HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P5/2022
File Title:	Electricity Networks Corporation Trading as Western Power v.
Registry:	Perth
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	05 May 2022

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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

APPELLANT'S 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 is whether the appellant (**WP**), a statutory corporation distributing electricity through the South West Interconnected System (**SWIS**), owed a duty of care 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 distribution of electricity, so as to require regular inspection of property owned and controlled not by WP but by consumers. The issue should be resolved on the basis that WP owed no such duty because either of the following two sub-issues resolve in WP's favour: (1) WP did not have "control" sufficient to give rise to a common law duty to exercise its discretionary statutory powers in relation to consumer property; and (2) the supposed duty is inconsistent with the applicable statutory scheme.

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

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

PART IV: CITATIONS

4. The relevant reasons of the primary judge (Le Miere J) and the WA Court of Appeal (**CA**) are *Herridge v Electricity Networks Corporation t/as Western Power [No 4]* [2019] WASC 94 (**TJ**) (Core Appeal Book (**CAB**) 9), *Herridge v Electricity Networks Corporation t/as Western Power [No 4]* [2019] WASC 94 (S) (CAB 177); and *Herridge Parties v Electricity Networks Corporation t/as Western Power* [2021] WASCA 111 (**J**) (CAB 395).

PART V: MATERIAL FACTS

5. On 12 January 2014, a jarrah point of attachment pole (**PA pole**), which belonged to the 4th respondent (**Mrs C**), failed below the ground line due to fungal decay and termite damage. As it fell, Mrs C's **submains** cable was pulled through the cable hole at the base of Mrs C's **switchboard enclosure** affixed to the PA pole. This exposed the submains cable's insulation to the sharp metallic edges of the hole, damaging it. This caused a short circuit fault and arcing. This ignited the dry vegetation around the base of the PA pole, starting the Parkerville fire. The fire spread over a wide area and destroyed or damaged property of the 1st to 3rd respondents (**plaintiffs**): J[1], [2], [3], [31], [47]; CAB 404, 411, 415.

6. An aerial **service cable** owned by WP ran from WP's **termination pole**, on the road adjacent to Mrs C's property, passed through WP's wedge clamp hooked onto Mrs C's attachment hook at the top of the PA pole and then into Mrs C's **mains connection box** secured adjacent to the top of the PA pole. Inside that box at the top of the PA pole, electricity passed from the wires of WP's service cable to the wires of Mrs C's **consumer mains** cable. The consumer mains ran in Mrs C's PVC conduit down the side of the PA pole and into Mrs C's switchboard enclosure. Inside that enclosure was a meter panel owned by Mrs C, to which was attached three fuses and a meter owned by WP, and other electrical apparatus owned by Mrs C. After passing though the meter, electricity was conveyed by

Mrs C's **submains** in Mrs C's PVC conduit attached to the PA pole and then underground to a distribution board near Mrs C's house: J[16], [31]-[35]; CAB 408, 411-2.

7. The PA pole was embedded in land owned by Mrs C. The PA pole, the mains connection box, the consumer mains and other electrical apparatus were provided and installed by Mrs C and her late husband before 1983: J[35]; CAB 412. Mrs C never procured any inspection of the PA pole: J[288]; CAB 480. The mains connection box was the point at the property at which WP's predecessor connected its distribution network: J[2], [31], [32], [35]; CAB 404, 411-2. When the PA pole was installed, WP's predecessor was required only to take its service cable to the consumer's point of attachment; the consumer provided the PA pole: *Electricity Act Regulations, 1947* (WA), regs 206, 245(c)(iii) (21 Aug 1968 reprint) (***1968 E Regs***). There was no finding that WP or its predecessor at any time thereafter had any physical control of the PA pole or Mrs C's property. In July 2013, the 5th respondent (**Thiess**), WP's independent subcontractor, was required to inspect the PA pole when replacing the termination pole (from which WP's cable ran to the PA pole).

8. That is, in June 2013, WP engaged Thiess to replace a number of WP's network poles in the vicinity of Parkerville, including WP's termination pole. The works were undertaken on 19 July 2013. Under the terms of its contract with WP, Thiess was required to conduct a pre-work inspection of the PA pole: J[28]-[29]; CAB 410-11. The inspection undertaken by the Thiess line crew was inadequate. It did not comply with industry standards or Thiess's contractual obligations: J[67]; CAB 420.

9. WP had systems in place for the regular inspection and maintenance of its own network assets, including wooden poles belonging to it: J[168]; CAB 446. WP did not regularly inspect or maintain consumer-owned point of attachment poles: J[179]; CAB 449.

PART VI: WP'S ARGUMENT

10. **Statutory scheme**: WP was established on 1 April 2006 by *Electricity Corporations Act 2005* (WA) (***ECs Act***), s 4. WP's distribution network is used to transport electricity to consumers. The consumers are customers of Electricity Generation and Retail Corporation, a different statutory corporation, which generates and sells electricity to its customers by using WP's distribution network: J[14], [113], [114], [118]; CAB 408, 430-31.

11. WP operates its distribution network in the SWIS pursuant to an electricity distribution licence issued by the Economic Regulation Authority (**ERA**) under the *Electricity Industry Act 2004* (WA) (***EI Act***): J[14], [107], [111]-[113]; CAB 408, 429-31. The ERA, an expert regulator, had power to determine terms and conditions of WP's licence: s 11(1). It could not grant a licence unless satisfied that it would not be contrary to the public

interest: s 9(1). The *EI Act* itself imposed a condition that WP have an "asset management system" as to the "licensee's assets": s 14. No condition required an asset management system for consumer assets. The grant of a licence did not affect WP's obligations to comply with any other *written law* (but not the general law): s 20.

