

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION**

No. SCI 4538 of 2012

BETWEEN:

**KATHERINE ROWE**

Plaintiff

- and -

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (formerly SPI  
ELECTRICITY PTY LTD) & Ors (according to the Schedule)**

Defendants

**SEVENTH ~~SIXTH FURTHER AMENDED STATEMENT OF CLAIM~~**

*(filed pursuant to the Orders of His Honour Justice Dixon made on 15 October 2014)*

**Date of Document:**

29 17 October 2014

**Filed on behalf of:**

The Plaintiff

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## SECTION A – PRELIMINARY

### *Plaintiff*

1. At all material times Katherine Rowe with her husband, Dr Kenneth Rowe (deceased) were joint proprietors of real property located at:
  - (a) 2 Hull Road, Marysville in the State of Victoria described in Volume 08466 Folio 061 (**2 Hull Road**); and
  - (b) 4 Hull Road, Marysville in the State of Victoria described in Volume 08466 Folio 060 (**4 Hull Road**).

1. ~~The plaintiff was at all material times:~~
  - (a) ~~a joint proprietor of real property located at 29 Woods Point Road, Marysville in the State of Victoria (“**the plaintiff’s land**”);~~
  - (b) ~~the husband of Elisabeth Liesfield (deceased) (“**Elisabeth**”); and~~
  - (c) ~~the father of James Liesfield (deceased) (“**James**”) and Matthew Liesfield (deceased) (“**Matthew**”).~~

- 1A. The plaintiff brings this proceeding in her own right and as executor of the estate of her deceased husband Kenneth Rowe on behalf of the dependants of Kenneth Rowe.

2. The plaintiff brings this proceeding on ~~his~~ her own behalf and on behalf of the group members.

### *Murrindindi bushfire*

3. The Murrindindi bushfire (“**the Murrindindi bushfire**”) is the fire that:

- (a) started near the Murrindindi Sawmill on Wilhelmina Falls Road at Murrindindi in the State of Victoria, at approximately 2:45pm on 7 February 2009; and
- (b) burnt the area highlighted on the map titled “Murrindindi Bushfire Area” and filed in the Court in this proceeding (“**the Murrindindi bushfire area**”).

3A. 7 February 2009 was a day of extreme bushfire risk in the Murrindindi bushfire area.

### **Group Members**

4. The group members to whom this proceeding relates are:

- (a) The persons identified in the confidential exhibit filed pursuant to Order 2 made on 4 March 2014 (as varied by orders of 4 April 2014 and 30 May 2014) and known as the “List of Registered Personal Injury and Dependency Claimants” ~~all persons who as at 2 May 2014 are recorded on the “List of Registered Personal Injury Claimants” held by the plaintiff’s solicitors; and~~
- (b) ~~all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of:~~
  - (i) ~~the Murrindindi bushfire (including, without limitation, an injury suffered as a result of attempts to escape the Murrindindi bushfire or other emergency action taken by any person in response to the Murrindindi bushfire); and/or~~
  - (ii) ~~the death of or injury to another person as a result of the Murrindindi bushfire.~~

~~where “psychiatric injury” in this group definition means nervous shock or another psychiatric or psychological injury, disturbance, disorder or~~

~~condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 2 May 2014; and~~

~~(e)(b)~~ the estates of or dependants of any person who died in or as a result of the Murrindindi bushfire (including, without limitation, a death resulting from attempts to escape the Murrindindi bushfire or other emergency action in response to the Murrindindi bushfire); and

~~(e)(c)~~ all those persons who suffered loss of or damage to property as a result of the Murrindindi bushfire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Murrindindi bushfire); and

~~(e)(d)~~ all those persons who at the time of the Murrindindi bushfire resided in, or had real or personal property in, the Murrindindi bushfire area and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property;

but provided that:

- (i) persons in (c) or, (d) ~~or (e)~~ shall not be treated as making a claim in this proceeding for personal injury or pursuant to Part III of the *Wrongs Act 1958 (Vic)* in relation to a person who died as a result of the fire unless such claim is also identified in the List of Registered Personal Injury and Dependency Claimants referred to in (a) above ~~in these proceedings unless they are also covered by (a) or (b) above~~; and
- (ii) the group members do not include departments, agencies, authorities, instrumentalities or persons established by or holding offices or authorities of the Commonwealth or a State or Territory which are, or if established or authorised by the State of Victoria would be, public authorities within the meaning of paragraphs (a) to (c) or (e) to (i) inclusive in section 79 of the *Wrongs Act 1958 (Vic)* ("**Wrongs Act**").

5. As at the date of commencement of this proceeding there are, as against each defendant, seven or more persons who have claims against the defendants.

## **SECTION B – AUSNETSPI – STATUTORY DUTY AND NEGLIGENCE**

6. The first defendant (“SPIAusnet”):
- (a) is and at all times from around May 1994 was a corporation registered for the purposes of the *Corporations Law*, and since 2001 the *Corporations Act 2001 (Cth)*, and capable of being sued;
  - (b) was:
    - (i) incorporated in or around May 1994 with the corporate name “DB One Limited”;
    - (ii) from in or around October 1994 until in or around March 2000, known as “Eastern Energy Limited”;
    - (iii) from in or around March 2000, known as “TXU Electricity Limited” and from in or around October 2004 known as “TXU Electricity Pty Limited”; and
    - (iv) from in or around October 2004 until after 7 February 2009 known as “SPI Electricity Pty Limited”;
    - ~~(iv)~~(v) from in or around 4 August 2014 known as “Ausnet Electricity Services Pty Ltd”;
  - (c) at all material times since 3 October 1994 has carried on business as a distributor of electricity in the geographical area in northern and eastern Victoria depicted on a map, a copy of which is available for inspection at the offices of the solicitors for SPIAusnet (“the **license area**”), pursuant to a license as varied from time to time (“the **electricity distribution business**”);
  - (d) at all material times in carrying on the electricity distribution business was:
    - (i) an electricity supplier; and

(ii) a network operator;  
 within the meaning of section 3 of the *Electrical Safety Act 1998 (Vic)*  
 (“**the ES Act**”);

(e) is and was the successor to the electricity distribution business carried on:

(i) by State Electricity Commission of Victoria (“**SECV**”) until  
 December 1993;

#### Particulars

*Electricity Industry Act 1993 (Vic)* ss 62, 64 (“**EI Act**”); *Electricity Industry (Residual Provisions) Act 1993 (Vic)* ss 63A, 63C, 64 (“**EIRP Act**”) and the allocation statement titled “*Electricity Industry Act 1993 – Allocation Statement – Section 62(1)*” dated 23 December 1993 (“**1993 Allocation Statement**”). A copy of the 1993 Allocation Statement may be inspected by appointment at the offices of the plaintiff’s solicitors.

(ii) Electricity Services Victoria (“**ES-Victoria**”) from December 1993  
 until September 1994;

#### Particulars

*EIRP Act* Part 10 and the allocation statement titled “*Electricity Industry Act 1993 – Section 117 Allocation Statement*” dated 29 September 1994 (“**1994 Allocation Statement**”). A copy of the 1994 Allocation Statement may be inspected by appointment at the offices of the plaintiff’s solicitors.

and acquired all liabilities, duties and obligations, whether actual,  
 contingent or prospective, of SECV and ES-Victoria in accordance with the  
*EI Act*, the *EIRP Act*, the 1993 Allocation Statement and 1994 Allocation  
 Statement respectively (the said Acts and Statements being together the  
 “**Privatisation Legislative Scheme**”);

(f) at all material times since about 28 October 2004 was, as network  
 operator, required to comply with an Electrical Safety Management  
 Scheme (“**ESMS**”) approved by Energy Safe Victoria (“**ESV**”) in  
 circumstances where:



- (i) Division 2 of Part 10 of the ES Act and the *Electricity Safety (Management) Regulations 1999 (Vic)* (“the **ESMS Regulations**”) entitled ESV to permit SPI Ausnet to submit to ESV, or its predecessor the Office of Chief Electrical Inspector (“**OCEI**”), for acceptance of the Governor in Council, a scheme in respect of the design, construction, operation and maintenance of SPI Ausnet’s distribution network, known as an Electrical Safety Management Scheme, being the ESMS: ES Act s.107(1)(b);
- (ii) the ESV, or its predecessor the OCEI, was required to recommend to the Governor in Council that the ESMS be accepted if ESV, or its predecessor the OCEI, was satisfied that, *inter alia*, the scheme was appropriate for the distribution network and complied with section 107(2) and the ESMS Regulations and if it was satisfied that the level of safety to be provided by the ESMS minimized as far as practicable the hazards and risks to any person and the property of any person arising from the distribution network: ES Act s.111;
- (iii) in or about November 2001, SPI Ausnet, then known as TXU Electricity Ltd, submitted an ESMS to the OCEI;
- (iv) on or about 26 October 2004 the Governor in Council, on the recommendation of the OCEI, accepted the ESMS and the approval was recorded in the Government Gazette on 28 October 2004; and
- (v) the ESMS was in operation from its approval and remained in operation on 7 February 2009; and
- (g) at all material times since about 28 October 2004, was required by its ESMS to undertake programs of cyclic inspection to identify required maintenance works (“**scheduled inspections**”) (ESMS cl.2.10.5.1).

7. In the course of and for the purpose of the electricity supply business, SPI Ausnet at all material times:

- (a) owned, further or alternatively had the use and management of, the poles, pole fittings, conductors, fuses, circuit reclosers, substations, transformers

and associated electrical installations (together and severally “**installations**”) forming parts of:

- (i) a 66kV subtransmission line coded by SPI Ausnet as the “KLK-RUBA” line (“the **Subtransmission line**”), which between the poles known to SPI Ausnet as Pole 5 (asset ID 11525) (“**Pole 5**”) and Pole 6 (asset ID 11526) (“**Pole 6**”) in the vicinity of the Murrindindi Sawmill (“the **Sawmill Span**”) was configured as an overhead array of three conductors strung in a single row horizontally-aligned conductors; and
  - (ii) a 22kV three-phase feeder line (“the **Feeder line**”), which on the Sawmill Span was configured as an overhead array of three aluminium conductors aligned horizontally beneath the Subtransmission line (66kV) conductors;
- (together and severally “the **Murrindindi assets**”); and
- (b) transmitted electricity at high voltage along the Subtransmission line and the Feeder line.

### Particulars

So far as the plaintiff is able to say ~~prior to discovery~~, the ~~Murrindindi Assets including both the Subtransmission Line~~ was constructed in or about the period between February and December 1985 and the Feeder Line was constructed in or about the period from 1993 to 1997~~1986~~.

Pole 6 is a steel-reinforced concrete pole. As at 7 February 2009 it featured a top (horizontal) cross arm supporting the upper row of 66kV conductors, a middle (sloping) cross arm supporting the lower row of 66kV conductors and a bottom (horizontal) cross arm supporting the single row of 22kV conductors.

On the 22kV cross arm the conductors were bare or uninsulated conductors, arrayed as red phase (northern), white phase (centre) and blue phase (eastern).

Attached to the northern side of Pole 6, between the middle and bottom cross arms, was a stay assembly comprising a stay wire and insulator assembly. The insulator on the stay was located high on the stay wire, above the level of the 22kV conductor and in particular above the level of the nearest section of the northern (or red-phase) 22kV conductor.

SPI Ausnet duties of care

*SPI Ausnet Statutory Duty*

8. At all material times section 75 of the ES Act required SPI Ausnet as a network operator to take reasonable care to ensure that all parts of its network were safe and were operated safely (“**the SPI Ausnet Statutory Duty**”).
9. The SPI Ausnet Statutory Duty imposed on SPI Ausnet obligations for the protection of a particular class of persons, being persons who from time to time, by themselves or their property:
  - (a) approached or came into contact with any part of SPI's Ausnet's network; or
  - (b) might be injured or damaged by a discharge of electricity from any part of the said network or by the consequences of any such discharge, including but not limited to fire.

**Particulars**

The object of protecting the said class is to be inferred from the ES Act as a matter of the proper construction of the Act.

10. At all material times the plaintiff and each of the group members (together and severally “**claimants**”) were:
  - (a) persons within the class described in the preceding paragraph; or
  - (b) estates or dependents of persons within the class described in the preceding paragraph; or
  - (c) persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the class described in the preceding paragraph.

### Particulars

- (A) The Marysville area in which the plaintiff's property was located featured heavy forest in hilly terrain extending south-east from Murrindindi ("the Marysville area").
- (B) The Marysville area was susceptible to bushfire ignited by a discharge of electricity from the SPI Ausnet network, including any bushfire started by a discharge occurring to the north-west of Marysville including, without limitation, in the Murrindindi area.
- (C) Prior to and as at 7 February 2009, the plaintiff and her husband:
  - (i) leased out 4 Hull Road;
  - (ii) operated 2 Hull Road as a holiday let; and
  - (iii) lived in Surrey Hills, Victoria, and used 2 Hull Road as a holiday home.

Each of 2 Hull Road and 4 Hull Road was located within the Marysville area.

- ~~(a) The plaintiff with his wife Elizabeth and their sons James and Mathew resided at Nanda Binya Lodge situated at 29 Woods Point Road, Marysville.~~
- ~~(b) The plaintiff and his wife Elizabeth:~~
  - ~~(ii) Jointly owned Nanda Binya Lodge which they operated as a "bed and breakfast" holiday accommodation facility;~~
  - ~~(iii) Operated a holiday accommodation business at Lyell Guest Cottages situated at 30 Lyell Street, Marysville, over which they jointly held a 5 year lease;~~
  - ~~(iv) Managed for reward accommodation facilities at:~~
    - ~~(A) "Magnolia House" situated at 26 Murchison Street, Marysville;~~
    - ~~(B) "Timberlodge", situated at 2 Hulls Road, Marysville; and~~
    - ~~"Keppel Waters", situated at 88 Falls Road, Marysville.~~

11. In the premises, at all material times SPI Ausnet owed the SPI Ausnet Statutory Duty to the claimants.

### **SPI Ausnet General duty**

12. At all material times from in or around October 1994 SPI Ausnet:

- (a) had the ultimate responsibility for all activities associated with the planning, design, construction, inspection, modification and maintenance of the Murrindindi assets;
- (b) had the right, to the exclusion of other private persons to:
  - (i) construct, inspect, modify, repair and operate; or
  - (ii) give directions as to the construction, inspection, modification, repair or operation;of the Murrindindi assets;
- (c) exercised the right referred to in (b) above; and
- (d) in the premises, had practical control over the Murrindindi assets.

13. At all material times from in or around October 1994:

- (a) ~~SPI~~ Ausnet used the Murrindindi assets to transmit electricity at high voltage;
- (b) the transmission of electricity along the Subtransmission line and the Feeder line created a risk of unintended discharges of electricity from the said lines;
- (c) unintended discharges of electricity from the Subtransmission line or the Feeder line were capable of causing death or serious injury to persons, and damage to or loss of property, by:
  - (i) electric shock;
  - (ii) burning by electric current; further or alternatively
  - (iii) burning by fire ignited by the discharge of electricity;
- (d) in the premises set out in sub-paragraphs (a) to (c) inclusive, the transmission by ~~SPI~~ Ausnet of electricity along the Subtransmission line and the Feeder line was a dangerous activity;

- (e) ~~SPI Ausnet~~ knew or, as the network operator of the Murrindindi assets, ought reasonably to have known of the matters referred to in subparagraphs (a) to (d) above.

