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

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

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 REPLY

PART I: CERTIFICATION FOR INTERNET PUBLICATION

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

PART II: CONCISE REPLY TO THE RESPONDENTS' ARGUMENTS

OVERVIEW

2. In 80 pages of submissions, the 1st respondents (**R1**), 2nd respondents (**R2**), Mrs C (**R4**) and Thiess (**R5**) make many disparate points against WP's submissions (**WP**). WP replies to the key points asserted. In essence, WP did not owe the (unpleaded) CA duty, or any relevant duty, because it did not ever own or otherwise control the PA pole; and, in any event, the CA duty was incompatible with the statutory scheme.

3. WP's pre-work inspection duty was not non-delegable because the statutory scheme did not require WP to ensure that reasonable care was taken by its independent contractor, Thiess. It is against principle to conclude that, merely because an activity is said to be extra-

hazardous (if reasonable care is not taken), a non-delegable duty arises. The plaintiffs' alleged vulnerability to WP would not make the pre-work inspection duty non-delegable. No special leave question is raised by the non-delegability argument.

4. Mrs C, as the owner of the PA pole and occupier of the land on which it was affixed, owed and breached a duty to maintain or keep the PA pole safe. She cannot escape liability on the basis that she did not know about the PA pole's inadequacy and because Thiess inspected (negligently) in July 2013. Mrs C rather overstates (R4[17]) her inability to replace the inadequate PA pole. A licenced electrical contractor engaged by Mrs C on notice to WP could have replaced the PA pole: *Electricity (Licensing) Regulations 1991* (WA), rr 50, 51, 52 (definitions in rr 3, 4A). The position is equally overstated by the other parties (R1[19]; R2[18]; R4[19], [56]). No special leave question is raised by Mrs C.

CONTROL & DUTY

5. In their statements of claim (**SoC**), the plaintiffs and Mrs C relevantly pleaded a duty to take reasonable care to inspect and maintain the PA pole: SoC [26], [26AA] (R1's Book of Further Materials (**R1B**) 28); (WP's Book of Further Materials (**WPB**) 24-25). The trial judge raised concern about the conflation of duty and breach (T2784) (WPB 48); but, neither the plaintiffs nor Mrs C amended their pleaded duty against WP to address the conflation. WP met the pleaded case. Yet, now, Mrs C complains that a similarly formulated duty found against her involves the conflation (R4[50]-[52]).

Duty has to be compatible & coherent with statutory scheme

6. In ***Graham Barclay***, Gummow and Hayne JJ recognised that a common law duty may sit "alongside" statute ([147]) only if the question posed by them in [146] is answered in the affirmative (cf R5[21]). Gummow and Hayne JJ said ([146]) that the "existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime" and the question is whether it creates a relationship sufficient for intervention by the tort of negligence.

7. As Gaudron J explained in ***Crimmins*** ([27]), even if a statute does not "in terms" exclude a common law requirement, "the nature or purpose of the powers and functions conferred, or some of them, may be such as to give rise to an inference that it was intended that the common law should be excluded either in whole or in part". It is thus incorrect to suggest the issue is determined by asserting, in a circular fashion, some sort of abstract compatibility between a common law duty and the statutory regime. The *first* task is to

determine whether the Parliament expressly or implicitly decided that the statutory authority need not take particular action (see WP[67]-[68]).

No concession as to duty to take reasonable care of consumer property

8. WP's so-called concessions (cf R1[40]; R2[20]-[21]; R4[14], [21]; R5[22]) about its common law duties as to risks arising from its own network and as to the pre-work inspection duty do not entail the conclusion that WP was required to take action to inspect, maintain, or warn consumers about, consumers' property, even if WP's service apparatus is attached to that property. Service cables are attached not just to consumer poles but to consumers' houses and other buildings.