12. WP's functions are identified in the *ECs Act* and include the management, provision and improvement of electricity transmission and distribution services in the SWIS: ss 41, 43. Section 56 provides that the fact that WP has a function conferred by the *ECs Act* does not impose a duty on it to do any particular thing. The functions are to be performed in accordance with specified principles: ss 58, 61(1). Thus, WP has discretion as to how and when it performs any function (subject to the *ECs Act* and lawful direction).

13. While its functions are discretionary, WP has an obligation to connect a customer to the SWIS: *Electricity Industry (Obligation to Connect) Regulations 2005* (WA) (***OC Regs***). It has obligations to maintain supply at certain standards: *Electricity Act 1945* (WA) (***E Act***), ss 25(1)(c), (d). WP has powers to interrupt, suspend or restrict the supply of electricity, but only if it is of the "opinion" that it is necessary to do so because of, in short, "potential danger": *EI Act*, s 31(1); *ECs Act*, s 63(1). That is, these powers are expressly enlivened only when WP forms an actual "opinion" that it is necessary to act because of that danger.

14. Section 25 of the *E Act* is a critical provision. Section 25(1) imposes two duties on WP as a network operator. The first duty is a strict or absolute duty to maintain certain apparatus in a safe and fit condition (s 25(1)(a)). That duty applies only to service apparatus "belonging to the network operator which is on the premises of any consumer". It does not extend to items that WP does not own.

15. The second duty is a duty to take reasonable precautions to avoid the risk of fire (s 25(1)(b)). That duty applies only "in the actual supply of electricity to the premises of a consumer … to the position on the said premises where the electricity passes beyond the service apparatus of the network operator". Some property belonging to a consumer may fall within the definition of "service apparatus", but s 25(1) carefully confines para (a) to service apparatus belonging to WP and also confines para (b) to the actual supply of electricity up to the position at which it passes beyond WP's service apparatus.

16. There are a number of negative propositions or implications that flow from the precise demarcation of WP's duties in s 25(1): [72]-[77] below.

17. The *Electricity Regulations 1947* (WA), regs 253-254, require WP to *individually* inspect a *consumer's* electric installations and apparatus only when newly installed or altered, and do not require *individual* inspection if a system is approved by the Director of Energy

Safety, as was the case with WP's system: TJ[221]-[225]; CAB 72-3. (The plaintiffs and Mrs C originally relied on these regs as a source of their pleaded duty but (correctly) abandoned such reliance at trial. A general law duty of asset inspection cannot be based on a statutory requirement that permits inspections by sample.)

18. WP also has powers conferred by the *Energy Operators (Powers) Act 1979* (WA) (***EOP Act***). The *EOP Act* authorises WP, in specified circumstances, to enter upon and occupy land and other premises without the occupier's consent. The powers are not at large but are confined by WP's functions and the purposes of the *EOP Act*: ss 28(3)(c), 46, 48, 49.

19. WP is not conferred general statutory power to inspect consumer property to determine whether it is unsafe, and to order maintenance. Instead, the *Energy Coordination Act 1994* (WA) (***ECA***), s 12(2)(b), provides that the Director of Energy Safety may designate inspectors for the purposes of the *E Act*. Such inspectors may enter premises if they have reason to believe electricity is being used there and inspect any works used for electricity there: *ECA*, ss 14(a), 14(c). If the inspector is of the opinion that any thing that they are authorised to inspect is "unsafe", the inspector may prohibit its use absolutely or on condition, and disconnect electricity supply to the premises until satisfied that the thing is safe: *ECA*, s 18.

20. **Trial judge's decision**: The plaintiffs in several actions (all heard together) sued WP, Thiess and Mrs C alleging the Parkerville fire had been caused by their negligence and was a nuisance created by each of them. The trial judge found as follows.

21. WP did not owe the plaintiffs the pleaded duty of care to regularly inspect and maintain the PA pole in a safe and fit condition for use in the supply of electricity because (i) that duty was incompatible with the applicable statutory scheme, which required WP to maintain only service apparatus belonging to it; and (ii) WP did not have requisite control over the source of the risk of harm, namely, the risk that Mrs C's PA pole might fail in service: TJ[12(6)], [292]-[295]; CAB 22, 91-2; J[60], [92], [94]; CAB 418, 426.

22. WP owed the plaintiffs a duty to take reasonable care (**pre-work inspection duty**) to inspect the PA pole to ascertain whether it was in a safe and fit condition for use in the supply of electricity before and when undertaking works involving contact with the pole; and if WP identified that the pole was not safe and fit for such use, WP had a duty not to use it: TJ[12(7)], [297]-[298] CAB 22, 93; J[53]; CAB 416-7. WP discharged this duty, which was not non-delegable, by engaging Thiess to carry out work, including a pre-work inspection of the PA pole: J[55]-[58]; CAB 417-8.

23. Thiess owed the plaintiffs a duty to take reasonable care to inspect the PA pole. Thiess breached this duty by not adequately inspecting the PA pole on 19 July 2013 when Thiess replaced WP's termination pole and had to connect and disconnect WP's service cable from the PA pole: J[65]-[67]; CAB 419-20.

24. Mrs C owed the plaintiffs a duty to take reasonable care, which she breached, to inspect and maintain the PA pole in a safe and serviceable condition: J[71]; CAB 420-21.

25. The breaches of duty by both Thiess and Mrs C caused the plaintiffs' loss from the fire (J[68], [71]; CAB 420-21) and each of them was also liable in nuisance: J[69]; CAB 420. The trial judge apportioned responsibility for the plaintiffs' losses 70% as to Thiess and 30% as to Mrs C (J[77]; CAB 422), and dismissed all of the claims against WP: J[61], [63]; CAB 418-9.

26. **CA's decision**: Mrs C appealed against the trial judge's findings that WP did not owe a duty to regularly inspect and the plaintiffs adopted that challenge: J[62]; CAB 418-9. All other grounds of appeal against WP failed: J[9]; CAB 406. The CA found as follows.