14. At all material times it was reasonably foreseeable to ~~SPI Ausnet~~ that:

- (a) a placement of conductors and other parts of the Murrindindi assets in such proximity to each other that energized conductors might make electrical contact with other assets, could allow an unintended discharge of electric current from the conductors to the other assets;
- (b) a discharge of current described in (a) could result in:
  - (i) the other assets becoming electrified; and
  - (ii) electric shock to or electrocution of persons or property in the vicinity of the electric discharge;
- (c) further or alternatively, a discharge of electric current described in (a) could result in:
  - (i) the emission of heat or metal particles (“**sparks**”) from the conductor or other assets as electric arcs formed;
  - (ii) damage to the conductor, as sparking removed metal content from the arc site;
  - (iii) weakening of the conductor as a result of damage to the conductor from arcing;
  - (iv) collapse of the conductor, if weakened sections failed under mechanical load resulting from the weight of the conductor, its tension and wind loads;
  - (v) the unintended discharge of electricity, sparks or heat from the conductor as it collapsed and contacted the ground or other objects around the Murrindindi assets;

- (d) ~~the discharge flow of electricity, heat or sparks from electrical current through a collapsed conductor, or from objects in contact with an energized but collapsed conductor, could result in:~~
- (i) ~~-flow of current through other objects in electrical contact with the collapsed but energized conductor;~~
  - (ii) ~~flow of current through vegetation in contact with that conductor or in contact with those other objects; and/or~~
  - (iii) ~~the emission of heat, sparks or embers from the collapsed conductor, those other objects or that vegetation resulting in the ignition of flammable material in the vicinity of the point of discharge conductor and/or those objects or that vegetation.;~~
- (e) such fire could spread over a wide geographic area;
- (f) such fire could cause death or injury to persons and loss of or damage to property within the area over which such fire spread (“**fire area**”), and consequential losses including loss of a reasonable expectation of benefit and economic losses;
- (g) such fire could cause damage to property and consequential losses including economic losses within areas:
- (i) affected by the physical consequences of fire, such as smoke or debris; or
  - (ii) the subject of emergency activity to prevent the spread of fire, such as the clearing of firebreaks;
- (“**affected areas**”);
- (h) such fire or its consequences could:
- (i) disrupt or impair the income-earning activities of persons residing or ~~carrying on business~~ having real or personal property located in the fire area ~~or affected areas~~; or
  - (ii) impede the use or amenity of real or personal property located in the fire area ~~or affected areas~~; or

~~(iii)~~ reduce the value of real or personal property ~~or businesses~~ located in the fire area ~~or affected areas~~; or

~~(iii)~~ (iv) reduce the value of businesses owned by persons residing in or having real or personal property located in the fire area;

and thereby cause loss of a reasonable expectation of benefit or economic loss to those persons, or the owners of those properties or businesses;

- (i) the risks referred to in sub-paragraphs (b) to (h) above were greater during periods of high or extreme bushfire risk.

15. At all material times members of the public who:

(a) were ~~from time to time~~ or were likely to be; or

(b) ~~owned~~ resided or had an interest in real or personal property located; or

~~(c)~~ ~~carried on business~~;

in the fire area ~~or affected areas~~:

(i) had no ability to prevent or minimize the risk of such discharge occurring; and

(ii) were vulnerable to the impact or effects of such fire; and consequently

(iii) were dependent, for the protection of their persons, property and interests, upon ~~SPI~~ Ausnet ensuring that the Murrindindi assets were safe and operated safely in the operating conditions applying to the assets from time to time.

16. At all material times the claimants were:

(a) persons within the class described in the preceding paragraph; or

(b) dependents of persons within the class described in the preceding paragraph; or



- (c) persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the class described in the preceding paragraph.

17. In the premises set out in paragraphs 8 to 16 inclusive, alternatively paragraph 8 and paragraphs 12 to 16 inclusive, at all material times from in or around October 1994 ~~SPI~~Ausnet owed to the claimants a duty:

- (a) to take reasonable care by its officers, servants and agents; and  
 (b) as a non-delegable duty – to ensure that reasonable care was taken by any contractors engaged by it;

to ensure that all parts of the Murrindindi assets were safe and operated safely in the operating conditions that were foreseeable for the assets (“**the ~~SPI~~Ausnet General Duties**”).

***Standard of care***

17A. At all material times:

- (a) the ~~SPI~~Ausnet Statutory Duty; further or alternatively  
 (b) the ~~SPI~~Ausnet General Duties;

required ~~SPI~~Ausnet to take reasonable care to ensure that, *inter alia*:

*Engineering*

- (i) there was adequate clearance between conductors and earthed or unearthed structures including stay wires;

**Particulars**

Adequate clearance is such that conductors and earthed or unearthed structures including stay wires will not touch or come sufficiently close together to result in arcing occurring between the conductor and earthed or unearthed structures.

With respect to Pole 6, Ausnet internal standards specify that the minimum clearance between 22kV conductors and earthed structures is 450mm.

The plaintiff relies upon the versions of Drawing VX9/7020/22 contained or referred to in:

- (i) SECV Overhead Line Manual Vol 1 (1983) (SPN.263.001.0001) and Vol 1 (1992) (SPN.251.037.0001);
- (ii) SECV Overhead Line Design Manual Vol 1 (July 1993) – Section 7 “Stays” (SPN.808.059.0090);
- (iii) SECV Overhead Line Design Manual Vol 2 (July 1993) – Section 9 “Clearances” (SPN.808.060.0001);
- (iv) VESI Line Inspection Manual (1995) (SPN.005.001.0406);
- (v) Eastern Energy Ltd Line Inspection Manual (August 1997) (SPN.005.001.0981); and
- (vi) SP AusNet Asset Inspection Manual (July 2007) (SPN.005.001.0001).

- (ii) stay wires were correctly designed, installed, and positioned as to allow adequate clearance from conductors;
- (iii) cross arms securing the conductor assembly to the pole were correctly installed, and positioned as to allow adequate clearance between conductors and earthed or unearthed structures including stay wires;
- (iv) stay insulators in stay wires were installed correctly, and positioned appropriately;
- (v) stay insulators installed in stay wires were positioned such that the end of the insulator closest to the pole is below the level of the lowest conductor;
- (vi) further and in the alternative to (i) to (v), stay wires were adequately insulated from conductors by the use of insulative wrap, in the alternative other insulation device;

*Asset inspection and maintenance system*

- (vii) the procedures undertaken in routine inspections (“**scheduled inspections**”) of poles, conductors, cross arms, insulators, stay wires, stay wire insulators, fasteners and other pole-top assemblies (together “**pole-top assets**”) were suitable to enable the clearances between conductors and earthed or unearthed structures including stay wires to be assessed;

- (viii) there was an adequate system for recording observations made by personnel conducting scheduled asset inspections (“**inspectors**”) or maintenance work (“**maintenance crews**”) regarding the configuration and condition of pole-top assets~~installations~~, and/or making such records available to inspectors for comparison with observations at later inspections, ~~and~~ to maintenance crews prior to undertaking maintenance work and/or to technical assessors (“**technical assessors**”) for further review and/or auditing;
- (ix) inspections of pole-top assets were conducted using suitable inspection techniques, which included inspection by trained line inspectors using stabilised binoculars, cameras, and, where appropriate, inspection by suitably trained and qualified personnel carried out from an elevated work platform located close to the conductor (“**line-height inspections**”);
- (x) reasonable steps were taken to ensure that the inspection manual provided to inspectors was at all times reasonably suitable as a reference guide;
- (xi) reasonable steps were taken to ensure that inspectors, ~~and~~ maintenance crews and/or technical assessors received adequate training in the identification of incorrect pole-top assemblies, and in particular the identification of inadequate clearances between conductors and other pole-top assets including earthed structures;
- (xii) reasonable steps were taken to ensure that inspectors, ~~and~~ maintenance crews, and/or technical assessors, following training, were competent in the identification of incorrect pole-top assemblies, and in particular the identification of inadequate clearances between conductors and other pole-top assets including earthed structures;

Asset Inspection

- (xiii) the procedures undertaken in inspections of pole-top assets, including any subsequent technical assessor's review and/or audit, were suitable to enable the detection, reporting, prioritisation or remediation of:
- (A) inadequate clearance between conductors and earthed structures;
  - (B) incorrectly installed or positioned stay insulators to be detected;  
and
  - (C) damage to pole-top assets.
- (xiv) the procedures undertaken in inspections of pole-top assets, were suitable to enable damage to pole-top assets to be detected inspections and attendance by maintenance crews detected, reported, prioritised and remediated:
- (A) inadequate clearance between conductors and earthed structures;
  - (B) incorrectly installed or positioned stay insulators; and
  - (C) damage to pole-top assets.
- (xv) any subsequent technical assessor's review and/or audit detected, reported, prioritised and remediated:
- (A) inadequate clearance between conductors and earthed structures;
  - (B) incorrectly installed or positioned stay insulators; and
  - (C) damage to pole-top assets
- ~~(xv)~~(xvi) pole-top assets located on feeder lines which had suffered regular outages were specially checked for damage, including for inadequate clearances between conductors and earthed or unearthed structures;

*Patrol and reconnection*

- ~~(xvi)~~(xvii) power was not restored following an earlier disconnection of power caused by an operation of the any fuses, including at zone

substations\_ in extreme bushfire risk weather conditions, without affirmatively identifying and remedying the cause of the fault;

~~(xvii)~~(xviii) power was not restored as described in ~~(xvi)~~(xvii) in extreme bushfire risk weather conditions without having conducted an adequate patrol of the affected line, and in particular an adequate examination of the relevant pole-top assets; and/or

~~(xviii)~~(xix) power was not restored as described in ~~(xvi)~~(xvii) by servants, agents or contractors of ~~SPI~~Ausnet on location in extreme bushfire risk weather conditions without specific authorization by its Network Operations Control centre.

### Particulars

~~Further particulars may be provided following the completion of discovery, interrogation and receipt of expert evidence. Unless there existed special reliability considerations, which Ausnet's Network Operations Control centre would advise, power should not be restored in extreme bushfire risk weather conditions.~~

### **Pole 6**

17B. Pole 6:

- (a) was manufactured in or about 1984;
- (b) was installed as part of the Feeder line in or about the period between February and December 1984;
- (c) was and is made of concrete;
- (d) supports three 66kV conductors on two separate steel cross-arms fitted to the pole (one for the span to pole 7 and one for the span to pole 5), constructed, installed and maintained on dates known to ~~SPI~~Ausnet, but not to the plaintiff;
- (e) until in or about 1993, supported one or more 12.7kV Single Wire Earth Return ("**SWER**") conductors;

- (f) in or about the period from 1993 to ~~1999~~1997, was the subject of construction and installation works to:
- (i) retire the SWER conductor(s);
  - (ii) construct a new subsidiary 22kV three-phase feeder line (being the Feeder line);

### Particulars

The plaintiff refers to the dates and particulars of the construction of the Feeder line are known to SPIAusnet, but not to the plaintiff set out to answers 1 to 5 inclusive of the *First Defendant's Answers to Plaintiff's Interrogatories for the Examination of the First Defendant Dated 28 July 2014* sworn by Karena Louise Reid on 1 September 2014 ("**First Defendant's Answers to Interrogatories**").

~~Further particulars will be provided following discovery and interrogation.~~

- (g) supports three 22kV conductors on:
- (i) a third steel cross-arm fitted to the southern side of the pole ("**bottom cross-arm**"); and
  - (ii) a pole-mounted 22kV disc insulator located above the bottom cross-arm;
    - (A) located beneath the Subtransmission line (66kV) cross-arms and conductors; and
    - (B) constructed, installed, repaired, relocated and maintained on dates known to SPIAusnet, but not to the plaintiff;
- (h) supports a single aerial earth conductor connected directly to the pole beneath the bottom cross-arm;
- (i) supports a change of direction of conductor spans in the Feeder line; and
- (j) as at 7 February 2009 was supported by two (2) stay wires:
- (i) constructed, installed and maintained on dates known to SPIAusnet, but not to the plaintiff;

- (ii) the northern stay wire ("**northern stay wire**") being attached to the pole between the ~~22kV~~lower of the two 66kV cross arms, above the lower 22kV cross arm; ~~and~~
- (iii) the stay insulator on the northern stay wire being positioned above the lowest 22kV conductor; and
- (iv) the western stay wire ("**western stay wire**") being attached to the pole between the two 66kV cross arms.

#### **Particulars**

~~Further particulars of the history of the construction, installation and maintenance of the stay wires supporting Pole 6 from 1993 will be provided following discovery and interrogation.~~

17C. From at least in or about 2002:

- (a) the Feeder line has suffered frequent outages to the supply of electricity; and

#### **Particulars**

In the period from 2002 to 6 February 2009, the Feeder line experienced up to 178 outages, including 31 blown high voltage fuses, 10 outages for the 602473 fuse, ~~1 outage for the 602474 fuse,~~ and 52 unexplained outages.

~~Further particulars of outages on the Feeder line may be provided following the completion of discovery.~~

- (b) there was a material risk that some or all of the outages were caused by arcing between conductors and earthed structures including stay wires.

17D. Prior to 7 February 2009, on dates known to ~~SPI~~Ausnet but not the plaintiff, SPIAusnet and/or its servants, contractors or agents:

- (a) undertook scheduled inspections of; and
- (b) undertook unscheduled inspections of; and
- (c) performed maintenance on; and
- (d) undertook technical reviews, audits or assessments of photographs taken during scheduled inspections of:

the ~~Murrindindi~~ Murrindindi assets, including Pole 6.

### Particulars

Scheduled inspections of Pole 6 were conducted on 31 July 1996, 22 July 1999, 16 March 2005, and 28 May 2008.

A line-height inspection was conducted of Pole 6 in or around the time of installation and/or construction of the 22kV conductors and cross-arm, on a date which is unknown to the Plaintiff but ought to be known by Ausnet.

Further line-height inspections were conducted of Pole 6 at or around the time of maintenance of the 22kV conductors and other pole top assets, on date(s) which are unknown to the Plaintiff but ought to be known by Ausnet.

A technical review, audit or assessment of photographs of Pole 6 taken during the scheduled inspection of 28 May 2008 was conducted by Ausnet between about 13 June 2008 and 24 September 2008.

~~Further particulars may be provided following the completion of discovery.~~

17E. At all material times from a date prior to 7 February 2009, which date is known to ~~SPI~~Ausnet but not known to the plaintiff, the scheduled inspections undertaken or procured by ~~SPI~~Ausnet for pole-top assets on the Feeder line:

- (a) comprised of visual inspection undertaken from ground level; and
- (b) were scheduled at a frequency determined by ~~SPI~~Ausnet.

17F. At all material times prior to 7 February 2009, which date is or ought to be known by ~~SPI~~Ausnet but is not known to the plaintiff the protection systems regulating the Feeder line:

- (a) included high voltage fuses located at on Pole 7A (Asset ID 4720530) outside the fence of the MDI zone substation at the Murrindindi Sawmill;

### Particulars

~~SPI~~Ausnet asset No. 602473 being: ~~pole mounted recloser brush type PMR 3 SF6 units; alternatively, three pole mounted 25E Slow BA fuse type SMU 20 units in SMD 20 Mounts.~~

~~Sensitive earth fault protection in the MDI substation.~~

~~Further particulars may be provided following the completion of discovery.~~



- (b) ~~included such other protection which is known by SPI but is not known to the plaintiff~~ in the MDI zone substation namely CDG14 overcurrent relays, a CMUR relay (sensitive earth fault protection) and a 66kV Circuit Breaker; and

#### Particulars

~~Further particulars may be provided following the completion of discovery and receipt of expert evidence.~~

The plaintiff refers to answers 6 to 30 inclusive of the First Defendant's Answers to Interrogatories.

- (c) were such that there was a material risk that, in the event of a conductor failure, would or could allow current to continue to be transmitted through the conductor to cause ignition of a fire, especially in dry and windy conditions.

#### Particulars

~~So far as the plaintiff is able to say prior to discovery, interrogation, and receipt of expert evidence, the protection systems on the Feeder line were such that after a conductor failure, electricity would or could continue to be transmitted, during which ignition of dry vegetation could occur:~~

- (i) The Feeder line consisted of three aluminium conductors, the blue, white and red phases.
- (ii) Each phase was protected by a 25E boric acid fuse on Pole 7A.
- (iii) These fuses operated independently in that if one fuse operated, no current would be transmitted through that phase downstream of the fuse. Current would continue to be transmitted through the other phases with fuses that had not operated.
- (iv) In the event of conductor failure and earthing, even if the fuse protecting that conductor upstream of the point of failure operated, current would or could continue to be transmitted through the earthed failed conductor by reason of current from one of the remaining phases passing through the SWER isolation transformer at pole 55 and then being backfed through the earthed failed conductor.