9. The issue in the case is about whether WP is required to take any action as to such consumer property. For two reasons, WP is not: it does not control such property; Parliament intended to exclude any requirement to take any action. Further, the so-called concessions were about law made in argument before the CA. They did not inform any forensic decision made at the trial.

Requirement on public utilities to maintain consumer property novel

10. ***Thompson v Bankstown***, ***Munnings*** and ***Brocklands v Tasmanian Networks*** do not establish a relevant and recognised duty of an electricity network provider to take reasonable care to avoid the risk of fire arising from defective consumer property. Whether the point is put as a point about duty or about breach, none of these cases concerned the true issue in the present case, about whether the network provider is required to take action to inspect, maintain, or warn consumers about, defective consumer property (cf R5[23]-[29]).

11. In ***Thompson v Bankstown***, this Court held that the Council owed a duty to persons that could reasonably be foreseen to be injured by the Council's failure to act reasonably as to *the Council's* decaying pole erected by the Council on a public road, when a 13 year old boy climbed the pole to try and reach a bird's nest. In ***Munnings***, this Court held that the Hydro Electric Commission was liable for failing to take reasonable care as to a metal and concrete pole *that had been constructed by the Commission* on unfenced wasteland when an 11 year old boy suffered injury when he climbed the pole and accidently touched the high voltage transmission line. In ***Brocklands v Tasmanian Networks***, a pole and the transformer on it had been poorly designed and installed by Tasmanian Networks' predecessor. The Tasmanian Networks' high voltage electricity lines connected to the pole at which the high voltage was to be transformed to low voltage from which electricity was supplied solely to the nursery. Because of failures in Tasmanian Networks' pole or transformer or some other related failure, Brocklands succeeded in a claim for loss suffered when its equipment was

harmed by the failures. Tasmanian Networks was unsurprisingly held liable for the failures of its own service apparatus.

Duty & breach

12. It is incorrect to assert that the true issue is "intensely fact-specific" (R5[10]); that is not how the case was run at trial. The true issue, howsoever characterised, was whether WP was required to take action as to defective consumer property if WP's apparatus was attached to that property for electricity supply from the network. There is "no bright-line boundary separating questions going to duty, breach or causation": ***Amaca v A B & P Construction*** [2007] NSWCA 220; (2007) Aust Torts Reports 81-910; (2007) 5 DDCR 543 [130] (Basten JA); also [58] (Giles JA). The distinction between duty and breach mattered in ***Amaca*** because an appeal from the Dust Diseases Tribunal was confined to a decision in point of law.

13. The need to separate duty and breach is to avoid retrospective reasoning and conflating issues of law with issues of fact: e.g. ***RTA v Dederer*** (2007) 234 CLR 330, 353 [66]-[67]; ***Vairy*** [29]-[30], [59]-[62]; ***Crimmins*** [65]. The Court has emphasised that retrospective reasoning from the harm that occurred invites an assertion of duty when no duty truly exists; it risks treating findings of breach as findings of law not fact.

14. The need for purity in analysis is a need that arises so that there may be proper focus on whether a duty exists at all. Purity in analysis narrows (properly) the determination of *when duty arises* and what is *its content*. A duty's *content* informs what reasonable precautions were necessary to determine whether the duty was breached.

15. Assertions to the effect that it is impermissible to conclude WP had no duty as to consumer property (because WP had a duty as to its network); and that it (somehow) cannot be contested that WP breached by failing to inspect, maintain, or warn consumers about, defective consumer property would not be accepted by the Court. The purity in analysis as to duty and breach does not compel acceptance of such assertions (cf R1[27]; R4[30]; R5[2], [8], [10], [22], [54]). Howsoever the issue is analysed, WP's point is that there is no component of the duty of care owed by WP to take reasonable care as to its network that extends so that WP was required to take reasonable care as to consumer property. Analysed slightly differently, the scope or content of WP's duty to take reasonable care as to its network did not extend to require inspection, maintenance, or warnings about, consumer property.