27. WP did not control the PA pole or Mrs C's land in which it was embedded (J[154], [226], [227]; CAB 442, 462-3), but did have control over the SWIS, including where the service cable was (on the CA's characterisation "chosen") to be placed, what structure would be used to support the service cable, and whether the service cable was electrified: J[154]; CAB 442.

28. The plaintiffs' pleaded duty of care to regularly inspect and maintain the PA pole in a safe and fit condition for use in the supply of electricity was too narrow to be a useful tool for analysing WP's liability: J[151]; CAB 441. The CA reformulated the plaintiffs' duty case (cf ***Tapp v Aust Bushman's Campdraft & Rodeo Ass*** [2022] HCA 11 [67]). The CA held that 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 (**CA duty**): J[158], [159]; CAB 443. The CA said this duty was not inconsistent with the statutory scheme: J[135]-[147], [161]; CAB 437-40, 443.

29. The risk of harm by fire to persons or property in the vicinity of WP's distribution network, if a pole supporting an aerial cable failed, was reasonably foreseeable and not insignificant: J[164]; CAB 445. The CA said that a reasonable network operator in WP's position would have responded to that risk of harm by establishing a system for the periodic inspection of such poles, irrespective of ownership, and when that system identified a defective consumer pole, a reasonable network operator would repair or replace the pole

itself, or require the consumer to do so in order to continue to receive electricity: J[178]; CAB 448-9. The CA said that WP breached the CA duty by failing to have such a system (J[179], [180]; CAB 449) and that breach caused the plaintiffs' loss: J[182]; CAB 449-50. The CA re-apportioned responsibility 50% as to WP, 35% as to Thiess and 15% as to Mrs C: J[9], [356]; CAB 406, 498.

30. **Ground of Appeal 2(a) [Control] (CAB 947)**: "[T]he common law respecting negligence and the exercise of statutory powers has undergone significant development [by the Court] in recent years": ***Brodie v Singleton Shire Council*** (2001) 206 CLR 512, 541 [58]. The Court has held that no duty of care exists under the common law in at least four classes of cases: ***Sullivan v Moody*** (2001) 207 CLR 562, 579-580 [50], including where there is a "need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships". See also ***Hunter and New England Local Health District v McKenna*** (2014) 253 CLR 270, 278-279 [17]-[19].

31. "Control" as the critical criterion for duty: In ***Tame v NSW*** (2002) 211 CLR 317, 379 [185], Gummow and Kirby JJ said that the objective in negligence is to promote reasonable conduct that averts foreseeable harm and "[i]n part, this explains why a significant measure of control in the legal or practical sense over the relevant risk is important in identifying cases where a duty of care arises". By 2009, when ***Stuart v Kirkland-Veenstra*** (2009) 237 CLR 215 was decided (if not by December 2002 when ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 was decided), a majority of the Court further explained the applicable legal principles about when a public utility may owe a common law duty of care and focussed particularly on the degree and nature of control exercised over the risk of harm that eventuated, describing the factor of control as of "critical significance" (254 [111]-[114]). Crennan and Kiefel JJ said there is no guiding principle yet, but the relevant statute needs to be considered and if it provides significant and special measures directed to deal with the risk of harm, that may inform a duty; but statutory power coupled with a discretion may not suffice (258-266 [126]-[149]).

32. The Court has emphasised the primary need to focus on the statutory scheme and whether the statute provides for, or requires, actual control to be exercised over the relevant risk of harm. In ***Graham Barclay*** (McHugh J) and in ***Stuart*** (Gummow, Hayne and Heydon JJ), the Court explained why a duty of care had been found in the earlier cases.

33. In ***Pyrenees Shire Council v Day*** (1998) 192 CLR 330, because the public authority had "entered upon the exercise" of its statutory power to protect against fire, it owed a duty to take reasonable care in the *exercise* of that power: ***Stuart*** 255-6 [117], 261-2 [135]-[137].

McHugh J did not regard ***Pyrenees*** as a "control" case but said a duty arose because the council "knew of the risk of harm to *specific* individuals" and "importantly" had "given directions to eliminate the risk": ***Graham Barclay*** 581-2 [94]. That is, "control", as understood by McHugh J, relevantly involved physical control.

34. In ***Crimmins v Stevedoring Industry Finance Committee*** (1999) 200 CLR 1, the public authority was closely analogous to an employer and had control of the workplace: ***Stuart*** 255 [115]. McHugh J said that "the object of the powers vested in the Authority was to secure the expeditious, safe and efficient performance of stevedoring operations" and "most important of all, the Authority had used its powers to direct waterside workers to places of work that contained reasonably foreseeable risks of injury to workers": ***Graham Barclay*** 581 [94]. That is, legal control had been taken in ***Crimmins***.

35. In ***Brodie***, as McHugh J explained, the legislation empowered the councils to design or construct roads and to carry out works or repairs, which powers the councils frequently used, and as such, they "had complete control", in both a physical and legal sense: ***Graham Barclay*** 581 [94].

36. In contrast, in ***Graham Barclay***, neither the State of New South Wales nor the Great Lakes Council owed a duty of care to exercise available statutory power to keep consumers of oysters safe, despite knowing that the lake was polluted. McHugh J emphasised that the State's and the Council's *power* to supervise and manage all fisheries could not be equated with "control" in the requisite sense: ***Graham Barclay*** 581 [94].

37. Post ***Stuart,*** in ***Sydney Water Corp v Turano*** (2009) 239 CLR 51, the water authority was not liable for loss arising from the collapse of a tree onto a car travelling on a public road causing death and injury. The authority had installed a water main about 20 years before the collapse in a trench parallel to the road that had caused intermittent water logging, which affected the root system of the tree. The road and the tree were the municipal council's property. It was held that the authority did not have any control over the risk of the tree's collapse. The mere fact that the authority had the power to remove trees and the "power to enter upon land in order to carry out an inspection of works" was held insufficient; "no occasion arose for it to exercise this power in the absence of any report" as to the operation of the water main: ***Turano*** 72 [50], [52].

