breach: *RTA v Dederer* [2007] HCA (2007) 234 CLR 330 at [67]; and has the tendency

to be self-fulfilling at the stage of breach: cf *Dederer* at [49], [51]; *Graham Barclay* at [189]. The enquiry as to what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk is to be conducted at the breach stage of analysis: *Graham Barclay* at [191]- [192].

- 10 51. The duty found by the trial judge and the CA expressly requires Mrs Campbell to take identified steps with respect to the PA Pole. The answer to the question of breach follows from the identification of a duty so formulated; the failure to obtain an inspection. The CA erred in holding the duty so framed was appropriate. The vice is revealed by the trial judge's circular approach to breach, described below (the error identified in *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [60], [128], also *Dederer* at [67]-[69]). A further flaw in the analysis arose from the duty as formulated by the trial judge and adopted by the CA. The duty as expressed, or as applied at the stage of breach (J [295]; CAB 482), was to obtain periodic skilled inspections. Thiess did inspect the PA Pole, albeit not an inspection obtained in the sense of procured by Mrs Campbell. Let it be assumed that, having not obtained an inspection for many years, shortly before the fire Mrs Campbell obtained an inspection which was, unknown to her, undertaken incompetently. Because of the way in which the Courts below conceptualised the duty, in that circumstance she would be in breach of duty because of her failure to obtain periodic inspections (J [295], [301]; CAB 482, 483).
- 20 To so conclude makes Mrs Campbell liable despite having taken the identified precaution, albeit not repeatedly, because of the service provider's incompetent performance. That outcome is incoherent with the basis for the duty. The duty as expressed was delegable and, in effect, necessarily to be performed by delegation. The example is not far removed from the facts. The immaterial difference is that the inspection, performed incompetently, was procured by WP and not by Mrs Campbell.
52. Instead of an obligation to "inspect" and "maintain" in a safe condition, focus is properly directed to a duty to exercise reasonable care to avoid risk of harm framed at the appropriate level of abstraction. Having formulated the duty too particularly (J [290]-[291]; CBA 480), the CA erred in finding breach.
- 30 53. Duty referable to Mrs Campbell's property, not solely the PA Pole: Mrs Campbell accepts the enquiry goes further. The CA also approached the question of breach by reference to a duty framed at a higher level of abstraction: J [294] first sentence; CAB 481. The more generally expressed duty accepted by Mrs Campbell is consistent with authority regarding the duty owed by an occupier with respect to fire arising from a

natural use of land: see *Hargrave v Goldman* (1963) 110 CLR 40 at 71; *Hoyt's Pty Ltd v O'Connor* (1928) 40 CLR 566, 584; cf AS [40]. So framed, attention is directed to the risk of harm and the enquiry required by s 5B of the CLA. But the immediate error by the CA is, having framed the duty by reference to the risk of harm by fire starting on and escaping from her property, the CA focussed attention on the PA Pole: J [294] second and following sentences; CAB 481.