17G. On 7 February 2009, and for a period of time preceding 7 February, which period is or ought to be known by ~~SPI~~Ausnet but is not known to the plaintiff:

- (a) there was inadequate clearance at Pole 6 between:

- (i) the northern (red-phase) conductor on the Feeder line on the Sawmill Span ("**northern conductor**"); and
- (ii) the northern stay wire

**Particulars**

The clearance between the northern conductor and the northern stay wire was less than 450mm and such that they could touch or come sufficiently close together to result in arcing between the northern conductor and the northern stay wire in the operating conditions that were foreseeable for the Feeder line ("**inadequate clearance**")-

- (b) the northern stay wire was attached to Pole 6 at a point above the bottom cross arm;
- (c) the stay insulator on the northern stay wire was positioned above the lowest conductor on Pole 6;
- (d) there was no insulative coating on the northern stay wire;
- (e) there was no insulative coating on the northern conductor;
- (ea) a piece of black piping was installed on the western stay ("**black piping**");
- (eb) the western (red-phase) conductor of the Feeder Line on the Sawmill Span between Pole 6 and Pole 6A/7 (asset ID 11528) ("**western conductor**") had been repaired with a compression joint and/or associated crimping ("**compression joint**") adjacent to the black piping;
- (f) as a result of the inadequate clearance referred to in sub-paragraph (a), prior to 7 February 2009, the northern conductor and the northern stay wire had, from time to time, either touched or come sufficiently close together to result in arcing occurring between the northern conductor and the northern stay wire;

- (g) the arcing referred to in sub-paragraph (f) resulted in damage to the northern conductor such that on 7 February 2009, the northern conductor was weakened at a point or points close to the northern stay wire;
- (h) further, and alternatively to sub-paragraph (f), as a result of the inadequate clearance referred to in sub-paragraph (a), on 7 February 2009, there was a material risk that the northern conductor and the northern stay wire would touch or come sufficiently close together to result in arcing occurring between the northern conductor and the northern stay wire;
- (i) any arcing of the kind referred to in sub-paragraph (h) was likely to result in damage to the northern conductor such that the conductor was weakened at a point or points close to the northern stay wire; and
- (j) there was a material risk that a conductor that was weakened from damage caused by arcing would fail at the point or points at which it was weakened.

17H. By, on or before 31 July 1996, alternatively 22 July 1999, alternatively 16 March 2005, alternatively 28 May 2008, alternatively 7 February 2009, ~~SPI~~Ausnet knew or ought to have known each of the matters set out in paragraphs 17B to 17G inclusive above.

### **Particulars**

The Plaintiff repeats the particulars to paragraph 17D.

The configuration and state of the pole top assets on Pole 6 and the condition of the conductor were capable of detection by visual inspection (including by the review and/or audit of photographs taken during inspections).- Signs of arcing on the conductor, stay wire and pole were also capable of detection by visual inspection.

17HA. The presence of the items in 17G(ea) and (eb) should have triggered a line-height inspection of the assets at Pole 6 to enable detection of the remaining matters identified in paragraph 17G.

17I. Prior to 7 February 2009 ~~SPI~~Ausnet:

- (a) had not repaired the pole-top assets on Pole 6 to achieve adequate clearance between the northern conductor and the northern stay wire;
- (b) had not, by its servants, agents or contractors, undertaken a scheduled inspection, or any maintenance inspection, of the pole-top assets on Pole 6 except on 31 July 1996, 22 July 1999, 16 March 2005 and 28 May 2008;
- (c) had not, by its servants, agents or contractors, undertaken an inspection of the pole-top assets on Pole 6 from pole-top height at any time since at or around the time of construction and installation of the Feeder line;
- (d) had not, by its servants, agents or contractors, installed insulative coating on the northern conductor or the northern stay wire;
- (e) maintained fault protection systems covering the Feeder line that were such that, in the event of a conductor failure, current would or could continue to be transmitted through the conductor so as to allow ignition of a fire, especially in dry and windy conditions; and
- (f) knew or ought reasonably to have known the matters set out in paragraph (a) to (e) inclusive.

17J. It was reasonably foreseeable by ~~SPI~~Ausnet that a day of extreme bushfire risk could occur in February 2009

17K. On 7 February 2009:

- (a) at approximately 11.30 am on 7 February 2009, electricity supply to:
  - (i) the Feeder line;
  - (ii) the Murrindindi assetswas interrupted and/or disconnected (“**the morning fault**”);

#### **Particulars**

~~Further particulars may be provided following completion of discovery.~~

- (b) between approximately 1.25pm and 2.45pm, SPIAusnet its servants or agents undertook patrols and/or inspections of, and/or performed maintenance on, the Murrundindi-Murrindindi assets, including Pole 6;

**Particulars**

~~Further particulars may be provided following completion of discovery.~~

- (c) just prior to 2.45pm, SPIAusnet its servants or agents reconnected electricity supply to the Murrundindi-Murrindindi assets including the Feeder line;

**Particulars**

The plaintiff relies upon SPIAusnet's Unplanned Faults Response (SIF) Form dated 7 February 2009 for the 717048 trouble order. ~~Further particulars may be provided following completion of discovery.~~

- (d) the reconnection referred to in sub-paragraph (c) was undertaken without SPIAusnet's servants or agents:
- (i) having affirmatively identified the cause of the morning fault;
  - (ii) having conducted an adequate patrol of the Feeder line and in particular an adequate examination of the pole-top assembly on Pole 6;
  - (iii) having obtained specific approval or authorization from SPIAusnet's Network Operations Control Centre.

**Breaches of duties of care**

17L. In the premises set out in paragraphs 17A to 17K inclusive above, as at 7 February 2009 SPIAusnet:

*Engineering failures*

- (a) attached the northern stay wire to Pole 6 at a point above the bottom cross arm;
- (b) failed to relocate the attachment point of the northern stay wire, to a location below the bottom cross arm;

(b) In the alternative to (a) and (b) above, in or about the period from 1993 to 1997 when the Feeder line was installed, failed to design, install and position the northern stay wire so that there would have been adequate clearance between the northern conductor and the northern stay wire;

~~(b)~~(c) placed the insulator on the northern stay wire so that the end of the insulator closest to the pole was above the lowest conductor on Pole 6;

(d) failed to modify the northern stay wire so that the end of the insulator closest to the pole was below the lowest conductor on Pole 6;

~~(e)~~(e) failed to coat insulate the northern stay wire with insulative wrap in the vicinity of the northern conductor or at all prior to effecting a permanent design solution to ensure adequate clearance between the northern conductor and the northern stay wire;

~~(e)~~(f) failed to coat insulate the northern conductor with insulative wrap in the vicinity of the northern stay wire or at all prior to effecting a permanent design solution to ensure adequate clearance between the northern conductor and the northern stay wire;

~~(e)~~(g) failed to maintain adequate clearance between the northern conductor and the earthed section of the northern stay wire;

~~(f)~~(h) further or alternatively, failed to otherwise configure the pole-top assets so that there would have been adequate clearance between the northern conductor and the northern stay wire.

### **Particulars**

A combination of some or all of the following would have increased clearance between the northern conductor and the northern stay wire:

- i. relocating the 22kV cross-arm to its design height, and to bisect the line deviation angle at Pole 6 in accordance with VH8/4321B (SPN.007.001.0250);
- ii. relocating the 22kV cross-arm to the northern side of Pole 6 in accordance with the 1993 design for the installation of a 22kV cross-arm on Pole 6 (SPN.007.014.0003);

- iii. replacing the eyebolt connecting the insulator string on the northern conductor to the 22kV cross arm on Pole 6 with a longer eyebolt;
- iv. restringing the northern conductor.

*Asset inspection and maintenance system failures*

~~(g)~~(i) failed to have procedures undertaken in scheduled inspections of pole-top assets suitable to enable the clearances between conductors and earthed or unearthed structures including stay wires, incorrectly installed or positioned stay insulators and / or damage to pole-top assets to be assessed;

**Particulars**

Such appropriate procedures required:

- i. use of image stabilising binoculars to conduct pole top asset inspections;
- ii. Further and in the alternative to (i) above, inspection of pole top assets and conductors using image stabilising binoculars from more than two positions on the ground;
- iii. a detailed inspection of Pole 6 and its assets by visually examining it in detail from top to bottom and then using image stabilising binoculars.

~~(h)~~(j) failed to have an adequate system for recording observations made by inspectors or maintenance crews regarding the configuration and condition of installations, and/or making such records available to inspectors for comparison with observations at later inspections and to maintenance crews prior to undertaking maintenance work;

~~(i)~~(k) failed to conduct adequate inspections of ~~the Sawmill Span~~ Pole 6, and in particular failing to inspect the northern conductor and northern stay wire on Pole 6 using suitable inspection techniques, which included inspection by trained line inspectors using stabilized binoculars and, where appropriate, line-height inspections by suitably trained and qualified personnel;

~~(j)~~(l) failed to take reasonable steps to ensure that the inspection manual provided to inspectors was at all times reasonably suitable as a reference guide;

~~(k)(m)~~ failed to take reasonable steps to ensure that inspectors, and maintenance crews and/or technical assessors received adequate training in the identification of incorrect pole-top assemblies, and in particular the identification of inadequate clearances between conductors and other pole-top assets including earthed structures

### Particulars

Such reasonable steps were:

- (i) ensuring, or taking reasonable steps to ensure, that training provided to asset inspectors conducting scheduled inspections of the Murrindindi assets:
  - a. complied with National Electricity Supply Industry Competency Standards as required by the VESI Green Book Code of Practice 2006 (“Green Book”); and
  - b. was structured, delivered, documented, assessed and, where test results or work performance were unsatisfactory, remediated in accordance with reasonable training industry practice.
- (ii) ensuring, or taking reasonable steps to ensure, that the content of any training course sufficiently addressed the inspection of pole top assets required to be undertaken by an asset inspector in accordance with the Asset Inspection Manuals;
- (iii) ensuring procedures undertaken in the course of the Inspections were suitable to enable detection of:
  - a. inadequate clearance between conductors and earthed structures;
  - b. incorrectly installed or positioned stay insulators; and / or
  - c. damage to pole-top assets;
- (iv) ensuring that asset inspectors received adequate training before commencing unsupervised inspections;
- (v) taking reasonable steps to ensure that inspectors trained as referred to in particulars at (iv) above received appropriate corrective training before being permitted to carry out unsupervised inspections;
- (vi) requiring the use of, or provide any or any adequate direction to asset inspectors to use, image stabilising binoculars for every asset inspection, including after the introduction of cameras for



conducting inspections, and in particular inspections of pole top assets and conductors;

- (vii) verifying the content of training, refresher training, and assessment courses provided to asset inspectors;
- (viii) ensuring, or taking reasonable steps to ensure, that training provided to asset inspectors conducting scheduled inspections of the Murrindindi assets where test results or work performance were unsatisfactory, was remediated in accordance with reasonable training industry practice;
- (ix) taking reasonable steps to ensure that inspectors identified by either Ausnet or UAM or their agents as having failed an audit, completed appropriate corrective training and demonstrated appropriate competency before being permitted to resume unsupervised inspections;
- (x) conducting, or conducting an adequate, review or analysis of product and process audits of asset inspectors to identify and reduce the number of non conformances in relation to pole top maintenance;
- (xi) ensuring asset inspectors completed further or refresher training in accordance with the results of audits conducted by UAM establishing causes, trends and corrective actions to improve the inspection process, in particular in relation to pole top maintenance;
- (xii) approving and/or auditing for compliance the UAM training program for asset inspectors;

~~(n)~~ failed to take reasonable steps to ensure that inspectors, and maintenance crews and/or technical assessors, following training, were competent in the identification of incorrect pole-top assemblies, and in particular the identification of inadequate clearances between conductors and other pole-top assets including earthed structures, incorrectly installed or positioned stay insulators and / or damage to pole-top assets

*Asset inspection failures*

~~(m)~~(o) failed during scheduled inspections of Pole 6 by asset inspectors to detect or report or prioritise for maintenance:

- (i) signs of arc damage on the northern conductor and/or the northern stay wire;

- (ii) inadequate clearance between the northern conductor and the northern stay wire;
- (iii) the incorrect placing of the insulator above the lowest conductor on Pole 6;

(iv) the black piping on the western stay; and

(v) the compression joint adjacent to the black piping.

~~(n)~~(p) failed during attendances by maintenance crews at the Murrindindi assets to detect, report, prioritise for maintenance or take any or any adequate steps to remediate:

- (i) signs of arc damage on the northern conductor and/or the northern stay wire;
- (ii) inadequate clearance between the northern conductor and the northern stay wire;
- (iii) the incorrect placing of the insulator above the lowest conductor on Pole 6;

(iv) the lack of insulation between the northern stay wire and the northern conductor;

(v) the black piping on the western stay; and

(vi) the compression joint adjacent to the black piping.

(q) failed during subsequent reviews, audits or assessments by technical assessors of photographs taken during the scheduled inspection on 28 May 2008 to detect, report or take any or any adequate steps to remediate:

- (i) signs of arc damage on the northern conductor and/or the northern stay wire;
- (ii) inadequate clearance between the northern conductor and the northern stay wire;
- (iii) the incorrect placing of the insulator above the lowest conductor on Pole 6;

(iv) the lack of insulation between the northern stay wire and the northern conductor;

(v) the black piping on the western stay;

(vi) the compression joint adjacent to the black piping.

~~(e)~~(r) failed to specially check the pole-top assets on the Feeder line including on Pole 6, being located at or near spans which had suffered unusual damage or high rate of asset failure or interruption of supply, for adequate clearances;

*Patrol and reconnection failures*

~~(p)~~(s) restored power to the Feeder line at around 2:45pm on 7 February 2009, following the morning fault;

~~(q)~~(t) restored power as described in (~~r~~s) in the weather conditions prevailing on 7 February 2009, without having affirmatively identified the cause of the morning fault;

~~(r)~~(u) restored power as described in (~~r~~s) in the weather conditions prevailing on 7 February 2009 without having conducted an adequate patrol of the Feeder line, and in particular an adequate examination of the pole-top assembly on Pole 6;

~~(s)~~(v) restored power to the Feeder line as described in (~~r~~s) in the weather conditions prevailing on 7 February 2009 without specific approval or authorization from SPIAusnet's Network Operations Control centre.

17M. In the premises set out in the preceding paragraph, as at 7 February 2009

SPIAusnet had breached, and continued to be in breach of:

- (a) the SPIAusnet Statutory Duty; further or alternatively
- (b) the SPIAusnet General Duties.

17N. But for the breaches of duty alleged in paragraph 17L(a) to (h):

- (a) the pole-top assets would have been installed prior to 7 February 2009 so that there would have been adequate clearance between the northern conductor and the northern stay wire;

**Particulars**

If:

- (i) the northern stay wire was located below the lowest cross arm; or
- (ii) the pole-top assets were otherwise configured correctly

there would have been adequate clearance between the northern conductor and the northern stay wire.

- (b) further and in the alternative to (a), prior to 7 February 2009, adequate ~~insulative coating, alternatively other insulation~~ would have been installed to prevent arcing and damage to the northern conductor at Pole 6 prior to effecting a permanent design solution to ensure adequate clearance between the northern conductor and the northern stay wire;
- (c) prior to 7 February 2009, the stay insulator on the northern stay wire would have been positioned below the lowest conductor on Pole 6 to prevent arcing between the northern conductor and the earthed section of the northern stay wire.

17NA. But for the breaches of duty alleged in paragraph 17L (i) to (q)

- (a) the engineering failures identified in paragraph 17L(a) to (h) would have been detected;

**Particulars**

The failures identified in paragraphs 17L(i) to (n), 17L(o)(i)-(iii), 17L(p)(i)-(iv), (17L(q)(i)-(iv) resulted directly in a failure to detect the engineering failures identified in paragraph 17L(a) to (h). The failures identified in paragraph 17L(o)(iv)-(v), 17L(p)(v)-(vi) and 17L(q)(v)-(vi) resulted in a failure to detect the engineering failures in that detection of the matters in paragraphs 17L(o)(iv)-(v), 17L(p)(v)-(vi) and 17L(q)(v)-(vi) should have resulted in a line height inspection which in turn would have resulted in identification of the engineering failures.

- (b) as a result of sub-paragraph (a), the pole-top assets would have been installed, maintained and / or repaired prior to 7 February 2009 so that there would have been adequate clearance between the northern conductor and the northern stay wire;

**Particulars**

If:

- (i) the northern stay wire was located below the lowest cross arm; or
- (ii) the pole-top assets were otherwise configured correctly

there would have been adequate clearance between the northern conductor and the northern stay wire.

- (c) further and in the alternative to sub-paragraph (b), as a result of sub-paragraph (a), prior to 7 February 2009:
- (i) the northern conductor would have been repaired or replaced; and/or

**Particulars**

The northern conductor would have been repaired or replaced where it had been damaged and weakened by arcing.

- (ii) the inadequate clearance referred to in paragraph 17G(a) would have been remedied;
- (d) further and in the alternative to sub-paragraph (b) and (c), as a result of sub-paragraph (a), prior to 7 February 2009, adequate ~~insulative coating,~~ ~~alternatively other~~ insulation would have been installed to prevent arcing and damage to the northern conductor at Pole 6 prior to effecting a permanent design solution to ensure adequate clearance between the northern conductor and the northern stay wire;
- (e) as a result of sub-paragraph (a), prior to 7 February 2009, the stay insulator on the northern stay wire would have been positioned below the lowest conductor on Pole 6 to prevent arcing between the northern conductor and the earthed section of the northern stay wire.