38. The cases assist in giving meaning and content to the "control" required for a duty to be imposed on a public authority. The required "control" of the risk of harm exists (i) if, in the exercise of statutory power, an officer takes physical control by depriving another of their liberty (***Howard v Jarvis*** (1958) 98 CLR 177, 183); (ii) in a workplace, when a public

authority is in a position analogous to an employer and in legal control of that workplace (***Crimmins***); (iii) over roads, where legislation empowers a public authority to design or construct such roads and to carry out works or repairs, which powers are frequently used (***Brodie***); and (iv) where the occupier of premises has control over things at those premises (particularly if dangerous) (***Burnie Port Authority v General Jones Pty Ltd*** (1994) 179 CLR 520, 550-552, 556-557).

39. Thus, the requisite "control" for the purposes of the imposition of a duty on a public authority is focussed on the question of whether the public authority exercised (or was by statute required to exercise) physical or legal dominion over the risk of harm that eventuated.

40. Such "control" is also relevant when a duty of care is imposed on persons other than public authorities. Mrs C, as occupier, always had physical dominion and control of the PA pole. The PA pole was a fixture on premises occupied by Mrs C, and she therefore always had and exercised actual control of it in the requisite sense. The duty of an occupier to keep her property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against, is not novel. It has been recognised for almost a century: ***Hoyt's Pty Ltd v O'Connor*** (1928) 40 CLR 566, 584.

41. The cases also illustrate that control is not exercised in the requisite sense by (i) the existence of statutory power alone (***Graham Barclay*** 555 [9], 562 [32], 580 [91], 599 [154]); (ii) the bare fact that statutory power is exercised from time to time (***Graham Barclay*** 580 [91]); (iii) supervision and management of a particular industry, accompanied by powers including to issue permits and carry out inspections and investigations of premises in connection with that industry (***Graham Barclay*** 581 [92]-[93]); or (iv) the mere fact that an authority has the power to enter upon land in order to carry out an inspection of another person's property, which poses a risk of harm, when no occasion arose for the exercise of such power in the absence of any report (***Turano*** 72 [50]).

42. Power to act in a particular way, even if coupled with the fact that harm is reasonably foreseeable if action is not taken, is a necessary, but not sufficient, condition of liability: ***Stuart*** 254 [112]. Statutory power alone does not give a statutory body control in the requisite sense. More is needed to bring about the result that the statutory body (whether or not compellable by mandamus) will be duty-bound at common law to exercise its power.

43. There also needs to be an evaluation of the relationship between the holder of the power and the persons to whom it is said that a duty of care is owed, requiring an examination of the degree and nature of *control* exercised over the risk of harm that has

eventuated, the degree of vulnerability of those who depend on the proper exercise of the relevant power (although the criterion of "vulnerability" of a plaintiff is not "universally accepted as a useful analytical tool": ***Stuart*** 260 [133]; see also ***Brodie*** 627 [308]), and the consistency or otherwise of the asserted duty with the "terms, scope and purpose of the relevant statute": ***Stuart*** 254 [112]-[113].

44. Summarising these submissions, when the mere *ability* to exercise statutory power is said to ground a common law duty of care, the factor of control *over the relevant risk of harm* is of "critical significance": ***Stuart*** 254 [114]. Control in the requisite sense arises not simply from the ability to address the risk of harm with reasonable foresight. Instead, control in the requisite sense arises only if the statutory body enters the field by using its statutory power over the relevant risk or was given statutory power for the very purpose of guarding against the relevant risk: ***Stuart*** 261-5 [135]-[146].

45. Thus, the real question is whether there was reposed in or exercised by the statutory authority such "significant and special" "control" (in the requisite sense) over the risk of harm that eventuated as to give rise to a common law duty to exercise a particular power in the performance of its statutory functions: ***Stuart*** 262-3 [137]-[139].

46. The CA's error as to control: The CA's error in analysis as to the control issue is at J[153]-[158]; CAB 441-3. The CA incorrectly reasoned that WP's control of its own electricity transportation network in the SWIS, and WP's apparent "choice" in using Mrs C's PA pole, was sufficient for WP to owe a common law duty at least to inspect the PA pole, regularly. This was so even though the CA expressly found that Mrs C had control of the PA pole and WP did not have control of the PA pole: J[154], [226]-[227], [294]; CAB 442, 462-3, 481.

47. The CA's suggestion (J[153]-[154]; CAB 441-2) that WP "chose" to use Mrs C's PA pole to deliver electricity was an incorrect characterisation. It had the effect of expanding, or ignoring, the requirement for requisite "control" (namely, the public authority's use of its statutory power to take actual physical dominion). The CA's view, based on what WP apparently "chose" to do, was not based on any evidence or argument put to the CA or the trial judge. The statutory scheme does not give WP the "choice" that informed the CA's approach. Pursuant to the scheme, WP and its predecessors were not required to provide apparatus needed to connect to premises that were a distance away from the network: *1968 E Regs*, reg 206. But, if a consumer met the requirements to provide the required consumer apparatus (including any PA pole) at the point of attachment, the network operator was obliged to connect the consumer to its network for electricity supply and was not entitled

to suspend that connection in the absence of an *actual* opinion as to danger or potential danger: see *1968 E Regs*, regs 183, 186, 202, 206, 253, 254; *OC Regs*; *EI Act*, s 31(1) and *ECs Act*, s 63(1).

48. The plaintiffs - correctly - ran their case on the basis that the relevant risk of harm was that a wooden pole might fail in service due to rot, termites or other damage and cause harm to life or property by unintended discharges of electricity: TJ[294], [301], [342]; CAB 92, 93, 105. That risk of harm eventuated when Mrs C's PA pole failed.