- 10 54. Focusing on the PA Pole distracts from the correct analysis. If the duty is a duty to take care to prevent harm caused by fire (or by fire caused by electricity) escaping from Mrs Campbell's property, the duty is not confined to the PA Pole but extends to all chattels or infrastructure on her property: cf *Jones v Bartlett* (2000) 205 CLR 166 at [19] (Gleeson CJ). So formulated the enquiry required by s 5B of the CLA is directed to a reasonable property owner's response to the risk.
- 20 55. **The approach to breach below:** The trial judge held that Mrs Campbell breached the duty she owed to the first to third respondents by failing to take precautions required to perform the duty: TJ [504]-[519]; CAB 144-7. The duty identified, to obtain inspections, was breached by not obtaining regular skilled inspections of the PA Pole: TJ [519]; CAB 147. Breach was thus directly referable to the terms of the duty itself. The CA agreed with the trial judge's conclusion that Mrs Campbell was liable, generally for the same reasons: J [292]; CAB 481. The CA also held a duty expressed in "broader terms" would have been breached: J [293]-[302]; CAB 481-4. Departing from the trial judge's reasons, the CA held a reasonable landowner would not know the expected operating life of an untreated jarrah pole: J [297]; CAB 482. However, and in the absence of evidence as to general practice of landowners with respect to obtaining inspections of jarrah or wooden poles, the CA concluded that a reasonable person in Mrs Campbell's position would have appreciated a sufficient risk that the PA Pole's integrity may be compromised to arrange inspection by a qualified termite inspector or electrical contractor (J [297]-[299]; CAB 482-3).
- 30 56. **Grounds 2 and 3: Breach: Summary:** When Mrs Campbell's duty is correctly expressed, performance of that duty did not require her to obtain regular inspections of the PA Pole. Focusing on the identified risk of harm, there was nothing particular about the PA Pole requiring that Mrs Campbell engage a skilled service provider to determine the existence of an otherwise unobserved risk. The PA Pole showed no signs of structural deterioration observable to a reasonable layperson. There was no evidence that a reasonable private landowner would have known the PA Pole, by reference to

its external condition, was past the end of its service life, was at any particular risk of failing below ground, a failure risking fire harming the first to third respondents. Mrs Campbell was not in breach of duty as the PA Pole was inspected by Thiess, a competent contractor, in July 2013.

57. Once the duty is correctly framed, the correct conclusion is that Mrs Campbell did not fail to do anything that a reasonable person would have done in exercising reasonable care to prevent the identified harm. The analysis required by s 5B of the CLA, at the breach stage of analysis, is to be approached by reference to the foreseeable risk (damage by fire) and the steps a reasonable person would take considering that risk of harm. Viewed by reference to the whole of Mrs Campbell's property, the PA Pole did not require an inspection by a skilled service provider. So viewed, the risk of the PA Pole collapsing and causing a fire, *a fortiori* soon after Thiess inspected it and (on behalf of WP) attached a new cable to it, is remote: s 5(2)(a) of the CLA; similarly, while delivery of electricity is socially useful, s 5(2)(d) of the CLA, that consideration has a question begging character in circumstances where an inspection had occurred. Further, the risk of harm caused by fire was subject to control or mitigation by the two sets of fuses which were part of the equipment in the meter box, and the insulated cable. To arrange regular inspections, in the context of the other protections and the inspection which occurred, is beyond what a reasonable person was required to do.
58. The absence of findings as to the knowledge of reasonable private landowners about the service life of jarrah poles or the practice of landowners in obtaining inspections of the type identified is significant. So too is the absence of findings as to the availability and cost of inspections to private landowners (s 5(2)(c) CLA), particularly considered in context of taking precautions by reference to the property as a whole. The findings of fact do not support a conclusion that, to act reasonably, a landowner must, in effect despite the actions or obligations of the network owner and other safety features such as fuses, have a point of attachment pole periodically inspected regardless of its external appearance: cf J [299]; CAB 483.
59. The error is apparent in J [297]; CAB 482. While the harm, a fire in a semi-rural area, is most serious (s 5(2)(b) CLA), the degree of risk ("very likely") identified in the second sentence is unsupported by findings of the trial judge and overlooks safety features such as the fuses. The CA commences with a self-evident proposition that a reasonable person may appreciate that "it could not be assumed that a wooden pole had an infinite operating life" (J [297] CAB [297] third sentence). Based on that

proposition, the CA erroneously proceeded to infer that a reasonable person would regard it as “prudent” to cause skilled inspections “from time to time” of the PA Pole’s integrity to be conducted. That does not follow. Nor does the CA’s finding provide any content as to when inspections would commence, or as to the frequency of them. There is no basis for concluding that, being aware that wooden poles do not have an infinite operating life: (a) a reasonable landowner would know a pole could deteriorate to the point of failure without showing damage to its external appearance, such that he or she would procure inspections of a pole with a normal appearance; (b) a reasonable landowner would assume the service life of a jarrah pole to be less than 25 years (cf J [299]; CAB 483), such that he or she would procure inspections of the pole when it was 25 years old.