17NB. But for the breaches of duty alleged in paragraph 17L(¶S) to (¶V), power would not have been reconnected on the Feeder line on 7 February 2009 until it was safe to do so.

### **Breaches of duty caused Murrindindi bushfire**

18. At approximately 2:45pm on 7 February 2009, shortly after the reconnection of electricity supply to the Murrindindi assets including the Feeder line:

- (a) the northern conductor on the Feeder Line on the Sawmill Span failed; and
- (b) the northern conductor while still energized fell to ground, and draped across the paddock fence between Pole 6 and the western edge of Wilhelmina Falls Road (“**roadside fence**”) (“**the Incident**”).

18A. The northern conductor failed by reason of damage to and weakening of the conductor at a point or points close to the northern stay wire in the prevailing weather conditions and loads on the Sawmill Span on 7 February 2009.

18B. The damage and weakening referred in the previous paragraph was by reason of arcing caused by either:

- (a) the northern conductor touching or coming sufficiently close to the northern stay wire from time to time prior to 7 February 2009 as a result of the inadequate clearance referred to in paragraph 17G(a); or
- (b) the northern conductor touching or coming sufficiently close to the northern stay wire on 7 February 2009 as a result of the inadequate clearance referred to in paragraph 17G(a); or
- (c) a combination of (a) and (b).

18C. As a result of the Incident, the conductor discharged electricity into the roadside fence, causing:

(a) arcing; and/or

(b) electrical interaction including current flow;

between:

~~(i) the fallen conductor and the fence wire; further or alternatively~~

~~(ii)(i) the fence wire(s) and fence posts and/or vegetation near the fence;~~

further or alternatively

~~(iii) the fence posts-wires and vegetation near the fence; and~~

(ii) the discharge(s) referred to, caused causing:

(A) -heat or sparks to be emitted from the roadside fence into dry vegetation, which ignited; and/or

(B) embers to be emitted from vegetation into dry vegetation which ignited; and/or

(C) ignition of vegetation

and which became the Murrindindi bushfire.

18D. If any one or more of the actions referred to in paragraph 17N, 17NA and/or 17NB had been undertaken by SPIAusnet:

(a) the Incident would not have happened; and

(b) the Murrindindi bushfire would not have been ignited.

19. In the premises, the Murrindindi bushfire was caused by breaches by SPIAusnet of:

(a) the SPIAusnet Statutory Duty; further or alternatively

(b) the SPIAusnet General Duties.

20. The Murrindindi bushfire was a natural and foreseeable consequence of the breaches of duty alleged in paragraph 17L.

### **SECTION C – SPIAUSNET – PRIVATE NUISANCE**

21. Further to paragraph 4 above, the plaintiff brings this proceeding as subgroup representative of those group members (“**subgroup members**”) who suffered injury, loss or damage caused by the Murrindindi bushfire’s interference in their use or enjoyment of interests held by them in land.
22. At all material times each of:
- (a) the risks referred to in paragraphs 13 and 14 above; and
  - (b) the risk that a bushfire ignited by a discharge of electricity from the Murrindindi assets would unreasonably interfere with the use or enjoyment of interests in land:
    - (i) across which the fire passed; or
    - (ii) affected by the physical consequences of fire, such as smoke; or
    - (iii) the subject of emergency activity to prevent the spread of fire, including but not limited to, the clearing of firebreaks;
- were reasonably foreseeable to SPIAusnet.
23. By transmitting electricity on the Feeder line at a time, being 7 February 2009, when the Feeder line was not safe or not operated safely, SPIAusnet:
- (a) caused or allowed an unplanned discharge of electricity to occur; and thereby
  - (b) brought fire onto the land near the contact point between the northern conductor and the roadside fence, which fire became the Murrindindi bushfire.



**Particulars**

The Feeder line was not safe, and not being operated safely, by reason of the matters set out in the particulars under paragraph 19 above.

24. The Murrindindi bushfire unreasonably interfered in the use or enjoyment by the plaintiff and subgroup members of interests which they held in land.

**Particulars**

The Murrindindi bushfire burned over the plaintiff's land. Particulars of the plaintiff's losses are set out in paragraph 40 below.

Particulars of interference suffered by subgroup members will be provided following the trial of common questions.

25. In the premises, the plaintiff and the subgroup members suffered nuisance created by SPIAusnet.

**SECTION D – SPIAUSNET DERIVATIVE LIABILITY – ORIGINAL CONSTRUCTION**

26. Further and in the alternative to paragraphs 19 to 25 above, by reason of the matters set out in paragraph 6(e) above (regarding SPIAusnet's acquisition of liabilities of SECV and ES-Victoria), SPIAusnet is liable for the claimants' loss and damage resulting from the breaches of duty set out in paragraphs 27 to 38 below.

***Pre-December 1993 – SECV***

27. At all material times prior to about December 1993, SECV:
- (a) was a body corporate with perpetual succession and capable in law of suing and being sued;
  - (b) carried on a business of, inter alia, erecting and constructing electric lines, cables and applications used in connection with the distribution, use and supply of electricity throughout Victoria ("**SECV business**").

**Particulars**

Sections 3 and 4 of the State Electricity Commission Act 1958 (Vic) ("**SECV Act**").

28. In the course and for the purpose of the SECV business, SECV constructed, owned, further or alternatively had the use and management of the installations comprising the Murrindindi assets, including the Sawmill Span.

**Particulars**

Sections 3 and 21(1)(a) and (e) of the SECV Act. Further particulars may be provided following completion of discovery.

***December 1993 to September 1994 – ES-Victoria***

29. Further and in the alternative to paragraphs 19 to 28 above, at all material times between about December 1993 and about September 1994, ES-Victoria:
- (a) was a body corporate with perpetual succession and capable in law of suing and being sued;
  - (b) carried on the functions of, inter alia:
    - (i) distributing and supplying electricity; and
    - (ii) providing services including management services, in connection with the distribution and supply of electricity in Victoria;
- ("ES-Victoria business")**.

**Particulars**

Section 23 of the EI Act.

30. In the course and for the purpose of the ES-Victoria business, ES-Victoria constructed, owned, further or alternatively had the use and management of, the Murrindindi assets including the Sawmill Span.

**Particulars**

Section 23 EI Act. Further particulars may be provided following completion of discovery.

**SECV and ES-Victoria duties of care**

31. At all material times:

- (a) between the commissioning of the Feeder line in about 1986 and about December 1993 – SECV; and
- (b) between about December 1993 and about September 1994 – ES-Victoria;

respectively:

- (i) was the owner, further or alternatively the operator of the Murrindindi assets;
- (ii) had the ultimate responsibility for:
  - (A) the planning, design, construction, inspection and maintenance of the Murrindindi assets;
  - (B) the installation or retention in service of any assets forming part of the Murrindindi assets that were faulty, defective, incorrectly assembled or had deteriorated in condition;

**Particulars**

Sections 3, 20, 21 and 22 of the SECV Act (SECV); sections 21, 23, 25 & 47 of the *EI Act* (ES-Victoria).

- (iii) had the right, to the exclusion of other private persons, to:
  - (A) construct, repair, modify, inspect and operate the Murrindindi assets; or
  - (B) give directions as to the construction, repair, modification, inspection or operation of the Murrindindi assets, including the Sawmill Span;
- (iv) exercised the rights referred to in (iii) above; and
- (v) in the premises, had practical control over the Murrindindi assets.

32. At all material times during the periods referred to in paragraph 31:

- (a) SECV and ES-Victoria respectively used the Murrindindi assets to transmit electricity at high voltage;

- (b) the transmission of electricity along the Feeder line created a risk of unintended discharges of electricity from the Feeder line;
- (c) unintended discharges of electricity from the Feeder line were capable of causing death or serious injury to persons, and damage to or loss of property, by:
  - (i) electric shock;
  - (ii) burning by electric current; further or alternatively
  - (iii) burning by fire ignited by the discharge of electricity;
- (d) unintended discharges of electricity from lines forming part of the distribution network operated by SECV or ES-Victoria respectively were:
  - (i) notorious for having occurred; and
  - (ii) notorious for having sometimes caused, when they occurred, results of the kinds described in (c) above;
- (e) in the premises set out in subparagraphs (c) and (d), the risks referred to in (b) and (c) were:
  - (i) not insignificant as to their likelihood of occurring; and
  - (ii) not insignificant as to the potential consequences if they did occur;
- (f) in the premises set out in sub-paragraphs (a) to (c) inclusive, the transmission by SECV or ES-Victoria respectively of electricity along the Feeder line was a dangerous activity;
- (g) SECV and ES-Victoria respectively knew or, as the network operator of the Murrindindi assets, ought reasonably to have known of the matters referred to in sub-paragraphs (a) to (d) above;
- (h) it was reasonably foreseeable to SECV and ES-Victoria respectively that:
  - (i) a placement of conductors and other parts of the Murrindindi assets in such proximity to each other that energized conductors might make electrical contact with other assets, could allow an

unintended discharge of electric current from the conductors to the other assets;

- (ii) a discharge of current described in (i) could result in:
  - (A) the other assets becoming electrified; and
  - (B) electric shock to or electrocution of persons or property in the vicinity of the electric discharge;
- (iii) further or alternatively, a discharge of electric current described in (i) could result in:
  - (A) the emission of heat or metal particles (“sparks”) from the conductor or other assets as electric arcs formed;
  - (B) damage to the conductor, as sparking removed metal content from the arc site;
  - (C) collapse of the conductor, if eroded sections failed under mechanical load resulting from the weight of the conductor, its tension and wind loads;
  - (D) the unintended discharge of electricity, sparks or heat from the conductor as it collapsed and contacted the ground or other objects around the Murrindindi assets;
- (iv) ~~the emission of heat or sparks from~~flow of electrical current through a collapsed conductor, or from objects in contact with an energized but collapsed conductor, could result in:
  - (A) ~~-~~flow of current through other objects in electrical contact with the collapsed but energized conductor;
  - (B) flow of current through vegetation in contact with that conductor or in contact with those objects; and/or
  - (C) the emission of heat, sparks or embers from the collapsed conductor, those other objects or that vegetation resulting in the ignition of flammable material in the vicinity of the point of dischargeconductor and/or those objects or that vegetation.
- (v) such fire could spread over a wide geographic area;

- (vi) such fire could cause death or injury to persons and loss of or damage to property within the fire area (as defined in paragraph 14 above) and consequential losses including loss of reasonable expectation of benefit and economic losses;
- (vii) such fire could cause damage to property and consequential losses including economic losses within affected areas (as defined in paragraph 14 above);
- (viii) such fire or its consequences could:
  - (A) disrupt or impair or destroy the income-earning activities of persons residing ~~in or carrying on business~~ or having real or personal property located in the fire area ~~or affected areas~~;
  - or
  - (B) impede the use or amenity of real or personal property located in the fire area ~~or affected areas~~; or
  - (C) reduce the value of real or personal property ~~or businesses~~ located in the fire area ~~or affected areas~~; or
  - ~~(C)~~(D) reduce the value of businesses owned by persons residing in or having real or personal property located in the fire area;
  - ~~(D)~~(E) and thereby cause loss of a reasonable expectation of benefit or economic loss to those persons, or the owners of those properties or businesses;
- (ix) the risks referred to in (ii) to (viii) above were greater during periods of high or extreme bushfire risk; and
- (x) a break or defect in, or damage to the conductor on a span on the Feeder line, of the kinds referred to in paragraph A above, could be a long-term consequence occurring many years after the installation of an inappropriate termination assembly, or the incorrect configuration of a termination assembly, on a pole on the span.

33. During the periods referred to in paragraph 31, SECV and ES-Victoria respectively knew or ought to have known, as was the case, that during the service life of the Feeder line members of the public:

- (a) were or were likely to be; or
  - (b) ~~owned~~ resided or had an interest in real or personal property located, ~~or were likely to do so~~; and
  - ~~(c) — carried on business, or were likely to do so;~~
- in the fire area ~~or affected areas~~.

34. Further, at all material times during the periods referred to in paragraph 31, SECV and ES-Victoria respectively knew or ought to have known, as was the case, that members of the public described in the preceding paragraph:

- (a) had, or were likely to have, no ability to prevent or minimize the risk of electricity discharges of the kind referred to in paragraph 32;
- (b) were or were likely to be vulnerable to the impact or effects of fire occurring as described in paragraph 32; and consequently
- (c) were or were likely to be dependent, for the protection of their persons, property and interests, upon SECV and ES-Victoria respectively ensuring that the Murrindindi assets were designed and constructed safely for operation in the operating conditions applying to them from time to time.

35. At all material times the claimants and each of them was a person within the class of persons described in paragraph 34.

36. In the premises set out:

- (a) in paragraphs 27, 28 and 31 to 35 inclusive in respect of SECV; and
- (b) in paragraphs 29 to 35 inclusive in respect of ES-Victoria;

SECV and ES-Victoria respectively during the periods referred to in paragraph 31 owed to the class of persons described in paragraph 34, including the claimants, a duty:

- (i) to take reasonable care by their officers, servants and agents; and
- (ii) to ensure that reasonable care was taken by any contractors engaged by them;

to ensure that all parts of the Murrindindi assets, including the Feeder line, were designed and constructed to operate safely, and in fact operated safely, in the operating conditions applying to the line from time to time (“**the SECV duty**”, which reference incorporates the duty as owed by ES-Victoria).

### ***Breach of SECV duty by SECV or ES-Victoria***

37. In the alternative to paragraphs 19 to 25 above, the Murrindindi fire was caused by breaches by:

- (a) SECV, prior to about December 1993; alternatively
- (b) ES-Victoria, between about December 1993 and about September 1994;

of the SECV duty.

### **Particulars of Breach**

As a result of:

- (i) the attachment of the northern stay wire to Pole 6 at a point between the bottom and middle cross arms;
- (ii) the proximity of inadequate clearance between the bare northern conductor to and the bare stay wire, and
- (iii) the location of the stay insulator above rather than below the section of the stay capable of being contacted by the northern conductor,

there was a risk that the northern conductor might make electrical contact with the “earthed” section of the stay with the result that electric current might discharge from the conductor to the stay (and thence to earth). Further particulars will be provided following completion of discovery and receipt of experts’ reports, causing arcing and the collapse of an energized conductor.



38. The breaches of the SECV duty referred to in paragraph 37 constituted acts done, or omitted to be done:
- (a) prior to about December 1993 by SECV or by an officer, employee or agent of SECV in the performance of particular functions of SECV within the meaning of the 1993 Allocation Statement, being the construction or maintenance of electricity distribution lines, before about December 1993; further or alternatively
  - (b) at any time prior to about September 1994 by SECV or ES-Victoria, and which arose from the negligence or other actions or omissions of a person who was at the time an officer, employee or agent of ES-Victoria or SECV and based in the geographic area which by 7 February 2009 was serviced by SPIAusnet, within the meaning of the 1994 Allocation Statement.
39. In the premises set out in paragraph 6(e) (regarding SPIAusnet's acquisition of liabilities of SECV and ES-Victoria) and 38, SPIAusnet is liable for the claimants' loss and damage resulting from the breaches of duty alleged in paragraph 37.

#### **SECTION E – LOSS AND DAMAGE – CLAIMS AGAINST SPIAusnet**

40. By reason of:
- (a) the breaches by SPIAusnet of the SPIAusnet Statutory Duty;
  - (b) the breaches by SPIAusnet of the SPIAusnet General Duties;
  - (c) the nuisance committed by SPIAusnet; further or alternatively
  - (d) the breaches of duty by SECV, alternatively ES-Victoria, for which SPIAusnet is liable as alleged in paragraphs 27 to 39 above;
- the plaintiff and each of the group members, or subgroup members as the case may be, suffered loss and damage including personal injuries, property damage,

economic loss and inconvenience, being losses of kinds referred to in paragraph 14 above.

### **Particulars of loss and damage**

#### Property damage

(A) As a consequence of the Murrindindi fire, the plaintiff suffered the loss of all the improvements on the land at each of 2 Hull Road and 4 Hull Road, including all buildings, fixtures, trees and gardens, motor vehicles and other chattels owned by them at the properties.

#### Economic loss consequent upon property damage

(A) By reason of the impact of the Murrindindi fire, the plaintiff was unable to lease 4 Hull Road and was unable to let 2 Hull Road, and thus suffered economic loss.

#### Particulars pursuant to Part III of the Wrongs Act 1958

(B) The plaintiff is now aged 66 having been born on 8 March 1948.

(C) The plaintiff's husband was aged 63 as at 7 February 2009, having been born on 26 December 1945.

(D) The plaintiff's husband died at 2 Hull Road in the Murrindindi fire.

(E) The plaintiff's husband was prior to his death a Principal Research Fellow at the Australian Council for Educational Research.