49. The mere fact that WP had control of its own service cable is not sufficient for the conclusion that WP had the requisite control of the PA pole necessary for a duty of care to arise as to the risk of its failure. WP did not have any control over the risk of harm presented by the PA pole. In truth, the essence of the reasoning in J[154] (CAB 442) involves the erection of a common law duty merely because the statutory authority had statutory power and had control over its own network, even when it had no control of the thing that posed the risk of harm. That is not sufficient for a common law duty of care to arise.

50. The CA sought to characterise the present case as one of an alleged negligent exercise by WP of its statutory powers and functions (the operation of its electricity distribution network in the SWIS) rather than a negligent failure to exercise a statutory power or function (the power to inspect the PA pole): J[155]; CAB 442. The CA said that where statutory powers are exercised, they must be exercised with reasonable care and that WP's functions to operate and maintain its electricity distribution network, when exercised, were required to be exercised with reasonable care: J[156]-[157]; CAB 442-3.

51. By formulating the CA duty (J[158]; CAB 443) as a duty to guard against fire "*in connection with*" the delivery of electricity through WP's distribution network, rather than from that network itself, the CA used words that blur the distinction between WP's property and a consumer's property, a distinction drawn by *E Act*, s 25(1)(a) (the subject of appeal ground (b)). The CA thereby elided the distinction between that which WP "controlled" in the requisite sense and that which it did not. The concept of "*in connection with*" is open-ended and would impose on a public utility a duty of care the boundaries of which would be hard to identify with any precision. Focus on control of risks of harm generally, as distinct from the relevant risk of harm in particular, obscures the thing that has to be requisitely controlled for duty to arise. The fact that WP's service cable was connected to the PA pole does not change the enquiry so that WP became responsible for the PA pole (which it did not own nor control). The fire started when Mrs C's PA pole failed below ground, causing arcing from Mrs C's submains cable. The fire was not caused by WP's service cable.

52. In effect, the CA reasoned that WP came under a duty of care as to a consumer's property not *because* it exercised "significant and special" (or any) physical or legal control over the relevant risk of harm, but rather that the CA duty itself required WP to systematically exercise such control, so that it could (i) identify defective point of attachment poles and warn the consumer, who did have actual control over that risk of harm, that maintenance of the PA pole was required; and (ii) form the actual opinion that would be required by statute to discontinue electricity supply if such maintenance was not done: J[178]; CAB 448-9.

53. That process of reasoning is inconsistent with the CA's characterisation of the nature of the case in J[155]; CAB 442. It results in liability for negligence not by reason of any negligent *exercise* of power by WP, but by reason of WP's failure to *establish* a system for the regular exercise of its discretionary statutory powers of inspection (J[119]-[122], [154]; CAB 432-3, 442), to address the reasonably foreseeable risk of harm from the PA pole's potential failure: J[164], [167], [178]; CAB 445-6, 448-9.

54. That was the risk of harm relied on by the plaintiffs and it was the risk of harm that eventuated. It was a risk of harm over which WP did *not* have or exercise any physical or legal control: J[94], [154], [226]-[227], [294]; CAB 426, 442, 462-3, 481. The scope of the CA duty is thus not limited to a potential risk of harm over which WP has "significant and special" control (its own distribution network), but extends to potential risks of harm over which WP had *no control* in the requisite sense, namely, the condition of consumer property.

55. The CA erred in imposing an unpleaded duty compelling WP, in effect, *to take physical control* by using its discretionary statutory power. Statutory duties are normally to be compelled by mandamus, when there is an unperformed duty arising under the statute itself. The law of negligence does not readily enlarge public law duties imposed by legislatures, which are responsible for the policy choices involved in conferring statutory powers and duties: ***Graham Barclay*** 555 [9]. The Court's caution that imposition of duty on a public government body is an imposition on public funds (e.g., Gleeson CJ in ***Graham Barclay*** 553 [6]) requires the precise reason for the duty to be made plain. The law of negligence responds to narrower circumstances, where the *exercise* by a statutory body of *actual control* over a *particular risk of harm* gives rise to a common law duty to take care, the discharge of which may require the body to exercise its powers. It does not impose on a public authority a duty of care requiring it to systematically exercise a discretionary statutory power to inspect, on an on-going basis, a consumer's property for potential faults, simply because that authority has exercised its primary statutory function of operating the very

infrastructure it was created to operate and complied with its statutory obligation to connect that infrastructure to a consumer's property.

56. On the CA's approach, statutory power coupled with the fact that harm is reasonably foreseeable if action is not taken, is sufficient to establish a duty to exercise *control* by taking that action. That is precisely what the Court has held is not sufficient for a duty to arise.

57. The CA duty expands the classes of relationship from which a duty of care arises well beyond those involving "significant and special" control over the actual risk of harm. If "control" of the kind found by the CA is sufficient, that would impose on a public utility a common law duty of care requiring it to systematically exercise any statutory power available to it which may reduce or avoid the risk of any harm that may foreseeably result from any fault or defect in the condition of any of the consumer's property located in the vicinity of the authority's infrastructure, even though the consumer has control of their own property and a common law obligation to maintain it.

58. Moreover, such a duty of care goes well beyond a mere duty to warn (assuming such a duty could exist: cf ***Vairy v Wyong Shire Council*** (2005) 223 CLR 422). It would be a duty to investigate and warn the consumer of a risk of harm from a source over which the consumer itself has control in the requisite sense. Such a duty would result in the public utility having to exercise power to investigate to inform the consumer of their duty. Such a duty of care should not be recognised in the common law of Australia.

59. Accepted duties of care not relevant: WP's acceptance (J[152]; CAB 441) that it owed certain duties of care, of more limited scope than the CA duty, does not detract from that analysis, but is a necessary consequence of the true effect of the authorities on a public authority's duty of care arising from "control" in the requisite sense.