16. For example, in ***Wallace v Kam*** (2013) 250 CLR 375 [8], the Court identified the common law duty of a medical practitioner to a patient as a "single comprehensive duty" to

exercise reasonable care and skill in advising and treating but then said a "component of that single comprehensive duty is ordinarily to warn" of material risks on proposed treatment. A medical practitioner's failure to warn, on this analysis, is not simply a question of breach.

Further analysing whether duty & whether breach

17. In enumerating relevant questions in ***Crimmins*** ([93], and summated in ***Graham Barclay*** [84]-[85]) (cf R5[31]), McHugh J's question 6 was, "Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, …)? If yes, then there is no duty." This issue cannot be ducked by a question-begging assertion of apparent consistency. The issue requires *first* giving *close* scrutiny to the terms, scope and purpose of the statute (cf R5[37]).

18. The CA duty, as formulated, is said to be owed to "persons in the vicinity of the SWIS" (J[158]; CAB 443). This is a reference to the public at large in the SWIS geographical area. WP was not conferred powers to protect any particular class; this tells against duty. As Gleeson CJ explained in ***Graham Barclay*** ([39]), the powers conferred on the Great Lakes Council "were conferred for the benefit of the public generally; not for the protection of a specific class of persons" and this was a critical factor against duty (cf R2[56]; R5[33]-[34]). Relatedly, it does not assist the respondents that WP is entitled to recover its efficient costs through regulated pricing (cf R4[16],[27]): that rather underscores the fact that the funding of WP's functions is ultimately borne by the consumers of WA, much as the funding of other public services is ultimately borne by taxpayers generally.

19. Whenever there is electricity (or gas or water) supply from a network to a consumer, there will be an interface. It cannot be assumed that the relevant utility has actual control of the interface or that it is required by the relevant statutory scheme to be responsible for it. Whether the interface is a "shared responsibility" (generating a requirement to inspect, maintain or warn) will always depend on the context. In the present context, it was not intended by Parliament to be a shared responsibility. It cannot, e.g., be suggested that WP shares a responsibility for the inspection, maintenance of any building if WP's service cables are connected to it, or to warn consumers about their defective state (cf R1[17], [27]; R2[36], [39]; R4[21], [23], [24], [28]; R5[45]-[48], [50]).

20. As to the pre-work inspection duty, it is incorrect to focus on whether it is apparently incongruently "limited temporally". The pre-work inspection duty arises because of actual control; and is consistent with the statutory scheme that leaves the inspection and maintenance of consumer property to the consumer but, of course, requires WP or its contractors to do work *as to WP's network* safely including *when performing works* at or

altering the interface. The pre-work inspection duty applies sensibly *during* that work when *control* is taken (cf R1[28]; R2[22]; R4[28]; R5[49]).

21. WP does not wrongly focus on the role of the PA pole in the risk of fire disregarding how, on its failure, there would be electricity discharge because a service cable is attached to it: cf R1[3], [14], [15], [26]; R2[2], [25], [29], [31], [33], [35], [38]; R4[14], [25]. WP has not intervened in a "field of activity and increased the risk of harm" because as McHugh J also said in ***Graham Barclay*** ([81]), "[o]rdinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk". WP did not create the risk of the PA pole's potential failure.

22. In assessing whether any alleged duty is breached, it is necessary to correctly identify the relevant risk of injury by determining "what person, thing or set of circumstances gave rise to the potential for harm": ***Tapp v Australian Bushmen's Campdraft*** (2022) 96 ALJR 337 [106].

23. Even accepting the risk of injury arose because of the defective PA pole to which a service cable was attached, it cannot be concluded that the risk was created by WP; it was created by Mrs C. Further, when determining whether a duty of care is imposed (in the first place), the Court's approach requires an evaluation of a number of matters including an "examination of the degree and nature of control exercised over the risk of harm that has eventuated": ***Stuart v Kirkland-Veenstra*** [113]. The risk referred to in ***Stuart*** is the risk of harm that *eventuated*. The harm that eventuated here arose because of the defective PA pole, not because WP distributes electricity.