(F) Up to the date of the Murrindindi fire, the plaintiff worked part-time. The plaintiff's husband's earnings were substantially higher than the plaintiff's, and she was dependent upon him for financial support.

(G) The plaintiff claims the loss of the financial support that, but for the Murrindindi fire, her husband would be expected to have continued to provide.

(H) The plaintiff also claims the loss of services including domestic services rendered by her husband to her benefit before his death.

#### Further particulars

(I) Further particulars of the plaintiff's claims for property damage, economic loss consequent upon property damage and dependency claim will be provided.

- ~~i. The plaintiff was at his home on Woods Point Road in Marysville during the afternoon of 7 February 2009 with his wife Elizabeth aged 44 years and his sons James aged 14 years and Matthew aged 13 years.~~
- ~~ii. Elizabeth, James and Matthew died in the Murrindindi bushfire.~~
- ~~iii. The plaintiff suffered physical injuries including burns as a result of the fire. Further, as a consequence of the plaintiff's experience in the~~

~~bushfire, and the circumstances surrounding the deaths of his wife and two sons, the plaintiff has suffered severe psychiatric injury. The plaintiff has incurred and will continue to incur medical and like expenses in relation to his injuries.~~

- ~~iv. The plaintiff suffered loss of all the improvements on the plaintiff's land including all buildings, fixtures, trees and gardens, motor vehicles and other chattels.~~
- ~~v. The plaintiff suffered the loss of all fixtures and chattels in leased properties at 30 Lyell St, Marysville and 2 Cathedral Close, Buxton.~~
- ~~vi. Prior to the Murrindindi fire, the plaintiff operated a Bed and Breakfast business trading as "Nanda Binya" on the plaintiff's land. By reason of the impact of the Murrindindi fire on the plaintiff and the plaintiff's land including the fixtures and other chattels, the plaintiff has been unable to operate this business and has suffered economic loss.~~
- ~~vii. Prior to the Murrindindi fire, the plaintiff was employed as a property manager managing rental properties in the Marysville area. By reason of the impact of the Murrindindi fire on those properties and the plaintiff, the plaintiff has been unable to work in this position and has suffered a loss of income.~~
- ~~viii. Further, as a consequence of his psychiatric injury, the plaintiff has been incapacitated for or has suffered a reduction in his capacity for work and has suffered a loss of income.~~

~~Particulars pursuant to Part III of the Wrongs Act 1958~~

- ~~ix. The plaintiff was born on 12 July 1954 and is currently aged 59 years;~~
- ~~x. Elizabeth was born on 17 August 1964;~~
- ~~xi. The plaintiff and Elizabeth operated a business providing holiday accommodation facilities as particularised in paragraph 10 ("the business");~~
- ~~xii. The plaintiff and Elizabeth contributed to the income of the business in equal shares;~~
- ~~xiii. The plaintiff was not able to conduct the business without the contribution of Elizabeth;~~
- ~~xiv. The plaintiff claims loss of dependency of the contribution of Elizabeth to the income of the business;~~
- ~~xv. The plaintiff also claims loss of services including domestic services rendered by Elizabeth before her death.~~

~~Further particulars of the plaintiff's claim for damages for property, loss of business income and loss of services, economic loss, personal injury and inconvenience will be provided prior to the trial of this proceeding.~~

The particulars of loss relating to group members will be provided following the trial of common questions.

## SECTION F – CLAIMS AGAINST UAM

41. Further and in the alternative to the claims against SPIAusnet set out above, by reason of Part IVAA of the Wrongs Act the plaintiff on his own behalf and on behalf of the group members claims against the second defendant (“UAM”) as follows.

### *UAM – common law duty to the claimants*

42. UAM is and was at all material times a company incorporated pursuant to law and capable of being sued.

42A. Pursuant to a contract made between SPI and Powerline Management Systems Pty Ltd (ACN 061 157 015) (“PMS”) on or about 31 December 1999 (“PMS Contract”), PMS agreed to provide to SPI services in respect of asset inspection on the terms and conditions set out therein (“Services”).

#### **Particulars**

So far as the plaintiff is able to say prior to the completion of discovery, the PMS contract was in writing and comprised:

- (A) an Agreement entitled “For the provision of an asset inspection service for the distribution network within Eastern Energy’s franchise area: Agreement”, being contract number 98CLA066, as amended by amendment number 1 dated 6 January 2000 executed by John Kelso for and on behalf of SPI (then styled as Eastern Energy Limited) and David Grant for and on behalf of PMS (“the Agreement”);
- (B) schedules 1 to 10 inclusive (“the Schedules”);
- (C) annexure A: General Terms and Conditions – Services (the “General Terms and Conditions”);
- (D) any Works Order pursuant to which SPI engaged PMS (later UAM) to carry out discrete items of work (“Works Order”).

Each of the items set out in (A) to (C) above are in writing. A copy of each may be inspected at the offices of the plaintiff’s solicitors by appointment.

42B. The PMS Contract contained the following terms:

- (a) The Term of the PMS Contract was for six years based on two-year approvals: clause 2.1 of the Agreement;
- (b) PMS “agrees to perform the services at the request of [SPI]...”: clause 7(a) of the Agreement;
- (c) PMS was “responsible for the management, planning and supervision of all activities relating to the provision of the services...”: clause 7 (c) of the Agreement;
- (d) PMS shall provide SPI “with an inspection of assets that form part of the [distribution network] in the [defined area], which includes, the reporting and transfer of data relating to the inspection of assets and where required by the Standards, the carrying out of preventative maintenance”: clause 23.1 of the Agreement as amended by a Contract Amendment dated 6 January 2000;
- (e) The Services incorporated the description of work in Schedule 1, Unit Descriptions – Definition of Services (“**Schedule 1**”) including:
- (i) “The provision of performance, progress and asset condition reports to [SPI]...” including monthly progress reports, asset condition reports as required, monthly and yearly audit reports and monthly performance reporting: Unit A, paragraph (a) Reporting description;
- (ii) “The provision of internal auditing of all activities performed by [PMS] and it’s [sic] Sub-contractors”: Unit A, paragraph (b) Auditing description; and

(iii) “The service of packaging works identified through asset inspections into works construction files. These work files are to include, but not be limited to, maps, work instructions, project estimates and project numbers. The work to be packaged is to be based on [SPI]’s maintenance policies.

“Included in the works is the creation of projects with [SPI]’s works management systems. [PMS] will provide all relevant data to the project within [SPI] systems”: Unit A, paragraph (c) Maintenance Packaging description;

(f) “Inspection activities [Schedule 1, Inspection Units] will include the following:-

(i) “Uploading and downloading of PDE [Portable Data Entry] into [SPI]’s CAMM database”;

(ii) “Inspecting for evidence of defects in cross arms, insulators, conductors and their attachment ties, plus all other ancillary gear mounted on poles”;

(iii) “Recording all observations via a Portable Data Entry Device”;

(iv) “Record error corrections on AM/FM hardcopy plans”;

(v) “Provision of detailed assessment of pole top structures/hardware including any advice on replacement specification”;

- (vi) “The service of inspection, analysis and chemical treatment of a concrete pole, including the inspection [of] line clearance and pole top attachment...”: work Unit 3 description;
- (vii) “Provision of the service of a visual inspection of pole top assembly and recording the asset condition, including the inspection of line clearances...”: work Unit 8 description;
- (viii) “The service of physically inspecting a pole top assembly and recording the asset condition. A physical pole top inspection is when an appropriately trained person accesses the pole top physically via a ladder or EWP to assertion [sic] the asset condition...[including] Rural area – cross arm inspection... attachments separate from cross arm...”: work Unit 18 description;
- (g) PMS warranted that:
- (i) “all Work undertaken under the terms of this Agreement shall be performed in a good and proper manner”: clause 8 of the Agreement; and
- (ii) “the Services provided...comply in all respects with the quality and description of the Services; and comply with all relevant statutory requirements and all relevant Australian Standards”: clause 7 of the General Terms and Conditions;
- (h) PMS shall:-

- (i) “carry out all work in a good, proper and professional manner and with due expedition and in accordance with good practice having regard to economy and safety”; clause 11(c) of the Agreement;
- (ii) “in providing the Service... exercise due care and skill in accordance with best international practices; and wherever it is applicable, comply with” the Standards as specified in clause 23.4 of the Agreement, : clause 23.4 of the Agreement;
- (i) SPI reserved the right to audit the practices and procedures undertaken by PMS: clause 16(a) of the Agreement;
- (j) “Should audits indicate that [PMS] has incorrectly inspected poles or pole assembly’s [sic] [PMS] will re-inspect these assets at no cost to [SPI]”:  
Schedule 7 at item 3, Audit Failure;
- (k) PMS “must ensure that all personnel employed by [PMS] to perform functions pursuant to the Agreement are fully trained and competent and possess the necessary skills and ability to provide quality assurance of workmanship to ensure fulfilment of the obligations of [PMS] pursuant to the Agreement”: clause 17.1 of the General Terms and Conditions;
- (l) PMS “personnel working under this agreement.....shall meet the minimum training requirements”: clause 23.5 of the Agreement; clause 16 of the General Terms and Conditions;
- (m) SPI may:
  - (i) “audit the training undertaken by personnel under the Agreement, This shall include the right to test the knowledge and skill of any



such persons to ensure that those persons were competent...to carry out the provision of the Services”, and

(ii) where the skills and knowledge of personnel were not adequate, “direct [PMS] to not allow that person to be involved in the provision of the Services until such time as he or she has obtained the required training”: clause 16.3 of the General Terms and Conditions;

(n) “A quality rating will apply for each audit completed. Should the average ranking for any Asset Inspector remain below the acceptable level for a period greater than one month a penalty will apply”: Schedule 7 at item 8. Audit Report rating;

(o) “The bushfire mitigation indicators that relate to [PMS] shall be zero during the annual fire declaration period”; Schedule 7 item 6, Bushfire Mitigation Index;

(p) PMS “will, within a reasonable time prior to the provision of the Services, contact [SPI] to ensure that [SPI] personnel are available, if necessary, to provide [PMS] with instructions or directions as to the provision of the Services”: General Terms and Conditions clause 6.2;

(q) PMS was “liable for all damages, actions, claims, proceedings, injury, loss and expenses of whatsoever nature (including but not limited to economic loss, loss of profit and consequential loss and damage) incurred by [SPI] arising out of the failure of [PMS] to comply with its obligations under the Agreement, including but not limited to the failure of the Services to meet

the requirements of the Agreement.”: General Terms and Conditions  
clause 8.

42C. In or around 2000, UAM acquired the business of PMS pursuant to an agreement between PMS, Powerline Management Systems (NSW) Pty Ltd, Powerline Management Systems (Qld) Pty Ltd, Powerline (A) Pty Ltd, Tiong Djin Siau, Leony Siau and UAM dated 26 October 1999.

**Particulars**

The acquisition agreement is in writing and is contained in a document entitled “Business Purchase Agreement” dated 26 October 1999 between UAM (then styled as Utility Services Corporation Limited) and PMS [UAM.0002.018.0009] (the “Acquisition Agreement”), a copy of which may be inspected at the offices of the plaintiff’s solicitors by appointment.

42D. There was a term of the Acquisition Agreement that PMS “must use its best endeavours before Completion to assign and transfer to [UAM], with effect from Completion or such other date nominated by [UAM], all right, title and interest of [PMS] in, and arising out of, the Contracts [as defined in Clause 1.1 of the Acquisition Agreement]...”

**Particulars**

Clause 8.1(a) of the Acquisition Agreement.

42E. On or about 24 January 2000, the PMS Contract was assigned to UAM (“Assignment”).

**Particulars**

The Assignment is evidenced by a letter from PMS to SPI dated 24 January 2000 [UAM.0002.018.0047], a copy of which may be inspected at the offices of the plaintiff’s solicitors by appointment.

42F. The term of the PMS Contract was extended on the following dates:

(a) on or about 23 May 2001 for a further 2 year term;

(b) on or about 18 August 2003;

(c) on or about 10 January 2005;

(d) on or about 9 January 2006;

(e) on or about 16 October 2006, to 31 December 2006;

(f) on or about 19 December 2006, to 28 February 2007; and

(g) on or about 8 February 2007, to 31 March 2007 (collectively “the  
**Extensions**”).

#### **Particulars**

The Extensions are evidenced in writing and are contained in the following:

(A) Letter from UAM to SPI dated 23 May 2001  
[UAM.0002.018.0046];

(B) Letter from SPI to UAM dated 18 August 2003  
[UAM.0002.018.0045];

(C) Letter from UAM to SPI dated 10 January 2005  
[UAM.0002.018.0044];

(D) Letter from UAM to API dated 9 January 2006  
[UAM.0002.018.0043];

(E) Letter from SPI to UAM dated 16 October 2006  
[UAM.0002.018.0042];

(F) Letter from SPI to UAM dated 19 December 2006  
[UAM.0002.018.0041];

(G) Letter from SPI to UAM dated 8 February 2007  
[UAM.0002.018.0040].

Copies of the documents set out in (A) to (G) above may be inspected at the offices of the plaintiff’s solicitors by appointment.

42G. In the premises, the terms of the PMS Contract defined the contract in place between SPI and UAM at all material times from about January 2000 until April 2007 (“the First UAM Contract”).

43. Pursuant to a contract made between SPIAusnet and UAM on or about 1 April 2007 ("**Second UAM Contract**"), UAM agreed to provide to SPIAusnet services in respect of asset inspection on the terms and conditions set out therein.

#### Particulars

So far as the plaintiff is able to say prior to the completion of discovery, the Second UAM eContract was in writing and comprised:

- (A) an Instrument of Agreement located at the commencement of the document entitled "Contract Terms and Conditions" executed on 1 April 2007 by Nino Ficca for and on behalf of SPIAusnet and Richard Janssen for and on behalf of UAM (the **Instrument of Agreement**);
- (B) the Special Conditions of Contract detailed in Schedule 1 to the Contract Terms and Conditions (the **Special Conditions**);
- (C) the Contract Terms and Conditions following the Instrument of Agreement together with all Schedules, Appendices, incorporated documents and other documents where relevant including the Scope of Contract Works detailed in Schedule 2 to the Contract Terms and Condition (including other Schedules and Documents where relevant) and the Specifications referred to in Schedule 2 (the **Terms and Conditions**);
- (D) any Works Order pursuant to which SPIAusnet engaged UAM to carry out discrete items of work (~~Works Order~~).

Each of the items set out in (A) to (C) above are in writing. A copy of each may be inspected at the offices of the plaintiff's solicitors by appointment.

44. The asset inspection services included, inter alia:
- (a) ground-level and aerial inspection and condition assessment of poles and all attached hardware and conductors (**asset inspection**);
  - (b) maintenance works and activities required to address maintenance items identified by asset inspection;
  - (c) the employment and training of persons to conduct asset inspection (**asset inspectors**);
  - (d) at least bi-monthly internal auditing of asset inspectors and at least annual independent auditing of asset inspectors and internal auditors; and
  - (e) monthly reporting to SPIAusnet in relation to asset inspection.

**Particulars**Second UAM Contract Schedule 2.

45. The Second UAM Contract provided that UAM shall execute and complete the whole of the works described in any Works Order in every respect to the satisfaction of SPIAusnet in accordance with the Contract Documents being the Instrument of Agreement, the Special Conditions, the Terms and Conditions and any Works Order: Instrument of Agreement, Clauses 1 and 2.
46. The Second UAM Contract contained the following terms in the Terms and Conditions:
- (a) UAM shall comply with all applicable laws, by-laws, ordinances, regulations, proclamations, orders and rules and with the lawful requirements of the relevant authorities that may be in any way related to the Contract Works: Terms and Conditions, Clause 2.7.2, 1.1.16;
  - (b) all workmanship shall be of the highest quality and standard and the Contract Works shall be carried out competently, regularly, diligently, with due expedition, without delay and in accordance with best industry practice and comply with all applicable Australian Standards and/or other referenced codes, and the requirement of relevant Statutory Authorities and the Law: Terms and Conditions, Clause 8.1, 1.1.16;
  - (c) UAM, in agreeing to perform the Contract Works, represents and warrants to SPIAusnet that it has the necessary skills, resources and experience to successfully perform the Contract Works in accordance with the requirements of the First UAM Contract, and that it is appropriately licensed or registered where this is required by law: Terms and Conditions, Clause 8.2, 1.1.16.