60. The pre-work inspection duty (J[53]; CAB 416-7, J[152] (2nd sentence); CAB 441) is a duty which arises only if and when WP takes *physical* control of the PA pole in the exercise of its statutory powers by working on the PA pole and energising the connection between its distribution network and the consumer's premises at that PA pole. The duty is coherent with the statutory scheme's imposition on WP of defined obligations in the "actual supply" of electricity to a consumer's premises, summarised above ([14]-[15]). The duty to ensure that a service cable, *when* connected and *energised*, is connected to a sound structure is a reasonable precaution to avoid fire in the actual supply of electricity to a consumer's premises. It is not an asset management duty or a general duty to inspect consumer property regularly.

61. Importantly, no occasion for WP to personally discharge the pre-work inspection duty ever arose. At no time in the 30 or more years after it was installed and connected (J[35]; CAB 412), did WP itself enter the field and exercise physical control of Mrs C's PA pole by inspecting it or undertaking work on it. Only Thiess, WP's independent contractor, entered the field relevantly in July 2013.

62. Both the trial judge and the CA found that WP discharged the pre-work inspection duty, on the only occasion it fell to be discharged, by engaging and instructing its independent contractor, Thiess, to carry out the relevant work in July 2013, including inspection of the PA pole: J[58], [237], [254]-[263]; CAB 418, 466, 470-72.

63. The duty of care identified at J[152] (1st sentence) (CAB 441), and accepted by WP, is a duty to exercise reasonable care in the operation of WP's electricity distribution network, to deal with the risk of fire arising *from that network*. When it operates its own electricity network, WP exercises control, in the requisite sense, of its own property and WP thus owes a duty to take reasonable care to minimise that risk of harm *from its own property*, as to which it exercises physical control.

64. But, that duty is not the CA duty. In formulating the CA duty, not by reference to potential sources of harm physically controlled by WP, but by reference to potential risks of harm merely "connected with" WP's operation of its own distribution network, the CA misdirected itself as to what constitutes control in the requisite sense, and thereby held that WP owed a duty of care, the scope of which was too broad and open-ended.

65. The absence of any control by WP over the relevant risk of harm posed by the PA pole in the years after it was connected to the SWIS, means that WP did not to owe to the plaintiffs or Mrs C a duty of care requiring WP to establish a system for the periodic inspection of that PA pole or any other consumer owned assets.

66. That was, in substance, the conclusion correctly reached by the trial judge having applied the correct test of control: TJ[294]; CAB 92. The CA did not apply the correct test and thereby erred in concluding otherwise.

67. **Ground of Appeal 2(b) [Inconsistency] (CAB 947)**: The common law does not impose on a statutory authority a duty of care that is inconsistent with the applicable statutory scheme. The "primary requirement" is to analyse the relevant legislation to determine whether a duty of care could arise at all: ***Pyrenees*** 377 [126]; ***Graham Barclay*** 596-597 [146]-[147]; ***Stuart*** 239 [52], 244 [75]; ***Crimmins*** 72 [203]. Any duty "of a public authority at common law must be compatible with the legislative powers conferred, and duties imposed, on that authority": ***Graham Barclay*** 617 [213], 628 [243].

68. Relevant inconsistency may arise not only from direct clash between the posited common law duty and a different duty imposed by statute. The mere possibility of simultaneous obedience to both duties does not answer the question of inconsistency. There will be inconsistency if the posited common law duty would alter, impair or detract from negative implications of the statutory scheme: ***Graham Barclay*** 574 [78]. This is the necessary consequence of giving full effect to a statute which contains an "implicit negative proposition" that one law or set of laws is to be the only set of rights and duties in a particular field: ***Work Health Authority v Outback Ballooning*** (2019) 266 CLR 428, 447-8 [35]; ***Momcilovic v The Queen*** (2011) 245 CLR 1, 110-111 [240]-[244]; ***Boilermakers' Case*** (1956) 94 CLR 254, 270. When there are implicit negative propositions arising from the duties the Parliament has chosen to impose, a common law duty cannot be imposed to denude the effect of those negative propositions.

69. The CA wrongly focused on whether its asserted common law duty could be obeyed simultaneously with observance of the statutory scheme: J[137], [143]-[145], [156], [157]; CAB 437, 439, 442-3. It "obscures rather than illuminates the [statutory] scheme … to posit a common law duty of care and then determine whether the existence of that duty has been negatived by the statute" because such reasoning may fail to identify the proper interaction between the common law and statute: ***Crimmins*** 59 [159]. The CA ought to have found instead that its asserted duty was inconsistent with the implicit negative proposition in the applicable statutory scheme that, on consumer premises, WP has no other duty to maintain property or guard against fire beyond that specified in the *E Act*, s 25(1). A duty, the discharge of which would require inspection of consumer-owned property, conflicts with the scheme and therefore cannot be imposed.

70. The CA accepted that there was a question whether the scheme (although it sometimes focused narrowly on the *E Act*, s 25(1)) was "an exhaustive statement" of WP's relevant duties: J[135]; CAB 437. However, in addressing this, the CA placed undue weight on whether the asserted duty could be obeyed simultaneously with the scheme (esp. s 25(1)), and overlooked the negative propositions flowing from the scheme (considered as a whole). Thus, it said that the asserted duty is not incompatible "merely because the discharge of that duty requires WP to take steps going beyond those which s 25 … might require": J[137]; CAB 437. And it said that the statutory duty to maintain the service cable in a fit and safe condition was compatible with a requirement to inspect the consumer pole to which it was attached: J[143]-[144]; CAB 439.

71. *E Act,* s 25(1)(a), requires a network operator at all times to maintain all service apparatus belonging to the network operator which are on a consumer's premises in a safe and fit condition. The focus of the obligation in s 25(1)(a) is on maintenance of service apparatus that belongs to the network operator even when on a consumer's premises. The CA's view (J[143]; CAB 439) that "maintain" as used in s 25(1)(a) refers to a need to "keep" the infrastructure safe is incorrect. The section's evident focus is to impose a maintenance obligation. The words "belonging to the network operator", intentionally a part of the obligation created by s 25(1)(a), make it plain that the maintenance obligation is confined. It is an obligation to maintain the network operator's service apparatus. The words "belonging to the network operator" are not there merely as an adjectival phrase that do nothing but describe the service apparatus. Those words mark out the nature and outer boundary of the maintenance obligation imposed on the network operator by Parliament.