INCOHERENCE

Section 25(1)

24. Section 25(1) imposes on WP specific duties directed to solving the specific social problem of respective obligations at the interface between a network operator and a consumer. It was identified in the extrinsic material as clarifying the extent of a supply authority's (now, a network operator's) responsibility. The social problem is one that, of its nature, calls for a single and clear solution. The specific means adopted to address the problem can be seen to have risen to that challenge and supplied the single, clear solution.

25. By s 25(1)(a), there is imposed an *absolute* duty to maintain in a safe and fit condition that service apparatus which "belongs to" the network operator. By s 25(1)(b), there is imposed a duty to take reasonable precautions to avoid the risk of fire, but only in the performance of a particular activity (actual supply of electricity) and only to an identified point of interface (the position at which electricity passes beyond the supplier's service

apparatus). There is no room left for a common law duty discharge of which would require WP to inspect, maintain, or warn as to, consumer property to avoid the risk of fire starting beyond the point of interface because of the failure of the consumer's property. The two provisions need to be construed together and coherently.

26. The argument that the CA duty is nonetheless compatible with the statutory scheme should not be accepted. It relies on an incorrect construction of *E Act*, s 25(1).

27. "Maintain" does not mean "keep" (cf R4[35]-[36]). The notion of maintaining supply of electricity, in s 25(1)(c) and (d), is entirely different from maintaining service apparatus in s 25(1)(a) and does not assist the question of construction. The obligation to maintain apparatus in the specified condition, especially when read in light of the second reading speech confirming the intention to clarify "the extent of responsibility of supply authorities", is a maintenance obligation imposed with respect to specified apparatus, namely, service apparatus "belonging to" WP. The submission (R4[35]) that s 25(1)(a) obliges WP to "keep" its apparatus in a fit condition, including by ensuring the stability of consumer property by which its apparatus may be supported, is an unlikely and unworkable construction in the context of network infrastructure: the consumer property to which WP's network is connected does not end (or necessarily even start) at a PA pole. There will necessarily be further connections to houses and other buildings. Section 25 cannot be construed as requiring WP to inspect, maintain, or warn about, connected property in order to "keep" its cables aloft.

28. Even if "maintain" means "keep", the absolute obligation in s 25(1)(a) is still an obligation to keep what belongs to WP safe for electricity supply. That does not and cannot, as a matter of statutory construction, convert into an obligation to keep Mrs C's PA pole in a safe condition or to inspect, maintain, or warn her about, her PA pole, which she (not WP) was required to use reasonable precautions to maintain given her common law duty of care. The asserted obligation to use *reasonable* precautions to inspect or maintain the PA pole so that it can hold services cables "aloft" is inconsistent with the *absolute* nature of the obligation in s 25(1)(a) to maintain WP's service apparatus in a safe condition.

29. "Maintain" in its relevant ordinary meaning means to keep in good or proper condition: *Macquarie Dictionary* (8th ed, 2020), p 926; *Collins English Dictionary* (13th ed, 2018), p 1184 (cf R4[35]). The thing required to be kept in such condition for safe electricity supply was *WP's* service apparatus, not Mrs C's PA pole.

30. Further, it is necessary to construe and give effect to s 25(1)(a) by giving each word in it its ordinary meaning construed as a whole, not piece-meal ignoring the words

"belonging to" as used in creating the absolute obligation on WP: ***Collector of Customs v Agfa-Gevaert*** (1996) 186 CLR 389, 396-397, 399-402. The words of s 25(1)(a) have to be construed in context, to determine their purpose and effect, not retrospectively fitted to accommodate a view about WP's duty and breach. The statutory scheme has primacy.