47. The Second UAM Contract contained the following terms in the Special Conditions:
- (a) UAM must ensure that it supplies and maintains a trained and competent workforce at all times: Special Conditions, "Training";
  - (b) all personnel employed by UAM to perform work must meet the minimum requirements set out in the special conditions with regards to SPIAusnet minimum training and as reasonably required by SPIAusnet: Special Conditions, "Training";
  - (c) the training courses for asset inspectors listed in the Special Conditions of the First UAM Contract are the minimum training requirements for asset inspectors and it was the responsibility of UAM to ensure that all personnel engaged under the First UAM Contract had completed the appropriate recognised training courses and were skilled and competent to perform the requested tasks, such that UAM may need to supply additional training in order to comply with all government guidelines and regulations for the tasks being undertaken: Special Conditions, "Training";
  - (d) all training unless otherwise agreed by SPIAusnet must be conducted by a Registered Training Organisation: Special Conditions, "Training";
  - (e) UAM in providing services under the First UAM Contract, shall at all times carry out all activities in accordance with and comply with, inter alia, SPIAusnet's technical standards and procedures and such other standards as SPIAusnet may from time to time require: Special Conditions, "Standards of Quality and Guidelines".
48. Schedule 2 to the Terms and Conditions contained the following terms of the Second UAM Contract regarding the Scope of Works to be carried out by UAM under the Second UAM Contract:

- (a) the core components of the Second UAM Contract include asset inspection services, aerial inspection services, asset and aerial inspection coordination and defective private electric line management: Schedule 2, “Introduction”;
- (b) UAM is engaged to undertake a range of activities at each individual pole and/or site throughout SPIAusnet’s distribution and sub-transmission network, including an initial ground-level inspection of assets, followed by subsequent aerial inspections and maintenance activities as required: Schedule 2, “Introduction”;
- (c) the ground level activities that UAM was required to undertake included:
  - (i) pole inspection involving ground line condition inspection and treatment of wood, concrete or steel poles in accordance with the Asset Inspection Manual 30-4111;
  - (ii) line hardware inspection involving condition assessment of all attached hardware and conductors at each pole/site as per the Asset Inspection Manual 30-4111, including *inter alia*:
    - (A) defective cross arms;
    - (B) defective insulators;
    - (C) defective conductors, including LV servicing and conductor attachments/mid-span splices/servicing points of attachment at customer installations; and
    - (D) low conductors and LV Servicing as per ESMS Management Plan 30-2654;
- (d) all defects detected during ground level activities are to be reported with the appropriate priority and Q4 Failure Codes/Required Information as outlined in SPIAusnet Distribution Network Asset, Inspection Information, Appendix A: “Q4 Failure Code and Reporting Guide for Asset Inspectors”: Schedule 2, “ Ground Level Activities”;

- (e) failure to accurately identify any priority defect that is found to be either a contributing factor, or sole cause, of a major incident (wildfire, fatality etc) would result in immediate contract suspension and cessation of all works undertaken by UAM: Schedule 2, "Ground Level Activities";
- (f) UAM must complete certain mandatory minor maintenance activities at the time of inspection and should complete certain discretionary maintenance activities at the time of inspection: Schedule 2, "Ground Level Activities";
- (g) UAM must complete certain minor maintenance activities at the time of assessing reported defective attachments in the same zone: Schedule 2, "Aerial Activities";
- (h) UAM was required to undertake a ground level and aerial activities coordination function to ensure all inspection targets are met and an even flow of work maintained between asset inspectors and the SPIAusnet Electricity Maintenance Division: Schedule 2, "Ground Level and Aerial Activities Coordination";
- (i) in undertaking ground level and aerial activities coordination, UAM is required to compile an asset inspection schedule prior to the commencement of each inspection year; maintain and update the schedule with relevant information; undertake exception reporting to ensure that no inspections are scheduled beyond their due dates; ensure all inspection targets are met, including the 3-week inspection package deadline and HBRA Asset Inspection; undertake inspection data management between the Q4 Asset Management Database and Portable Field Devices; verify completed inspection data prior to upload into the Q4 Asset Management Database; prepare AM/FM maps for individual Asset Inspection packages; and coordinate aerial inspection activities and deadlines: Schedule 2, "Ground Level and Aerial Activities Coordination";



- (j) in undertaking asset inspection, UAM was required to capture all information electronically via hand-held PDE (portable data entry) device and record all defects identified using the appropriate Q4 "Failure Code" and Priority as set out in the "Q4 Failure Code and Reporting Guide for Asset Inspectors" (SPLAusnet Distribution Network Asset, Inspection Information, Appendix A: "Q4 Failure Code and Reporting Guide for Asset Inspectors"): Schedule 2, "Information and Data Recording";
  - (k) UAM was required to undertake frequent audits of all field staff to ensure quality of works/compliance with policies and procedures and adherence to HS&E policies and work practices and the frequency of such audits would be a minimum of bi-monthly for each asset inspector: Schedule 2, "Compliance Auditing";
  - (l) in addition to its internal auditing, UAM must engage at its expense an independent auditor at least once in any 12-month contract period to undertake audits on all UAM asset inspectors and UAM internal auditors: Schedule 2, "Compliance Auditing";
  - (m) UAM was required to submit to SPLAusnet a monthly report outlining the progress of various inspection regimes, the number of completed units for the month, the results, trends and progress of internal audits and other matters: Schedule 2, "Reporting".
49. Pursuant to the Second UAM Contract, UAM agreed to indemnify and keep indemnified SPLAusnet and its officers, employees and agents against all claims, demands, proceedings, liabilities, costs, charges and expenses arising as a result of any act, neglect or default of UAM, its officers, employees or agents related to its execution of the Contract Works.

### Particulars

Second UAM Contract, Terms and Conditions clauses 5, 1.1.16.

50. It was an implied term of the First UAM Contract and the Second UAM Contract (collectively, the “**UAM Contracts**”) that UAM would exercise reasonable care and skill in the provision of services pursuant to the UAM Contracts (the “**UAM implied term**”).

**Particulars**

The term was implied by law into the UAM Contracts being a contract for the performance of professional services.

51. At all relevant times, UAM held itself out to ~~SPI~~Ausnet to be fully experienced, competent and qualified with respect to carrying out the works required under the UAM Contracts and, to UAM’s knowledge, in reliance thereon, ~~SPI~~Ausnet agreed to engage UAM to carry out the works in accordance with the UAM Contracts.

**Particulars**

(A) — The term was implied by law into the First UAM Contract by reason of clauses 8 and 11 of the Agreement.

~~(A)~~(B) Recital B of the Second UAM Contract.

52. Throughout the term of the UAM Contracts, UAM provided to ~~SPI~~Ausnet asset inspection services under the UAM Contracts throughout the distribution network, including in respect of the Murrindindi Assets

53. In the premises, throughout the term of the UAM Contracts, UAM had, subject to the UAM Contracts, a responsibility for and some control over:

- (a) asset inspection throughout the distribution network, including on the Murrindindi Assets
- (b) asset inspection training for asset inspectors who conducted asset inspection throughout the distribution network, including on the Murrindindi Assets;

- (c) the implementation and observance by asset inspectors of the asset inspection requirements set out in the inspection manuals provided by SPI from time to time (the “Asset Inspection Manuals”) in conducting asset inspections throughout the distribution network, including on the Murrindindi Assets;
- (d) the identification through asset inspection of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi Assets;
- (e) undertaking maintenance activities in response to defects, faults, deterioration in condition and incorrect assembly identified through asset inspection of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi Assets;
- (f) reporting to SPIAusnet defects, faults, deterioration in condition and incorrect assembly of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi Assets and notifying SPIAusnet of necessary or desirable maintenance and replacement of such assets;
- (g) for the term of the First UAM Contract, the service of packaging works identified through asset inspections into works construction files for Ausnet.

54. Throughout the term of the UAM Contracts, UAM knew or ought to have known of the terms of the UAM Contracts set out above and the matters referred to in the previous paragraph.

55. Throughout the term of the UAM Contracts<sub>2</sub>, it was reasonably foreseeable to UAM that:
- (a) any failure by an asset inspector to implement and observe the asset inspection requirements set out in the Asset Inspection Manuals<sub>2</sub> in conducting asset inspections throughout the distribution network, including on the Murrindindi Assets;
  - (b) any failure by an asset inspector to identify defects, faults, deterioration in condition or incorrect assembly of assets forming part of the distribution network including poles, conditions and associated hardware on the Murrindindi Assets;
  - (c) any failure by an asset inspector to undertake, or to procure the undertaking of, maintenance activities in response to defects, faults, deterioration in condition or incorrect assembly identified through asset inspection of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi Assets;
  - (d) any failure by UAM to report to ~~SPI~~Ausnet defects, faults and deterioration in condition or incorrect assembly of assets forming part of the distribution network including poles, conductors and associated hardware on the Murrindindi Assets or to notify ~~SPI~~Ausnet of necessary or desirable maintenance or replacement of such assets;
- could result in the unexpected failure before the next scheduled asset inspection of assets forming part of the distribution network, including conductors and associated hardware on the Murrindindi Assets.

56. Further, throughout the term of the UAM Contracts<sub>2</sub> it was reasonably foreseeable to UAM that the risks of the unexpected failures referred to in the previous paragraph would increase if the asset inspectors who conducted asset inspections throughout the distribution network, including on the Murrindindi

Assets, were not adequately trained in asset inspection or failed to exercise due skill, care and diligence in conducting asset inspection.

57. Further, throughout the term of the UAM Contracts, UAM knew or ought reasonably to have known that:
- (a) ~~SPIAusnet~~ used the Sawmill Span to distribute electricity;
  - (b) if a conductor failed, a discharge of electricity could occur leading to ignition of flammable material in the vicinity of the assets;
  - (c) such fire could spread over a wide geographic area;
  - (d) such fire could cause death or injury to persons and loss of or damage to property within the fire area and consequential losses including economic losses;
  - (e) such fire could cause damage to property within the affected area and consequential losses including economic losses;
  - (f) such fire or its consequences could:
    - (i) disrupt or impair the income-earning activities of persons residing or ~~carrying on business~~ having real or personal property located in the fire area ~~or affected areas~~; or
    - (ii) impede the use or amenity of real or personal property located in the fire area ~~or affected areas~~; or
    - (iii) reduce the value of real or personal property ~~or businesses~~ located in the fire area ~~or affected areas~~; or
    - ~~(iii)~~(iv) reduce the value of businesses owned by persons residing in or having real or personal property located in the fire area; and thereby cause economic loss to those persons or the owners of those properties or businesses;
- (collectively the matters referred to in sub-paragraphs (b)-(f) are referred to as **the UAM risks**).

58. Throughout the term of the UAM Contracts<sub>2</sub>, the claimants:
- (a) had no ability or no practical or effective ability, to prevent or minimise the UAM risks;
  - (b) were vulnerable to the impact of the said risks; and consequently
  - (c) were to a material degree dependent for the protection of their persons and property, upon UAM exercising reasonable care in the discharge of its obligations under the UAM Contracts<sub>2</sub>.

59. In the premises, throughout the term of the UAM Contracts<sub>2</sub>, UAM owed to each of the claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken by agents, contractors or other persons engaged by it,

in the discharge of UAM's obligations under the UAM Contracts<sub>2</sub> to ensure that conductors and associated hardware on the Murrindindi Assets were adequately inspected, and that defects, faults, deterioration in condition or incorrect assemblies were adequately identified, reported to ~~SPI~~Ausnet and addressed by appropriate maintenance activities (the **UAM Duty**).

60. The UAM Duty required UAM to:
- (a) by its officers, servants or agents, conduct asset inspections on the Murrindindi Assets with due care, skill and diligence;
  - (b) by its officers, servants or agents, conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi Assets;

- (c) exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Asset Inspection Manuals in conducting asset inspections on the Murrindindi Assets;
- (d) take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi Assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assemblies of assets forming part of the Murrindindi Assets;
- (e) take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assemblies of assets forming part of the Murrindindi Assets;
- (f) take reasonable steps to report to SPIAusnet defects, faults, deterioration in condition and incorrect assemblies of assets forming part of the Murrindindi Assets and address them by appropriate maintenance activities;
- (g) during the term of the First UAM Contract, take reasonable steps to ensure that defects, faults, deterioration in condition and incorrect assemblies of assets forming part of the Murrindindi Assets were packaged into works construction files for Ausnet and addressed by appropriate maintenance activities.

### ***UAM Inspections***

60A. UAM carried out scheduled asset inspections in respect of the Murrindindi Assets, including Pole 6 on 16 March 2005 and 28 May 2008.

61. In connection with scheduled asset inspections conducted by it in respect of Pole 6 of the Murrindindi Assets, UAM did not identify record, report, prioritise for maintenance or notify SPIAusnet of any defect, fault, deterioration in condition or

incorrect assembly of the conductor or associated assets forming part of the Murrindindi Assets ~~including but not limited to~~ being:

- (a) signs of arcing on the northern conductor or the northern stay wire;
- ~~(b) the attachment of the northern stay to the pole, at a point above the bottom cross arm;~~
- ~~(c)~~ (b) the location of the end of the stay insulator closest to the pole above the lowest conductor on Pole 6;
- ~~(d) the lack of insulative coating on the northern stay wire;~~
- ~~(e) the lack of insulative coating on the northern conductor; and~~
- (c) the installation of Black Piping;
- (d) the installation of a Compression Joint adjacent to the black piping; and
- ~~(f)~~ (e) the inadequate clearance between the earthed section of the bare northern stay wire to the bare northern conductor.

### ***Breach of Duty by UAM***

62. UAM's failure to identify, record, report, prioritise for maintenance or notify SPIAusnet of, or procure the conducting of, maintenance necessary to rectify, any defect, fault, deterioration in condition or incorrect assembly of the conductor or associated assets forming part of the Murrindindi Assets was due to the following breaches of the UAM duty:

- (a) failure by its officers, servants or agents, to conduct asset inspections on the Murrindindi Assets with due care, skill and diligence;

### **Particulars**

16 March 2005 and 28 May 2008 inspections

- (A) Failing to identify, record, report or prioritise for maintenance the items detailed in paragraph 61 above



when undertaking the scheduled asset inspections of Pole 6 on 16 March 2005 and 28 May 2008 (“Inspections”);

- (C) Failing during the course of the Inspections to detect:
  - a. inadequate clearance between conductors and earthed structures;
  - b. incorrectly installed or positioned stay insulators; and / or
  - c. signs of arcing on the northern conductor or the northern stay wire;
- (D) Failing to use image stabilising binoculars to conduct pole top asset inspections;
- (E) Further and in the alternative to (D) above, failing to inspect pole top assets and conductors using image stabilising binoculars from more than two positions on the ground;
- (F) Failing to conduct a detailed inspection of Pole 6 and its assets by visually examining it in detail from top to bottom and then using image stabilising binoculars;

16 March 2005 inspection

- (G) During the term of the First UAM Contract, failing to package the works necessary to rectify the items detailed in paragraph 61 above into works construction files for SPI;

28 May 2008 inspection

- (H) Failing to consider surrounding lighting conditions when conducting the inspection of Pole 6 in May 2008 and adjust inspection techniques accordingly, and in particular, undertaking a visually closer or lengthier inspection when undertaking inspections in early morning light.
- (I) Failing to conduct a detailed inspection of Pole 6 and its assets by visually examining it in detail from top to bottom and then using image stabilising binoculars and a camera to inspect pole top assets.

- (b) failure by its officers, servants or agents, to conduct with due care, skill and diligence asset inspection training for asset inspectors who conducted asset inspections on the Murrindindi Assets;

**Particulars**

Training of Jason Leech

- (A) Failing to ensure, or take reasonable steps to ensure, that training provided to asset inspectors conducting scheduled inspections of the Murrindindi assets:
  - a. complied with National Electricity Supply Industry Competency Standards as required by the Green Book; and

b. was structured, delivered, documented, assessed and, where test results or work performance were unsatisfactory, remediated in accordance with reasonable training industry practice.

(B) Failing to ensure, or take reasonable steps to ensure, that the content of any training course sufficiently addressed the inspection of pole top assets required to be undertaken by an asset inspector in accordance with the Asset Inspection Manuals;

(D) Providing an inadequate number of technical training days to allow for the coverage of appropriate course material, including nationally accredited training modules NUE260 and NUE211;

(E) Failing to ensure that asset inspectors completed training in accordance with UAM's Course Outline for Asset Inspectors [UAM.0004.008.0057] and UAM internal training competency assessments, including the On Job Training Package [UAM.0100.002.5446] as set out in the expert report of RC Lowe [EXP.RLI.007.0001] ("**Lowe report**") at lines [810-865];

(F) Failing to ensure that asset inspectors received adequate training before commencing unsupervised inspections;

(G) Failing to require the use of, or provide any or any adequate direction to asset inspectors to use, image stabilising binoculars for every asset inspection, including after the introduction of cameras for conducting inspections, and in particular inspections of pole top assets and conductors;

(H) Failing to provide any or any adequate refresher training of asset inspectors as required by the Green Book;

(I) Failing to maintain records sufficient to verify the content of training, refresher training, and assessment courses provided to asset inspectors.