72. The negative proposition implied by the limited extent of this statutory maintenance obligation is apparent. The negative implication is that the network operator is not required to maintain service apparatus that belongs to the consumer. The Parliament intended that a consumer's service apparatus would be maintained by the consumer.

73. The Parliament's assumption (well-founded in the common law) was that the consumer at the premises is responsible for routine inspection and maintenance of their own property. That legislative intention to limit the public authority's duty by negative implication is confirmed by the second reading speech (made as to predecessor legislation that ultimately became part of the *E Act*) when s 25 was first introduced. The Minister referred to "a number of ambiguities" in the then legislation about "the extent of responsibility of supply authorities"; said that the then definition of "service apparatus" was so "loosely drafted" as to extend to consumer property over which "a supply authority has no control because they are not its property". ("Control" appears to have been used in the sense used to identify the requisite "control" for duty.) In effect, the intention was to demarcate the respective responsibilities of the authority and the consumer at the interface: WA, Legislative Council, *Parliamentary Debates* (Hansard), 13 November 1945, 1808-9.

74. The way in which the CA put all of the defined terms into s 25(1)(a) and then, in effect, re-wrote the section without all of its words, led the CA into error: J[141]-[142]; CAB 438-9. In that way, with apparent simplicity in J[142] (CAB 439), the CA erased the critical driver that the obligation was to maintain service apparatus *belonging to the network operator*. The negative implication that there is no maintenance obligation as to property belonging to the consumer is no longer transparent by this re-writing. The shift in the weight

of the adjectival phrase from its focus on the maintenance obligation to an indifferent focus on no more than the thing to be maintained robs s 25(1)(a) of its negative implication.

75. The CA considered that the express duty to maintain the service cable (which WP owned) could be discharged only by "taking steps to see that the PA pole is capable of safely supporting the service cable": J[140]-[144]; CAB 438-9. *E Act*, s 25(1)(a), has to be read as a whole. By focussing on the *standard* in s 25(1)(a) ("safe and fit") of WP's obligation to maintain apparatus "*belonging*" to WP, the CA shifted its true effect and construction. The focus is on inspection and maintenance of WP's property. "Belonging to" identifies the property required to be maintained; the words do not and cannot require inspection and repair or replacement of consumers' property. Such an approach ignores the negative proposition that is evident from the words used, and the order in which they are used.

76. *E Act*, s 25(1)(b), also contains a number of implied negative propositions. It requires the network operator to take reasonable precautions to avoid the risk of fire or other damage on premises. But, the obligation is expressly confined so that it arises only in the "actual supply of electricity to" the consumer's premises. It is an obligation that applies only to the position on the premises where electricity passes beyond the network operator's service apparatus. Section 25(1)(b) is focussed on the need for precautions to be taken when electricity is conducted using cables. When electricity is conducted using cables, the cables may break or fall. WP insulated the service cable from the termination pole to the PA pole; this guarded against the risk of fire.

77. The negative implication of s 25(1)(b) includes that the network operator does not have a broader duty of care to take precautions to guard against the risk of fire in the vicinity of a consumer's premises if such risk is not in the actual supply of electricity, but merely *in connection* with the network operator's operation of its own distribution network. The CA duty extends WP's duty well beyond what is contemplated by s 25(1)(b).

78. The CA's approach to the statutory scheme was erroneous: J[135]-[147]; CAB 437-40. It downplayed the significance of the *E Act*, s 25(1), by treating it as directed to the relationship between WP and a consumer, and not third parties: J[137]; CAB 437. However, s 25(1)(b) is expressly addressed to the risk of fire, which Parliament cannot have overlooked was a risk to persons in the vicinity of the consumer's premises. That is consistent with Parliament's decision to provide a remedy, in s 25(2), to any "person aggrieved", recognised words of width, wrongly confined by the CA: J[138]; CAB 437-8.

79. The CA suggested that the limited purpose of s 25(2) is to provide an administrative remedy: J[138]-[139]; CAB 437-8. The provision has never been exhaustive of remedies: at

a time when it provided for a small monetary award, it expressly stated that damages suits were not precluded: *EA Act*, s 25(2)(b)(ii) (before its repeal). This non-preclusion has not been necessary since the small monetary award was abolished: *Electricity Amendment Act 1996* (WA), s 19. Section 25 has *never* been exhaustive of the remedies for breach; so, nothing can be inferred from its provision of an administrative remedy.

80. Also, the CA duty imposes on WP a duty to *consider whether to form* the statutory opinion that preconditions its power to interrupt supply to a consumer. This statutory precondition is incompatible with a wide-ranging common law duty to *consider* — at regular intervals, across the many thousands of consumer interfaces — whether the opinion should be formed. The CA's error is repeated (J[145]; CAB 439): it posits that even if WP has no duty to *maintain* the pole, it might nonetheless owe a duty to *inspect* and disconnect unless Mrs C repairs or replaces it. The idea appears to be that, even if WP does not have a duty to maintain Mrs C's property, it might nonetheless have a duty to inspect that property to ascertain whether it requires maintenance. The conclusion that WP has a duty to inspect but not maintain is artificial. It would give rise to a most curious duty of inspection upon WP.

81. WP's powers are not at large. They are confined by WP's functions and the purposes of the *EOP Act*. For example, *EOP Act*, s 28(3)(c), gives power to enter any land to improve works, maintain undertakings, carry on undertakings or works "requisite, advantageous, or convenient to the exercise and performance of" WP's functions. *EOP Act*, s 49(b), authorises WP (and its independent contractors, like Thiess: s 4(2)(b)) to enter upon any land, and carry out the potentially intrusive activities specified if "required for the purpose of the construction or maintenance of any part of any undertaking or works of the energy operator". This right of entry is a right conferred on WP to construct or maintain its own undertaking or works, not consumer property.