Statutory scheme

31. The statutory context supports WP's construction:

(a) R5[64] asserts that there is "nothing in the express terms" of s 25(1) to suggest an intention to regulate exhaustively WP's obligations in respect of service apparatus on consumer premises. That simply begs the question of implication; it is the express regulation of those very obligations that gives rise to the inference that further or different regulation was intended to be excluded. Similarly, the observation in R5[65] that it would be possible to comply simultaneously with s 25(1) (on WP's construction of it) and the CA duty is not relevant; WP's case is that there is indirect inconsistency between them.

(b) R5[66] (also R5[72(b)]) posits a false distinction between consumers and persons in the vicinity of WP's distribution network. It is a distraction to ask about regulation of relations with persons in the vicinity of the network because those persons generally do not have obligations to be regulated. They generally have rights or privileges as against those who may owe them a duty to take care. Section 25 regulates the *respective* duties of WP and consumers (both to each other and to persons in the vicinity) at the interface between them. In so doing, there is no "narrow" subject-matter excluding persons in the vicinity; rather, s 25 deals with the allocation of responsibility as between WP and a consumer, including responsibility to persons in the vicinity. The argument (R5[72(b)]; also R2[13]) that s 25 does not impose a maintenance obligation on consumers is not to the point, because the scheme is enacted on the unexceptional premise that the consumer/occupier owes a common law duty of care in respect of their land and the fixtures and chattels on it.

(c) R5[67] invokes the detailed statutory elaboration of WP's maintenance duty, but that only *supports* WP's construction. The provisions to which Thiess refers govern WP's operations generally, and not only the particular problem of demarcating responsibility at a consumer interface. Thus, they do not in any way detract from the evident intention of s 25 to deal with *that* more specific problem exhaustively, supported by those more generally applicable provisions. The very detail with which the scheme, including the provisions identified by Thiess, deals with WP's maintenance or asset management obligations illustrates the legislative intention to deal with those matters to the exclusion of further or different common law duties. This approach is consistent with the Court's analysis in ***CAL***

No 14 v Motor Accidents Insurance (2009) 239 CLR 390 [41], [52], [55], where it was held that even though an asserted duty "does not clash directly" with the detail of a statutory scheme, no duty will arise if it does not "sit well" with the scheme because there will be a lack of coherence and that is a reason for rejecting the claimed duty.

(d) Also, *E Regs*, rr 253-254, require WP to have a system for, in effect, random inspection or an obligation to inspect when a consumer installs or alters or expands the consumer's electric installation. This ensures the safety of WP's network but the permission to have a system of random inspection tells against a common law obligation to inspect, maintain, or warn about, consumer property. Again, consumers are able to effect electric installations and alter them. This is expressly permitted by the statutory scheme.

(e) R4[41] and R2[51] wrongly submit that the licensing scheme cannot be a source of inconsistency. Parliament has required asset management to be the subject of licensing obligations worked out by an expert regulator according to a public interest test. Inconsistency arises not merely from the licensing scheme but from *Parliament's* intention that asset management be dealt with in that way: drawing on expertise that common law courts do not have and balancing public interest considerations that common law courts are not equipped to balance or even identify.

(f) None of the respondents deal persuasively with the fact that the Director of Energy Safety has designated inspectors who are responsible for the inspection and safety of consumer property and the power to compel consumers to carry out works on their property (including installed consumer poles): WP[84], [85(d)]. WP's powers, to which Mrs C refers (R4[44]), are not powers directed to the safety of *consumer* property *per se*.

(g) Further, ever since 1945 when s 25 was enacted, the scheme contemplated, and the Director continues to contemplate, that the consumer, not the supply authority or the network operator, is obliged to maintain PA poles: WA Electrical Requirements (July 2008), cl 2 (p 5) ["Consumer Pole", "Consumer Pole (Point of Attachment)"]; cl 4.7 (p 26); cl 6.2 (p 32) (published under *Electricity (Licensing) Regulations 1991*, r 49(1)(b)) (WPB 58, 79, 85).