*Training of Brian Wallis*

(J) Failing to ensure, or take reasonable steps to ensure, that training provided to asset inspectors conducting scheduled inspections of the Murrindindi assets where test results or work performance were unsatisfactory, was remediated in accordance with reasonable training industry practice;

(L) Failing to require the use of, or provide any or any adequate direction to asset inspectors to use, image stabilising binoculars for every asset inspection, and in particular inspections of pole top assets and conductors;

- (c) failure to exercise due care, skill and diligence to implement and observe the asset inspection requirements set out in the Asset Inspection Manuals in conducting asset inspections on the Murrindindi Assets;

**Particulars**

Failing, when undertaking the Inspections:

- (A) to identify, record, prioritise for maintenance or report the items detailed in paragraph 61 above;
- (B) in relation to the 2008 inspection, to identify, record, prioritise for maintenance or report the significant non-conformance with respect to required clearances between the earthed section of the bare northern stay wire to the bare northern conductor. Drawing EXV9/7020/22 specifies the relevant minimum clearance between an earthed stay and a 22kV conductor as 450mm;
- (C) in relation to the 2008 inspection, to identify, record, prioritise for maintenance or report the location of the stay insulators being above the lowest conductor on Pole 6 on the:
  - (i) western stay wire; and
  - (ii) northern stay wire

See asset maintenance code 42 priority 2 of SPI's 2006 and 2007 Asset Inspection Manuals [SPN.005.001.0170 and SPN.251.029.0432] relating to Guy Maintenance;
- (D) in relation to the 2008 inspection, to assess the inadequate clearance between the earthed section of the bare northern stay wire to the bare northern conductor as an immediate risk to public safety and report it as a fault to SPI with urgent priority [SPN.005.001.0178].

- (d) failure to take reasonable steps to ensure that asset inspectors who conducted asset inspections on the Murrindindi Assets had received adequate training in the identification of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets;

**Particulars**

Training received by Brian Wallis and Jason Leech

- (A) The plaintiff refers to and relies upon the particulars to paragraph 62(b) above;
- (B) Failing to conduct any or any adequate review or analysis of product and process audits of asset inspectors to identify and reduce the number of non conformances in relation to pole top maintenance;
- (C) Failing to ensure asset inspectors completed further or refresher training in accordance with the results of audits conducted by UAM establishing causes, trends and corrective actions to improve the inspection process, in particular in relation to pole top maintenance;

- (D) Failing to keep accurate and appropriate records and documentation of training being records of assessments and completion of training of individual asset inspectors, any documentation in relation to audit processes undertaken, documents relating to the structure and assessment of refresher training, and any auspicing agreements with third party registered training organisations;
- (E) Failing to ensure asset inspectors received any or any adequate further or refresher training;
- (F) Failing to ensure that asset inspectors received adequate training in the identification of incorrect pole-top assemblies including the items detailed in paragraphs 61(a), (c) and (f) to (h) above;

*Training received by Jason Leech*

- (G) Failing to ensure that asset inspectors completed a training program for asset inspectors which reflected the National Electricity Supply Industry Competency Standards in 2006 as set out in the Lowe report at lines [877-940];
- (H) Failing to ensure that asset inspectors received adequate training before commencing unsupervised inspections, in particular in the identification of incorrect pole-top assemblies including the items detailed in paragraphs 61(a), (c) and (f) to (h) above;
- (I) Failing to take reasonable steps to ensure that inspectors trained as referred to in particulars at (H) above received appropriate corrective training before being permitted to carry out unsupervised inspections;
- (J) Failing to take reasonable steps to ensure that inspectors, following training, were confident in the identification of inadequate clearances between conductors and other pole-top assets including earthed structures and the other items detailed in paragraphs 61(a), (c) and (f) to (h) above;
- (K) Failing to design and conduct a training course of sufficient duration to:
  - (i) ensure that the content of any training course sufficiently addressed the inspection of pole top assets required to be undertaken by an asset inspector in accordance with the Asset Inspection Manuals;
  - (ii) provide an adequate number of technical training days to allow for the coverage of appropriate course material, including nationally accredited training modules NUE260 and NUE211;
  - (iii) ensure that asset inspectors completed training in accordance with UAM's Course Outline for Asset Inspectors;
- (L) Failing to design and conduct a training course or any asset inspection refresher course in accordance with the

requirements of the Green Book and / or the National Electricity Supply Industry Competency Standards;

(M) Failing to take reasonable steps to ensure that inspectors identified by either SPI or UAM or their agents as having failed an audit, completed appropriate corrective training and demonstrated appropriate competency before being permitted to resume unsupervised inspections;

(N) Directing or permitting Jason Leech to conduct inspections on the distribution network of SPI before he had successfully completed a training program in accordance with UAM's Course Outline for Asset Inspectors or the Green Book; and

(O) The asset inspection training provided to Jason Leech:

(i) was not aligned with any applicable national competency;

(ii) was not in accordance with industry practice;

(iii) did not record, to a reasonable industry standard, the content of the training received or assessment work undertaken by Jason Leech;

(iv) despite some remedial training in December 2006, was not the subject of supplementary or remedial training that was sufficient to ensure his competency to detect pole-top maintenance problems in the field;

(v) was not delivered by a RTO, or under an applicable auspicing agreement with a RTO (with respect to refresher training);

and therefore was inadequate to train Jason Leech reliably to undertake competent pole-top inspections.

(e) failure to take reasonable steps in conducting asset inspection to identify defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets ~~being~~including:

(i) signs of arc damage on the northern conductor or the northern stay wire;

~~(ii) the attachment of the northern stay to the pole, at a point above the bottom cross arm;~~

~~(iii)~~(ii) the location of the end of the stay insulator closest to the pole above the lowest conductor on Pole 6;

~~(iv) the lack of insulative coating on the northern stay wire;~~

~~(v) the lack of insulative coating on the northern conductor; and~~

(iii) the installation of the black piping;

(iv) the installation of the compression joint adjacent to the black piping;  
and

~~(vi)~~(v) the inadequate clearance between the earthed section of the bare northern stay wire and the bare northern conductor;

#### **Particulars**

The plaintiff refers to the particulars at paragraph 62(a) above.

(f) failure to take reasonable steps to report to ~~SP~~Ausnet defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets ~~being~~including:

(i) signs of arc damage on the northern conductor or the northern stay wire;

~~(ii) the attachment of the northern stay to the pole, at a point above the bottom cross arm;~~

~~(iii)~~(ii) the location of the end of the stay insulator closest to the pole above the lowest conductor on Pole 6;

~~(iv) the lack of insulative coating on the northern stay wire;~~

~~(v) the lack of insulative coating on the northern conductor; and~~

(iii) the installation of the black piping;

(iv) the installation of the compression joint adjacent to the black piping;  
and

~~(vi)~~(v) the inadequate clearance between the earthed section of the bare northern stay wire and the bare northern conductor.

#### **Particulars**

The plaintiff refers to the particulars at paragraph 62(c) above.

(g) during the term of the First UAM Contract, failure to take reasonable steps to procure maintenance of defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets.

**Particulars**

UAM did not take any steps to procure maintenance in respect of items detailed in paragraph 61 above.

62A. But for the breaches of duty alleged in the preceding paragraph, prior to 7 February 2009:

- (a) the inadequate clearance between the northern conductor and the northern stay wire would have been detected by UAM; and
- (b) the inadequate clearance between the northern conductor and the northern stay wire detected by UAM would have been reported to ~~SPI~~Ausnet;
- (c) further and in the alternative to (a) and (b), UAM would have detected defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets as identified in paragraph 62(e)(i) to (v) and 62(f)(i) to (v).; ~~and~~
- (d) UAM would have reported to ~~SPI~~Ausnet defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets as identified in paragraph 62(e)(i) to (v) and 62(f)(i) to (v); ~~and~~
- (e) during the term of the First UAM Contract, UAM would have procured maintenance of the defects, faults, deterioration in condition and incorrect assembly of assets forming part of the Murrindindi Assets as identified in paragraph 62(g).

***UAM – causation***

62B. The Plaintiff refers to paragraphs 18 to 18C.

62C. If any one of the actions referred to in paragraph 62A(b), (d) or (e) had been taken by UAM, then the reasonable and probable response from ~~SPI~~Ausnet would have been to:

(a) undertake a line height inspection of the pole top assets and/or upon any inspection to detect, the inadequate clearance between the northern conductor and the northern stay wire; and

(a)(b) undertake remediation work to ensure that:

- (i) there was adequate clearance between the northern conductor and the northern stay wire; and
- (ii) the northern conductor was repaired or replaced if necessary;
- (iii) further and alternatively to (a) and (b), adequate insulative coating, alternatively other insulation to prevent arcing and damage to the northern conductor at Pole 6 was installed.

62D. If the remediation work as set out in the preceding paragraph had been undertaken, the northern conductor would not have failed on 7 February 2009 and the Murrindindi bushfire would not have been ignited.

63. Further and in the alternative to paragraphs 8 to 25 inclusive, in the premises set out in paragraphs 42 to 62D, the Murrindindi fire was caused by the breaches by UAM of the UAM Duty alleged above.

***UAM – loss and damage***

64. By reason of the breaches by UAM of the UAM duty, the claimants and each of them suffered loss and damage.

**Particulars**

The plaintiff refers to and repeats the particulars of loss and damage set out in paragraph 40 above.

65. The Murrindindi bushfire was a natural and foreseeable consequence of the breaches by UAM of the UAM Duty alleged above.



66. In the premises set out in the two preceding paragraphs, the claimants' loss and damage was caused by the breaches by UAM of the UAM duty.

***Apportionability and apportionment – UAM***

67. Further to paragraphs 42 to 66 above:

- (a) ~~SPIAusnet~~ at all material times had power under the UAM Contracts to, inter alia:

- (i) issue Works Orders and require the stipulated works to be completed to ~~SPIAusnet~~'s satisfaction:

**Particulars**

(A) Clauses 7(a) and 7(b) of the First UAM Contract, clauses 3.1, 3.3 and 6 of the General Terms and Conditions of the First UAM Contract.

~~(A)~~(B) Second UAM Contract cl.2; UAM Schedule 1 "Tasking of Work"; UAM Schedule 1 p.29 (of 54) "Standards of Quality and Guidelines";

- (ii) assess and apply demerit points and/or penalties to works undertaken by UAM under the UAM Contracts:

**Particulars**

(A) Schedule 7 of the First UAM Contract.

(B) Second UAM Contract Schedule 2;

- (iii) issue notices requiring and/or demand rectification of defective works:

**Particulars**

(A) Clause 8 First UAM Contract, clause 3.3 of the General Terms and Conditions of First UAM Contract.

~~(C)~~(B) Second UAM Contract cl.8.5.1, 8.6.3;

- ~~(iii)~~(iv) give directions or assistance as to the sequence of works activities; UAM Contract cl.9.3.7;

**Particulars**

(A) Clause 23.2 First UAM Contract, clause 6 General Terms and Conditions First UAM Contract.

(B) Second UAM Contract cl.9.3.7.

~~(iii)~~(v) vary Contract Works to be undertaken by UAM:

**Particulars**

(A) Clauses 7(a) and (b) of First UAM Contract.

~~(A)~~(B) Second UAM Contract cl.10.2;

(vi) audit UAM's compliance with the requirements of the UAM Contracts;

**Particulars**

(A) Clause 16, First UAM Contract, schedule 7 of First UAM Contract.

(B) Second UAM Contract cl.16; UAM Schedule 1 "Contractor Obligations"; UAM Schedule 2 p.34 "Compliance Auditing";

(vii) stipulate reasonable requirements as to training of personnel engaged by UAM to perform work under the UAM Contracts;

**Particulars**

(A) Clause 23.5 First UAM Contract, clause 16 General Terms and Conditions of First UAM Contract.

~~(C)~~(B) Second UAM Schedule p.26 (of 54) "Training";

(viii) direct that UAM equipment and vehicles used for work under the UAM Contracts bear SPIAusnet signage:

**Particulars**

Second UAM Contract Schedule 1 p.28 "SPIAusnet Signage";

(ix) access, and require UAM to have, modify or comply with, UAM's quality assurance plan:

**Particulars**

(A) Clause 24 of the General Terms and Conditions of the First UAM Contract.

~~(D)~~(B) Second UAM Contract cl.8.4; UAM Schedule 6 cl.1;

(b) in the premises set out in (a) above, SPIAusnet at all material times:

(i) had the right to direct UAM; and

(ii) did direct UAM;

as to UAM's performance of works in connection with each of the matters set out in paragraphs 53(a) to (f) inclusive above;

### Particulars

So far as the plaintiff is able to say prior to discovery, SPIAusnet from time to time:

- (A) received from UAM or its training provider details as to, and expressly or implicitly approved, the course content of asset inspection training to be provided to UAM employees or contractors ("**UAM personnel**") proposed to be engaged in work under the UAM Contracts;
- (B) was asked by UAM to approve and did approve the UAM personnel to be engaged on work under the UAM Contracts;
- (C) issued works orders for the undertaking of works, including asset inspections, by UAM pursuant to the UAM Contracts;
- (D) audited UAM's compliance with its obligations under the UAM Contracts;
- (E) issued audit results and defects notices to UAM and required UAM to rectify works not completed to SPIAusnet's satisfaction.

Further particulars may be provided following the completion of discovery.

- (c) at all material times SPIAusnet relied on or adopted the works done by UAM under the UAM Contracts as scheduled inspections (as defined in paragraph 6(g) above) in discharge of SPIAusnet's obligations under its ESMS; and
- (d) in the premises in (a) to (c) inclusive, UAM in discharging its responsibilities or exercising its capacity of control over the matters set out in paragraphs 53(a) to (f) above did so within its actual or ostensible authority as agent of SPIAusnet for the purposes of the SPIAusnet Statutory Duty, further or alternatively the SPIAusnet General Duties; and
- (e) in the premises, the conduct of UAM alleged above was conduct by it as agent for SPIAusnet within the meaning of section 24AP(b) of the Wrongs Act; and
- (f) in the premises in (e), nothing in Part IVAA of the Wrongs Act affects SPIAusnet's liability as principal for the negligence of its agent UAM alleged above.

68. Further and in the alternative to paragraph 67, the liabilities of SPIAusnet arising from the breaches of the SPIAusnet Statutory Duty alleged in paragraphs 8 to 20 above are:

- (a) liabilities arising from the operation of the ES Act and to the extent the ES Act imposes the SPIAusnet Statutory Duty on SPIAusnet as network operator, within the meaning of section 24AP(e) of the Wrongs Act; and
- (b) not affected by Part IVAA of the Wrongs Act.

69. In the premises set out in paragraph 67 and 68, so far as the claims of the claimants against UAM are claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care (“**ELPD reasonable care claims**”):

- (a) SPIAusnet is liable for the economic loss or property damage; alternatively
- (b) UAM is a person who with SPIAusnet is one of two or more persons whose acts or omissions caused the claimants’ economic loss and property damage the subject of the ELPD reasonable care claims within the meaning of Part IVAA of the Wrongs Act, and accordingly liable in proportion to its responsibility; alternatively
- (c) UAM is liable for the economic loss or property damage.

70. Further and in the alternative to the claims against SPIAusnet set out above, the plaintiff on his own behalf and on behalf of each of the group members defined in paragraphs 4(a), (b) and (c), above (“**personal injury claimants**”) claims against the Third, Fourth and Fifth Defendants as follows.

## SECTION G – FUEL MANAGEMENT BY DEPI SECRETARY

71. Further and in the alternative to the claims against SPIAusnet and UAM set out above, by reason of Part IVAA of the Wrongs Act the plaintiff on his own behalf and on behalf of group members adopts SPIAusnet's claims against the Third Defendant (“**DEPI**”) as follows.
72. At all relevant times the DEPI Secretary was a body corporate capable of being sued in its corporate name.

