



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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)**

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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

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and

NOREEN MERLE CAMPBELL

Fourth Respondent

and

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

Fifth Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIFTH RESPONDENT

Part I: Certification

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

Part II: Outline of Argument

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2. **Summary:** The Fifth Respondent (**Thiess**) makes the following overall contentions:
 - (a) Western Power's (**WP**'s) appeal should be dismissed;

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- (b) the applications by certain Respondents for leave to cross-appeal, either to dispute Mrs Campbell's liability or to deny that the liability in nuisance is apportionable, should be refused. Alternatively, such cross-appeals should be dismissed;
- (c) the relief should remain as it has been granted by the Court of Appeal (CA);
- (d) alternatively, if any of the parties have success on the appeal and/or the proposed cross-appeals the appropriate orders may need to be resolved on remitter.
3. **Facts:** Thiess emphasises certain uncontentious factual matters including important parts of the statutory scheme which have been overlooked by WP: **R5 [13]-[20]**.
- 10 4. **The duty of care falls within, or is closely analogous to, an established category:** The duty of care, at the level of generality stated by the CA at J[9] and J[158], should be upheld, including by reference to *Thompson v Bankstown Corporation* (1953) 87 CLR 649; *Munnings v Hydro-Electric Commission* (1971) 125 CLR 1 and *Brocklands Pty Ltd v Tasmanian Networks Pty Ltd* [2020] TASFC 4: **R5 [21]-[29]**.
5. **Salient features:** Alternatively, the duty, as stated by the CA, is supported on an analysis of the 'salient features' of the case, when regard is had to: (a) reasonable foreseeability; (b) power to protect the specific class from risk of harm; (c) specialised knowledge; (d) vulnerability; and (e) consistency with the statutory scheme: **R5 [30]-[38]**.
- 20 6. **Breach:** The finding that reasonable precautions required WP to have a system for undertaking the periodic inspection of wooden point of attachment poles (**PA poles**) owned by consumers and used to support live electrical apparatus forming part of WP's electricity distribution system, is sound as a matter of fact: **R5 [39]-[44]**.
7. **Alternative submission on duty:** Alternatively, if the PA pole is to be considered at the stage of duty, the duty required WP to take reasonable steps to avoid or minimise injury and loss or damage to property from the operation of its system up to the point at which there was a complete handover of responsibility by it to the consumer to whom electricity was being distributed. The PA pole, forming an essential part of WP's system, fell within the scope of the duty: **R5 [45]-[50]**.
- 30 8. **Control:** WP's reliance upon control misstates the control which is in issue, namely control over the risk of harm from fire resulting from the exercise by WP of its statutory function of operating and maintaining its electricity distribution system. Even if, wrongly, the focus is narrowed to the PA pole itself, each of WP and Mrs Campbell had a large measure of control over it, albeit not an unlimited one in either case: **R5 [51]-[59]**.
9. **No inconsistency:** WP's arguments should be rejected as wrongly focusing upon only one aspect of the scheme (namely s 25(1) of the *Electricity Act*), and even then wrongly discerning from it an implied negative limitation of exclusivity (**R5 [60]-[72]**):

- (a) s 25 imposes obligations supported by an administrative law remedy, and is silent on general law obligations enforceable judicially;
- (b) s 25(1) is about obligations to consumers, not to a more general class of persons;
- (c) s 25(1)(a) and (b) do not cover the territory of the common law duty of care.

10. **Mrs Campbell's case:** Mrs Campbell's application for leave to cross-appeal should be refused. If leave is granted, the cross-appeal should be dismissed: (a) Mrs Campbell concedes that she owed the duty of care found by the CA. Her challenge to the primary judge's (differing) formulation of duty therefore is of no utility (**R5R [5]**); (b) there was no error in the CA's finding of breach, having regard to the concurrent factual findings that inform the breach analysis, including the age and appearance of the PA pole, the history of termite damage on Mrs Campbell's property and the fact that, to Mrs Campbell's knowledge, the PA pole had never been inspected. Thiess' inspection of the PA pole is of no relevance to this conclusion (**R5R [6]-[10]**); (c) Mrs Campbell's challenge to the scope of her liability must fail, having regard to *Wallace v Kam* (2013) 250 CLR 375. The matters relied upon by Mrs Campbell in this context go to apportionment rather than the scope of her liability (**R5R [11]-[12]**).
11. **Apportionable claim:** The First Respondents' application for leave to cross-appeal from the finding that their claims in private nuisance are apportionable should also be refused (**5R5 [13]**). If leave is granted, this ground of the cross-appeal should be dismissed, as the reference to a "claim" in s 5AI of the *Civil Liability Act 2002* (WA) cannot be construed as a reference to a "cause of action" in the sense contended for by the First Respondents, applying orthodox principles of statutory construction (**5R5 [14]**).
12. **Relief:** WP's appeal should be dismissed with costs, and special leave in respect of the proposed cross-appeals should be refused with costs. Alternatively: (a) if WP's appeal is allowed but all other cross-appeals are dismissed, the Court should reinstate the primary judge's orders; (b) if WP's appeal is allowed and one or more cross-appeal succeeds, the proceedings should be remitted to a judge of the Supreme Court of Western Australia, as apportionment and/or contribution and indemnity findings (as applicable) will need to be revisited.

30 Dated: 6 September 2022



Justin Gleeson SC