32. The respondents' submissions also depend on an unduly narrow conception of inconsistency or incoherence. Thiess accepts that the CA duty would require WP to take steps that are "different" (R5[72(a)]) and "going beyond" (R5[72(a)]) those required by the statutory scheme and retreats to the proposition that there is no "impossibility of obedience" (R5[72(a)]), which of course is not a sufficient answer to inconsistency. R1[32] (and perhaps R2[40]-[42] and R4[33]) go further and contend that inconsistency with a negative implication in the statutory scheme will not prevent the imposition of the CA duty. That

submission, if accepted, would deny legislative competence to impliedly cover a field to the exclusion of other laws, whether written or not.

33. In ***Crimmins***, Gaudron J said ([27]) that where "it is contended that a statutory body is not subject to a common law duty in relation to the exercise or non-exercise of a power or function because of the nature or purpose of that power, what is being put is that, as a matter of implication, the legislation reveals an intention to exclude the common law in relation to the exercise or non-exercise of that power". In reliance on ***Crimmins***, in ***Graham Barclay***, McHugh J said ([78]) "it is essential to examine the words and policy of the legislation … because the legislation may indicate that the legislature has legislated to cover the field and excluded all common law duties of care". In ***Momcilovic***, Gummow J referred to class (3) cases where, in short, the legislature intended that the law be the only law on the particular point ([240]); said that this class (3) "came to be identified with the metaphor of 'covering the field' [which] on reflection is but an instance of alteration, impairment and detraction" ([242]); and concluded that class (3) "has come to be known as 'indirect inconsistency'" where the essential notion is that on its true construction the relevant law contains an "implicit negative proposition" that nothing other than it applies ([244]). The suggestion (R1[32]; R2[41]-[42]) that the concept of implied negative propositions is different and does not apply in this area would not be accepted.

34. WP's submission that the CA duty makes its discretionary functions obligatory is not "misconceived" (cf R5[72(e)]). WP accepts, at a level of principle, the cases recognising the conceptual possibility of a duty of care the discharge of which may require a public authority to exercise discretionary powers. But, as explained in WP[33]-[34], such a duty arises only where the authority has "entered upon the exercise" of those powers, or perhaps where the powers are conferred for the very purpose of taking care.

PRE-WORK INSPECTION DUTY DELEGABLE

35. Special leave to cross-appeal should not be granted to R1 and R2 to assert that WP owed a non-delegable duty when it engaged Thiess to do the July 2013 works.

36. The Court considered non-delegability, in some detail, in ***Leichhardt Municipal Council v Montgomery*** (2007) 230 CLR 22 in holding that the council did not owe pedestrians a non-delegable duty to ensure that reasonable care was taken to avoid injury when work was carried out on a public footpath by independent contractors. The Court analysed the relevant statute and found that nothing in it suggested that the council had to act personally or, if it delegated work, it was responsible not merely to exercise reasonable care to engage the contractor but to ensure that reasonable care was taken by the contractor

([8]-[13], [20]-[22], [54]-[63], [82]-[83], [97]-[98], [107], [137]-[142]). The Court was reluctant to conclude that the class of non-delegable duties should be extended ([23]-[27], [31]-[37], [110]-[121], [145]-[146], [151], [155]-[158], [187]-[192]).

37. There is no special leave question on the facts of this case about why and how it should be concluded that WP had a non-delegable duty as to the pre-work inspection duty where WP engaged Thiess as its independent contractor and required it to do the July 2013 works properly.

38. Because Thiess was an independent contractor, Thiess's negligence is not imputed to WP as if WP is vicariously liable for Thiess: ***Sweeney v Boylan Nominees Pty Ltd*** (2006) 226 CLR 161 [12]-[13], [27], [33]. Given the rationale for the established view that an entity is not liable for its independent contractor's negligence, the Court would not conclude that WP should be personally liable for Thiess's negligence.