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60. The extent of evidence directed to the knowledge of landowners, or the conduct of landowners in relation to private power poles, was limited to the perception of a State agency, EnergySafety, that landowners generally needed to be informed of their responsibilities in relation to private overhead power lines: J [36]-[38]; CAB 412-3. A reasonable person in Mrs Campbell’s position would have known that WP had appropriated the use of the PA Pole to hold aloft its equipment, and that WP had extensive knowledge and experience with respect to such wooden poles and their suitability for that function. Those facts inform both the probability of the harm occurring and the burden the first to third respondents’ breach case places on a landowner (s 5(2)(a) and (c) respectively). In those circumstances, and given the PA Pole did not (to a layperson) show any damage, a reasonable landowner would not have procured inspections of it.

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61. In addition, as the PA Pole was inspected in July 2013 a reasonable person would not have obtained a further inspection prior to January 2014. To the extent Mrs Campbell’s knowledge informs the analysis, she was aware that an apparently reputable contractor had worked on the PA Pole in July 2013: she spoke to an employee of Thiess at the PA Pole while work was being undertaken in July 2013 (see par 8). Once Thiess performed the type of inspection the CA held that Mrs Campbell was required to obtain, a reasonable person would not consider that the PA Pole posed a risk or required further inspection until a reasonable period, not defined in the case against Mrs Campbell but accepted to be measured in years, after that date. Moreover, the relevant touchstone is the conduct of a reasonable person (considered by reference to s 5B(2) of the CLA) and a reasonable person would not have procured a further

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inspection once Thiess had inspected the PA Pole. The final sentence of J [295] (CAB 482) is to the contrary but contains no explanation. Pausing there, that sentence is unclear as to whether the words in parentheses qualify “negligently” or the inspection and its character. Considering the evidence to which reference has been made, the correct understanding is that the words in parentheses qualify only “negligently”.

62. As to the prior termite damage on Mrs Campbell’s property (J [298]; CAB 483) that occurred and was identified over a decade before January 2014. There is no finding that the PA Pole suffered termite damage at that time. After that time, the PA Pole showed (to a layperson) no signs of structural damage. For more than five years, the pole’s appearance was unchanged. That historical event does not inform the actions required of a reasonable person to avoid the characterisation of a breach of duty.

63. **The approach to causation below:** The trial judge held that an inspection of the PA Pole after January 2010 would have identified its deficient condition and resulted in its replacement: TJ [523]; CAB 147. His Honour reasoned that it was appropriate for the scope of the liability of Mrs Campbell to extend to the harm as that accorded with “legal principle and public policy” as to occupier’s liability for the escape of fire but without considering Thiess’s July 2013 inspection: TJ [524]; CAB 148. The CA generally agreed with the trial judge’s reasoning (J [292]; CAB 481) and did not consider causation in detail. It held that, if Mrs Campbell had procured an inspection, the damage likely would have been discovered and the pole repaired or replaced: J [301]; CAB 483. It gave no reasons as to why it was appropriate to extend the scope of Mrs Campbell’s liability to the harm (J [301]; CAB 483). As already identified, the CA earlier observed Mrs Campbell’s breach was “not excused by the fact that (unknown to Mrs Campbell) Thiess had negligently inspected the PA Pole in July 2013” but again did not explain why: J [295]; CAB 482.

64. **Ground 4: Causation:** Accepting that, on the hypothesis of breach by not obtaining regular inspections, causation as required by s 5C(1)(a) (factual or “but for” causation) was established it was not appropriate for Mrs Campbell’s liability to extend to the harm caused to the first to third respondents (s 5C(1)(b) of the CLA) as: (a) Thiess inspected the PA Pole in July 2013; (b) Thiess’s negligence (of which Mrs Campbell was not aware) resulted in the pole not being replaced at the time; (c) the inspection Thiess performed was the type of inspection Mrs Campbell, on the hypothesis of breach, failed to obtain; and (d) Mrs Campbell did not breach her duty of care by any act or omission after July 2013, it not being necessary for her to obtain an inspection

in that six month period (as distinct from “regular[ly]”).