82. Similarly, *EOP Act*, s 49(c), confers a power of entry to maintain a "supply system" (defined in s 4(1)). "Supply system" relevantly includes "distribution works", also defined in s 4(1), by reference to "the purpose of transmitting or distributing energy to consumers" and includes "service apparatus", again defined by reference to things used for distribution to the position of delivery to consumers. The defined words refer to items used to transmit or distribute energy up to the position of supply to consumers and not beyond.

83. *EOP Act*, s 49(d), permits WP to support its distribution works and service apparatus by affixing or annexing them to or against any part of a house, building or other structure. The preservation of the consumer's rights (and responsibilities) in respect of their own property is reflected in the requirement that WP detach from the consumer's property if the

consumer wants to rebuild or alter their house, building or other structure. (This will be at WP's own cost if WP's apparatus is not affixed solely to supply the consumer.)

84. Moreover, WP does not have power to compel a consumer to carry out works on their own property. As mentioned ([19]), such a power is, instead, conferred on inspectors designated by the Director of Energy Safety under the *ECA*, ss 12, 14, 18. Thus, the supposed inspection duty would be a duty directed either to informing a consumer about their own duty, or to WP informing itself as to the possibility of disconnection if the consumer is not discharging their maintenance duty. WP's power to disconnect is, as mentioned, conditioned on WP's actual opinion. The law of negligence does not supplement such a public law power with a freestanding duty to consider its exercise.

85. The features of the governing statutory scheme as a whole should have led the CA to hold that there was no room for the asserted common law duty of care. The CA duty is inconsistent with those features:

(a) Conflicting asset management systems: Parliament has required an expert regulator to oversee the granting of licenses according to a public interest test, and imposed a requirement on a licensee to have an asset management system for its own assets. The CA duty erects a parallel asset management system as to other people's assets, not worked out by the regulator or subjected to the specified public interest test.

(b) Violation of legislative demarcation of responsibility at interface: Parliament has, by the *E Act*, s 25(1), specifically addressed the demarcation of responsibility at the interface between WP and the consumer (taking the common law position as to control of one's own property as its assumption). The CA duty imposes a different set of duties so broad in their import as to swallow the carefully delineated duty on WP to maintain its own apparatus (not other people's apparatus), and to take care to prevent fire in actual supply to the point of interface (but not beyond it).

(c) Inconsistency with conditional power to disconnect: Parliament has imposed on WP obligations to connect consumers and maintain supply. It has conferred a power to disconnect a consumer, which is conditional on WP forming an actual opinion about potential danger. It has not imposed a duty regularly to consider the exercise of that power. The CA duty requires WP to take steps to consider whether it should form the requisite opinion by inspecting consumer property that the statutory scheme does not require it to inspect.

(d) Superadded duty of individual inspection: The scheme does not require consumer apparatus to be individually inspected regularly by WP, but the CA duty does. The

scheme specifically empowers designated inspectors under the *ECA*, rather than WP, to inspect consumer property, prohibit its use or disconnect supply. The CA duty would require WP to carry out an overlapping function, despite WP's very different position from designated inspectors, accountable to the Director of Energy Safety.

(e) Making discretionary functions obligatory: Each of the above cuts across the overarching feature of the scheme, that WP's functions are discretionary and to be exercised in accordance with principles specified in the *ECs Act* (ss 56, 58, 61(1)).

86. For the above reasons, the CA adopted too narrow a conception of inconsistency for the purpose of assessing whether a duty arose, thereby failed to consider the full effect of the statutory scheme, and, in any event, misconstrued the *E Act*, s 25. The CA duty is inconsistent with the implied negative propositions apparent on the proper construction of s 25(1). It is therefore not a duty of care imposed on WP by the general law.

PART VII: ORDERS SOUGHT

87. WP seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Court of Appeal made on 2 July 2021 in each of the proceedings CACV 114 of 2019, CACV 115 of 2019, CACV 116 of 2019, CACV 117 of 2019, CACV 118 of 2019, CACV 122 of 2019, CACV 125 of 2019, CACV 128 of 2019, CACV 129 of 2019, CACV 130 of 2019, CACV 131 of 2019 and CACV 132 of 2019 and in their place order in each case that the appeal or cross-appeal as appropriate to that Court be dismissed with costs.

(c) The respondents pay the appellant's costs of the appeal to this Court.

PART VIII: TIME ESTIMATE

88. WP: 3 hours for oral argument (including cross-appeals, if special leave is granted).

Dated: 4 May 2022

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ANNEXURE A

CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN THE APPELLANT'S SUBMISSIONS.

	Statute	Version	Relevant Dates(s)
1.	*Electricity Act 1945* (WA)	08-a0-04	13 December 2013 – 28 March 2022
2.	*Electricity Act Regulations, 1947* (WA)	*Government Gazette*, 21 Aug 1968, pp 2475-2544	23 April 1968 – 1 November 1991 (in materially the same form)
3.	*Electricity Amendment Act 1996* (WA)	00-00-00	11 November 1996
4.	*Electricity Corporations Act 2005* (WA)	01-k0-04	1 January 2014 – 17 July 2014
5.	*Electricity Industry (Obligation to Connect) Regulations 2005* (WA)	00-a0-11	4 October 2005 – 5 November 2021
6.	*Electricity Industry Act 2004* (WA)	02-i0-03	1 January 2014 – 28 March 2018
7.	*Electricity Regulations 1947* (WA)	06-a0-02	8 November 2013 – 14 April 2015
8.	*Energy Coordination Act 1994* (WA)	04-h0-10	30 January 2012 - present
9.	*Energy Operators (Powers) Act 1979* (WA)	05-d0-03	1 January 2014 – 13 June 2019