39. There is nothing special about the alleged relationship between the plaintiffs and WP to warrant the imposition of a non-delegable duty. Nothing in the statutory scheme permits the conclusion that WP had to act personally and would be vicariously responsible if it engaged an independent contractor.

40. It is established that, under Australian law, it cannot be said that when an entity delegates an extra-hazardous activity to an independent contractor, the entity remains personally liable, merely because the activity is extra-hazardous: ***Torette House v Berkman*** (1939) 39 SR (NSW) 156, 176; ***Stevens v Brodribb Sawmilling Company*** (1986) 160 CLR 16, 30, 39-43; ***Transfield Services (Australia) v Hall*** (2008) 75 NSWLR 12 [60]-[69], [72]-[83], [89]-[90], [103], [106], [108]-[124]. Although the point was not finally decided, in ***Stoneman v Lyons*** (1975) 133 CLR 550, Stephen J said that any doctrine of strict liability should be limited to activities which "however performed" inherently involved peculiar danger (565-566); and Mason J said that something is extra-hazardous only if "notwithstanding the taking of proper precautions, there is some element of danger" (575).

41. ***Burnie Port Authority v General Jones*** (1994) 179 CLR 520 and ***AD & SM McLean v Meech*** (2005) 13 VR 241 are irrelevant because any principle from them applies only if WP had control when Thiess performed the July 2013 works. The CA was correct to conclude that WP had no control: J[226]-[227]; CAB 462-3.

MRS C OWED & BREACHED DUTY CAUSING LOSS

42. Special leave should not be granted to Mrs C to assert that she did not breach the duty of care she now accepts she owed to exercise reasonable care to prevent harm by the ignition on and spread of fire from her property (R4[49]).

43. Unlike the issue that arises about WP's lack of control (in actuality or as required by any statutory provision) and the issue that arises about the incompatibility of the statutory scheme with the CA duty and its alleged breach, the issue raised by Mrs C on her proposed cross-appeal, which relevantly goes to the issue of breach and the issue of causation, is "intensely fact-specific".

44. For example, Mrs C's postulated assumed counter-factual (R4[51]) about a single incompetent inspection and its implications about whether Mrs C did or did not breach the duty she owed demonstrates that the issues she raises are not issues that could properly be the subject of special leave.

45. Also, Mrs C's reference to how the PA pole apparently looked in support of her no breach theory descends into peculiar facts, raising no point of principle (R4[56]).

46. As well as being incorrect, the detailed factual analysis at R4[57]-[62] is no more than an application of *CLA*, s 5B(2), raising no point of general principle. The analysis is incorrect at least because it relies on Thiess' *negligent* inspection as a sufficient answer. Also, there is no finding that Mrs C knew Thiess had, in fact, inspected her PA pole: J[270]; CAB 475 (cf R4[57], [61]). A reasonable consumer of electricity who had to provide a PA pole to obtain electricity supply (in the first place) would not then reasonably assume that, thereafter, her property would become the responsibility of the public utility (cf R4[60]).

47. The argument that causation, when assessed normatively for the purposes of *CLA*, s 5C, leads to the conclusion that Mrs C did not cause loss (cf R4[63]-[66]) would not be accepted. It relies (too much) on Thiess' incompetent or negligent inspection as a reason to break the "but for" causation of loss, and raises no point of principle. The argument includes an assertion that Mrs C knew Thiess inspected (on which, as mentioned, there is no finding at all) but did not know it was negligent. (The argument is not normatively correct but, if correct, WP would also not have caused any loss, assuming (incorrectly) for one moment a duty and breach by WP.)

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ANNEXURE A

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

	Statute	Version	Relevant Dates(s)
1.	*Electricity Act 1945* (WA)	08-a0-04	13 December 2013 – 28 March 2022
2.	*Electricity (Licensing) Regulations 1991* (WA)	06-d0-01	1 July 2013 – 30 June 2014
3.	*Electricity Regulations 1947* (WA)	06-a0-02	8 November 2013 – 14 April 2015