



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: P5/2022
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Filing party: Appellant
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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

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**HERRIDGE PARTIES (PER ORDER MADE BY
JUSTICE MITCHELL ON 28 OCTOBER 2019)**
First Respondents

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

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

NOREEN MERLE CAMPBELL
Fourth Respondent

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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

30 **PART I: CERTIFICATION**

This outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

1. The appellant (**WP**) did not owe to the plaintiffs and Mrs Campbell a duty of care that required, as a reasonable precaution, the routine inspection of consumer-owned PA poles. The scope of the duty owed by WP as to its distribution system does not extend to require any routine inspection of consumer-owned PA poles. WP was not in physical control of PA poles nor is it required by the statutory regime to exercise any such control. Consumers have always been required to inspect and maintain their own property.
2. The statutory regime, in numerous inter-related respects, is incompatible with a duty
40 having that scope; and the Parliament did not intend WP to take the precaution of routine inspection of consumer property: AS[10]-[19], [67]-[86]; ARS[24]-[34].

(a) ***Electricity Corporations Act 2005 (JBA1, 142)***, ss 4(1)(b), 41, 43, 56 & 63: WP is a statutory electricity corporation with functions as to its distribution system by which no duty is imposed (including as to consumer property); WP may stop electricity transportation only if it forms an actual opinion of potential danger.

(b) ***Electricity Industry Act 2004 (JBA2, 486)***, ss 3, 4(1)(c), 9(1), 14 & 31: For its distribution licence, WP had to have an asset management system, approved by the Economic Regulation Authority in the public interest. It is incoherent for the common law to erect a more extensive consumer asset inspection system.

10 (c) ***Electricity Act 1945 (JBA1, 92)***, ss 5(1) & 25: On consumer premises, s 25(1)(a) imposes an absolute obligation to maintain service apparatus belonging to WP for safe electricity supply; s 25(1)(b) requires reasonable precautions to be taken to avoid the risk of fire in the actual supply of electricity up to the position where supply is made. It is incoherent to erect an obligation to take reasonable precautions to inspect property belonging to a consumer. Such an obligation clashes with s 25(1)(a) [ignores “belonging to” and ignores absolute maintenance obligation]; and it clashes with s 25(1)(b) [ignores “actual supply” and limit on precautions up to position of supply]. See also **1945 2nd reading (JBA10, 3690)**; ***EA 1945, s 5 (JBA2, 371)***; ***SEC Act 1945, s 7 (JBA2, 703)***; ***E Am. Act 1979, s 5 (SJBA-B, 14-15)***. The CA’s analysis of s 25 should not be accepted (**J[135]-[147]**; **CAB1, 437-440**). A precaution of consumer property inspection/maintenance cannot arise under s 25(1)(b) because that would be incongruent with the limits explicit in s 25(1)(a). The two provisions need to be construed together.

(d) ***Energy Coordination Act 1994 (JBA2, 567)***, ss 12(2), 13, 14 & 18: Inspectors certified by EnergySafety Director have power to inspect consumer property and order disconnection if unsafe. It is incoherent for WP to have a competing routine inspection duty.

(e) ***Electricity Regs 1947 (JBA2, 555)***, rr 253 & 254: WP was permitted to have a system of consumer installation inspections: (a) when installed or altered; and (b) even then, by sample only. It is incoherent for WP to have a wider routine inspection duty.

(f) ***Electricity Industry (Obligation to Connect) Regs 2005 (JBA2, 496)***.

30 (g) ***Electricity Act Regulations, 1947 (JBA2, 403)***, rr 183-186, 188-198, 201, 202, 206, 218 & 219: To obtain electricity supply, Mr & Mrs C, as consumers, were required to and did provide the PA pole, and were required to inspect it annually. They chose to use the PA pole to hold the service cable aloft.

(h) **WA Electricity Requirements (WP’s BFM, 23 June 2022, 52)**: This mandatory guideline is explicit that consumer PA poles are to be maintained by consumers.

(i) *Electricity (Licensing) Regs 1991 (JBA2, 515)*, rr 3(1), 4A(1), 49(1), 50 & 51: Mrs C could have caused a licensed electrician to notify WP and replace the PA pole.

(j) *Energy Operators (Powers) Act 1979 (JBA2, 581)*, ss 4(2), 28(3)(c), 48(1) & 49: WP's independent contractor had power of entry (and liability) as if it were WP. The *EOP Act* gives such power to enable WP to do work for the purposes of its statutory functions.

3. No case establishes that a network operator responsible for electricity distribution owes a duty of care requiring reasonable precautions to avoid the risk posed by consumer property that is not part of its network. *Thompson v Municipality of Bankstown* (1953) 87 CLR 619 (**JBA7, 2641**), *Munnings v Hydro-Electric* (1971) 125 CLR 1 (**JBA5, 1829**), & *Brocklands v Tasmanian Networks* [2020] TASFC 4 (**JBA8, 3052**) each involved an electricity authority being responsible for its own apparatus: ARS[10]-[11].

4. A public authority's common law liability in negligence has developed so that, unless the public authority took actual control or was required by statute to take control, or was made responsible by statute for the relevant risks, no duty should arise. *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (**JBA6, 2271**) synthesised the Court's approach. McHugh J treated control as of fundamental importance: *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [83]-[84] (**JBA4, 1121**): AS[30]-[69]; ARS[6], [7], [17]-[23].

5. WP's accepted duty to maintain its own distribution system and the pre-work inspection duty are compatible with its statutory obligations to maintain its distribution system and to take precautions not to connect to consumer apparatus if unsafe. These duties do not transform into a routine consumer asset inspection duty. The CA's process of reasoning to erect a supposed general duty of care owed to people in the vicinity and its reasoning to identify a supposed appropriate reasonable precaution was incorrect: **J[153]-[158], [162]-[180]; CAB1, 441-449**: AS[59]-[66]; ARS[8], [9].

6. The statutory regime (incl. *E Act*, s 25(1)(a)&(b)) did not require WP to control the PA pole, or to take any precaution of inspecting it. The scope of WP's accepted duties did not require routine consumer asset inspection. The case does not raise fact-specific questions as to breach but resolves because of no control and the statutory regime, which must be given primacy. A supposed duty of care that "does not sit well with" the legislative regime is incoherent and does not arise: *CAL No. 14 v Motor Accidents Insurance* (2009) 239 CLR 390 (**SJBA-C&D, 7**): AS[67]-[86]; ARS[12]-[16], [24]-[34].

Dated: 6 September 2022


Brahma Dharmananda SC


Michael Sims


Brendan Lim