65. Section 5C(1)(b) of the CLA requires the Court to assess whether it is appropriate for the scope of the negligent person’s liability to extend to the harm caused. That assessment is normative, and directed to consideration of whether, and if so why, responsibility for the harm should be imposed on the negligent party: *Wallace v Kam* (2013) 250 CLR 375 at [14]. In the circumstances identified in par 64, legal responsibility for the harm that eventuated should not be attributed to Mrs Campbell.

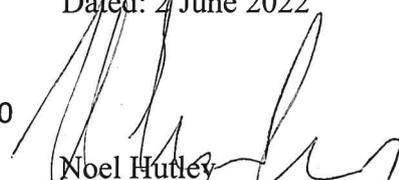
10 66. It is incongruous to attribute liability to Mrs Campbell for failing to procure an inspection that, in effect subsequent to her alleged failure, was actually performed by a qualified contractor albeit incompetently. Mrs Campbell’s duty is not non-delegable. Mrs Campbell had no notice of the shortcoming in Thiess’ performance. As neither the exterior nor interior condition of the PA Pole relevantly changed between July 2013 and January 2014, and there was no new sign of risk, after July 2013 a reasonable person in Mrs Campbell’s position had no reason to obtain another inspection prior to January 2014. In the circumstances of the July 2013 works, legal responsibility for a failure to regularly procure an inspection (which would have had the same result as the inspection performed by Thiess, had Thiess acted competently) ought not be attributed to Mrs Campbell. Adding to that reasoning, through a failure by WP or EnergySafety, Mrs Campbell did not receive the warning in the form of the brochure other
20 landowners, with private power poles, received: J [36]-[38]; CAB 412-3. In those circumstances legal responsibility should not be attributed to Mrs Campbell, and the causation case fails the scope of liability criterion required by s 5C(1)(b) of the CLA.

67. **Orders:** Upon the granting of special leave, Mrs Campbell seeks the orders set out in her notice of cross-appeal.

Part VII: TIME ESTIMATE

68. **Mrs Campbell:** 2.5 hours for oral argument (including cross-appeals, if special leave is granted, and reply on her cross-appeal).

Dated: 2 June 2022

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ANNEXURE A

**STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN THE FOURTH
RESPONDENT'S SUBMISSIONS**

| Statute | Version | Relevant Dates |
|--|--|---|
| 1. <i>Electricity Act 1945 (WA)</i> | 08-a0-04 | 13 December 2013 – 28 March 2022 |
| 2. <i>Electricity Corporations Act 2005 (WA)</i> | 01-k0-04 | 1 January 2014 – 17 July 2014 |
| 3. <i>Electricity Networks Access Code 2004 (WA)</i> | <i>Government Gazette, 30 Nov 2004, pp 5517-5700</i> | 30 November 2004 – present |
| 4. <i>Energy Operators (Powers) Act 1979 (WA)</i> | 05-d0-03 | 1 January 2014 – 13 June 2019 |
| 5. <i>Electricity Act Regulations 1947 (WA)</i> | <i>Government Gazette, 21 Aug 1968, pp 2475-2544</i> | 23 April 1968 – 1 November 1991 (in materially the same form) |
| 6. <i>Electricity Regulations 1947 (WA)</i> | 06-a0-02 | 8 November 2013 – 14 April 2015 |
| 7. <i>Electricity Industry (Obligation to Connect) Regulations 2005 (WA)</i> | 00-a0-11 | 4 October 2005 – 5 November 2021 |
| 8. <i>Electricity Industry Act 2004 (WA)</i> | 02-i0-03 | 1 January 2014 – 28 March 2018 |
| 9. <i>Civil Liability Act 2002 (WA)</i> | 04-a0-07 | 13 September 2013 – 13 April 2016 |