### Particulars

- (i) Under section 3 of the *Forests Act 1958* (Vic) (“**the Forests Act**”), "Secretary" means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987* (Vic) (“**the Conservation, Forests and Lands Act**”).
- (ii) Under sub-section 6(1) of that Part, the person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004* (Vic)) of the Department of Sustainability and Environment (“**DSE**”) and the successors in office of that person are a body corporate under the name "Secretary to the Department of Sustainability and Environment."
- (iii) Further, under sub-section 6(2) of that Part (inter alia), the Secretary may sue and be sued in its corporate name.
- (iv) Under Schedule 1 of the *Public Sector Reform (Miscellaneous Amendments) Act 1998* (Vic), in section 6 of the Conservation, Forests and Lands Act for "Department of Conservation and Natural Resources" (wherever occurring) was substituted "Department of Sustainability and Environment".
- (v) By notice published in the Victoria Government Gazette on 9 April 2013, the Department of Sustainability and Environment changed its name to the Department of Environment and Primary Industries (DEPI).

### **Statutory duties to the claimants**

73. At all relevant times. the DEPI Secretary was statutorily required to carry out proper and sufficient work for the prevention and suppression of fire in every

State forest and national park and on all protected public land (**the First DEPI Fire Duty**).

#### Particulars

- (i) Sub-section 62(2) of the Forests Act.
- (ii) A statutory duty in substantially the same terms as the First DEPI Fire Duty was initially imposed on the Forests Commission after the extensive and devastating wildfires in Victoria in 1939. The First DEPI Fire Duty was subsequently assumed, by operation of the provision referred to in subparagraph (i) above, by the DEPI Secretary.
- (iii) Recognition of the statutory duty is referred to on p1-2 of the DEPI's Fire Management Manual (version 8.1) - Fire Suppression (the DEPI Fire Management Manual) published by the DEPI in 2006. a copy of which may be inspected at the offices of the solicitors for ~~Ausnet~~<sup>SP Aus</sup> ~~Net~~ by appointment.

74. At all material times, the DEPI Secretary was statutorily required out of the moneys available for the purpose to make provision for plans, work and plant for the prevention and suppression of fires within fire protected areas being State forests, national parks and protected public land.

#### Particulars

Sub-section 20(b) of the Forests Act.

75. At all material times, a large proportion of the area to the north/north east, east and south east of Murrindindi comprised State forests, national parks and/or protected public land (**the Forested Area**) and townships and/or communities and/or residential homes adjacent or proximate to the Forested Area (collectively **Communities**).

#### Particulars

- (i) The Forested Area included various State forests, including the Toolangi State forest, the Black Range State forest, Marysville State forest, Upper Big River State forest, the Yarra Ranges National Park and Cathedral Range State Park.

- (ii) The Forested Area included the Yarra Ranges National Park comprising all those pieces or parcels of land containing 77 190 hectares, more or less, situate in the Parishes of Brimbonga, Bullung, Buxton, Coornburt, Glenwatts, Gracedale, Granton, Manango, Monda, Narbethong, Noojee, St. Clair, Steavenson, Taponga, Toorongu, Torbreck, Youarrabuck and Yuonga, Counties of Anglesey, Buln Buln, Evelyn, Tanjil and Wonnangatta being the land delineated and coloured pink or coloured blue excepting the roads shown as excluded in the plans lodged in the Central Plan Office and numbered N.P. 102A/2 and N.P. 102B/2 (the **Yarra Ranges National Park**).
- (iii) The adjacent or proximate Communities as aforesaid included the townships of Narbethong, Marysville, Buxton, Taggerty and Rubicon.

76. At all material times, the Forested Area comprised State forests and national parks under sub-section 62(2) of the Forests Act which were State forests and national parks to which the First DEPI Fire Duty applied.

#### **Particulars**

- (i) The State forests within the Forested Area were State forests under the Forests Act, being either reserved forests under sub-section 42(1) of, and Schedule Two to, the Forests Act, and/or protected forests within the meaning of the Forests Act.
- (ii) The Toolangi State forest, the Black Range State forest, the Marysville State forest and the Upper Big River State forest, are State forests as referred to in the preceding subparagraph hereof.
- (iii) By section 3 of the Forests Act, a national park for the purposes of sub-section 62(2) of the Forests Act means land that is or is part of a park within the meaning of the *National Parks Act 1975 (Vic)* ("the **National Parks Act**").
- (iv) By section 3 and sub-section 17(1) of, and Part 39 of Schedule 2 to, the National Parks Act, the Cathedral Range State Park and the Yarra Ranges National Park are parks under the National Parks Act.

77. The First DEPI Fire Duty imposed on the DEPI Secretary a duty to carry out proper and sufficient planned works within the Forested Area to reduce the fuel hazard within the Forested Area by, among other things, undertaking planned burning (**planned burning**).

### Particulars

The obligation arising from the duty as aforesaid is inferred from a proper construction of sub-section 62(2) of the Forests Act.

78. The First DEPI Fire Duty was owed by the DEPI Secretary to the claimants.

### Particulars

- (i) The object of protecting the claimants is to be inferred from the proper construction of sub-section 62(2) of the Forests Act.
- (ii) The plaintiff relies on the proper construction of the provision read in the context of the Act as a whole and the objectives discerned from the provisions thereof and the extrinsic material produced at the time of its enactment. Those extrinsic materials include the following.
- (iii) The 1939 Report of the Royal Commission to Inquire into the Causes of and Measures Taken to Prevent the Bush Fires of January 1939, and to Protect Life and Property and The Measures to be taken to Prevent Bush Fires in Victoria and to Protect Life and Property in the Event of Future Bush Fires by L.E.B Stretton (the **Stretton Report**).
- (iv) Chapter V of the Stretton Report is headed "The measures which are necessary or desirable to be taken by any and what corporations, persons or bodies to protect life and private and public property in the event of bush fires burning in Victoria."
- (v) Within Chapter V of the Stretton Report it is stated that "The greater part of what is to be discussed under the title to this chapter may be conveniently set forth in relation to the part which the Forests Commission ought to take in respect of the matters falling under this title.....Control of all Forests. - The Forests Commission should be placed in complete control for fire prevention and suppression purposes, of all forests. except in those areas in respect of which it has been recommended that they should be exempted from control by any other department."
- (vi) The Stretton Report was the basis for the introduction of the *Forests Act 1939 (Vic)* to be read and construed as one with the *Forests Act 1928 (Vic)*. Section 4 of the *Forests Act 1939 (Vic)* provided that "It shall be the duty of the Commission to carry out in every State forest proper and sufficient work for fire prevention and control."
- (vii) Section 4 as aforesaid was the predecessor provision to sub-section 62(2) of the Forests Act.
- (viii) The Victorian Parliamentary debate of the Forests Bill 1939 discloses that the Bill was directed at the preservation of life and property including by means of fire prevention



and control in State forests, consistent with the Stretton Report as aforesaid.

- (ix) During the course of the 1939 debate of the Forests Bill 1939 it was observed that:" I [Member Everard] commend the Minister on his Bill, but I would direct attention to the fact that many national parks are a grave source of fire danger. There is a national park at Kinglake. It is under the control of a committee of management, which, however has no money to spend on clearing the scrub, and so reducing the danger of fire to the neighbouring settlers. Several fires have originated in that area, and have done damage to orchard country. The committees managing national parks should be provided with money to enable them to protect State assets, as well as settlers' holdings, by taking adequate precautions against the outbreak of fire. As it is. the land owners are in fear and trembling as to whether there will be a conflagration in those parks which may spread to their own properties.": p2,242 of Hansard, 23 November 1939.

79. Further, at all relevant times, the DEPI Secretary was statutorily required to ensure that proper and sufficient measures were taken to protect the national parks within the Forested Area (the **National Parks Section of the Forested Area**) from injury by fire (the **Second DEPI Fire Duty**).

#### **Particulars**

- i. Sub-section 17(2)(b) of the National Parks Act.
  - ii. By section 3 and Part 2 of the Conservation, Forests and Lands Act, the DEPI Secretary is the relevant Secretary referred to in section 17(2)(b) of the National Parks Act.
  - iii. The relevant national parks within the Forested Area were the Kinglake National Park and the Yarra Ranges National Park.
80. The Second DEPI Fire Duty included an obligation to undertake planned burning in the National Parks Section of the Forested Area.

#### **Particulars**

The obligation arising from the duty as aforesaid is inferred from a proper construction of sub-section 17(2)(b) of the National Parks Act.

81. The Second DEPI Fire Duty was owed to the claimants.

**Particulars**

The object of protecting the class is to be inferred from a proper construction of sub-section 17(2)(b) of the National Parks Act.

***Common Law duty to the claimants***

82. At all relevant times, the DEPI Secretary had a duty to carry out proper and sufficient work for the prevention and suppression of fire in every State forest and national park and on all protected public land (collectively, the **Public Land Area**).

**Particulars**

Sub-section 62(2) of the Forests Act.

83. Further, at all relevant times, the DEPI Secretary was:
- (a) the relevant fire control authority for the Forested Area;
  - (b) statutorily authorised to assign a fire hazard rating of "low" or "high" to any area of land within a fire protected area including the Forested Area.

**Particulars**

- (i) The DEPI Secretary was and is the fire control authority as prescribed by the ES Act.
  - (ii) By section 3 of the Forests Act, the State forests and national parks within the Forested Area were and are fire protected areas.
84. At all material times, the State forests, national parks and protected public land within the Forested Area and any lands within 1.5 kilometres of those forests, parks and land were fire protected areas within the meaning of the Forests Act.

**Particulars**

Sub-section 3(1) of the Forests Act.

85. At all material times, the DEPI Secretary was an authorised officer within the meaning and for the purposes of the Forests Act.

**Particulars**

Sub-sections 3(1) and 83(4) and Schedule 1 of the Conservation, Forests and Lands Act.

86. During the 10 years prior to 7 February 2009, there were successive codes of practice for fire management on public land:

- (a) the *Code of Practice for Fire Management on Public Land*, published by the Victorian Government Department of Conservation and Natural Resources in 1995 (the **1995 Code of Practice**); and
- (b) the updated Code of Practice - For Fire Management on Public Land (Revision no. 1), published by the Victorian Government Department of Sustainability and Environment in January 2006 (the 2006 Code of Practice).

(collectively the **DEPI Codes of Practice**).

**Particulars**

- (i) The 1995 Code of Practice is an approved code of practice in accordance with s 47 of the Conservation, Forests and Lands Act.
- (ii) The 1995 Code of Practice in section 4 defines "Departmental" by reference to the Department of Conservation and Natural Resources or its successors.
- (iii) The 1995 Code of Practice in section 4 defines "Secretary" by reference to the body corporate established by Part 2 of the Conservation, Forests and Lands Act, that is, the Department of Conservation and Natural Resources or its successors.
- (iv) The 2006 Code of Practice was made in accordance with sub-section 31(1) of the Conservation, Forests and Lands Act.
- (v) A copy of the DEPI Codes of Practice is available for inspection at the offices of the plaintiff's solicitors by appointment.

87. At all relevant times, the DEPI Secretary had knowledge and expertise in relation to the prevention and suppression of bushfires in the Public Land Area and the risks and dangers of bushfires in the Public Land Area.

**Particulars**

- (i) The DEPI Codes of Practice provide a framework for fire management, procedure and practice on public land in Victoria.
  - (ii) The 1995 Code of Practice records that much of the Australian continent is dry and fire-prone, the geography, vegetation and climate combine to produce one of the most severe fire environments in the world: 1995 Code of Practice, paragraph 1.
  - (iii) The 2006 Code of Practice records that much of the Australian continent is fire-prone, particularly parts of Victoria where dry, windy summer conditions, combined with electrical storms, lead to frequent fires, which can be difficult to suppress and may cause significant economic damage: 2006 Code of Practice, paragraph 3.
88. Further, at all relevant times, the DEPI Secretary knew or ought reasonably to have known that excessive fuel hazard in the Public Land Area posed a significant bushfire risk.

**Particulars**

- (i) The DEPI is required by the DEPI Codes of Practice to attempt to establish promptly the place of origin and cause of all wild fires on public land: paragraph 104 of the 1995 Code of Practice; paragraph 258 of the 2006 Code of Practice.
  - (ii) Under the DEPI Codes of Practice, the DEPI must, inter alia, consider fuel management on and around sites of known high hazard and/or risk to human life and property on or adjacent to public land and where appropriate implement measures to reduce the possibility of wild fire ignitions: paragraph 109 of the 1995 Code of Practice; paragraph 263 of the 2006 Code of Practice.
89. Further or alternatively, at all material times the DEPI Secretary knew or ought to have known that:
- (a) fire severity depends on topography, weather and fuel conditions;

- (b) fuel is the only factor over which the land manager is able to exercise control;
- (c) fuel management burning is the only practical method of reducing fuel levels over large areas; and
- (d) that the management of fuel hazard in strategic areas reduces the potential for spotting from an advancing wildfire, allows wildfire damage to be moderated and facilitates wildfire control activities.

### **Particulars**

The North East Region Fire Protection Plan (Alexandra and Broadford Fire Districts) (the **Alexandra Fire Protection Plan**), page 29.

- 90. At all material times, the claimants had no authority or ability to carry out any work for the prevention and suppression of fire (including planned burning) in the Public Land Area which comprises each State forest, national park and protected public land within the shaded area on the Murrindindi Bushfire Area Map filed by the plaintiff in this proceeding (the **Murrindindi Fire Area Public Land**).
- 91. In the premises, the claimants were vulnerable to injury from fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities and were dependent for protection against such injury upon the DEPI Secretary to ensure, alternatively to take reasonable care to ensure, that proper and sufficient prescribed burning for the prevention and suppression of fire was carried out within the Murrindindi Fire Area Public Land.
- 92. At all relevant times, the DEPI Secretary and the DEPI had planned burning expertise and experience.

### **Particulars**

- (i) The DEPI Codes of Practice.

- (ii) The DEPI Fire Management Manual – Prescribed Burning (Version 10.1), February 2008.

93. At all relevant times, the DEPI Secretary knew or ought to have known that:
- (a) timely and adequate planned burning in the Murrindindi Fire Area Public Land would lower the impact of a bushfire burning in the Murrindindi Fire Area Public Land Area and therefore reduce the risk of fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities.
  - (b) the effectiveness of planned burning decreases as:
    - (i) burn size and coverage decreases; and
    - (ii) time since last burn (including planned and unplanned burning) increases.
94. Further, the DEPI Secretary was obliged to manage fire and fire related activities on public land for the purpose of protecting human life, assets and other values from the deleterious effects of wildfire or inappropriate fire regimes, and to achieve management objectives, through the definition and application of principles, standards and guidelines, in conjunction with the Victorian community.

#### **Particulars**

- (i) The 1995 Code of Practice, paragraphs 26-30: the 2006 Code of Practice, paragraphs 18–21.
  - (ii) The 1995 Code of Practice, paragraphs 36-56; Chapter 4 of the 2006 Code of Practice, paragraph 247.
  - (iii) The DEPI Codes of Practice apply to all public land in Victoria including the Murrindindi Fire Area Public Land.
95. At all relevant times, the stated purpose of the DEPI Codes of Practice was to promote the efficient, effective integrated and consistent management of fire and fire related activities on public land for the purpose of protecting human life, assets, and other values from the deleterious effects of wildfire or inappropriate fire regimes, and to achieve management objectives, through the definition and

application of principles, standards and guidelines, in conjunction with the Victorian community.

**Particulars**

Paragraph 11 of the 1995 Code of Practice; paragraph 18 of the 2006 Code of Practice.

96. At all relevant times, the DEPI Codes of Practice:
- (a) laid down minimum state-wide standards for fire management on public land in Victoria;
  - (b) required that any plan, instruction, prescription or guideline developed for activities on public land in Victoria be consistent with the relevant Code of Practice;
  - (c) recognised the use of land adjoining public land and the need for the integrated management of risks and impacts between both public and adjoining private land;
  - (d) according to their own terms supported the discharge of the DEPI Secretary's legislative responsibilities including specifically the duty to carry out proper and sufficient work for the prevention and suppression of fire in the Public Land Area under sub-section 62(2) of the Forests Act.

**Particulars**

Paragraphs 1-3, 17-18, 26-30 and 36 of the 1995 Code of Practice; paragraphs 19-21 and 26 of the 2006 Code of Practice.

97. At all relevant times, the DEPI Codes of Practice also contained provisions requiring that fire management plans be prepared for relevant areas including plans for planned burning activity.

**Particulars**

Sections 2.3 and 3.2 of the 1995 Code of Practice; section 2.2 of the 2006 Code of Practice.

98. At all relevant times, the DEPI Codes of Practice stated that planned burning is used in Victoria, inter alia, to reduce fuel levels for fire protection.

**Particulars**

Section 3 of the 1995 Code of Practice, paragraph 133; chapter 3 of the 2006 Code of Practice, paragraph 183.

99. At all relevant times, under the DEPI Codes of Practice, in respect of the Public Land Area, and therefore in respect of the Murrindindi Fire Area Public Land, planned burning was only permitted to be undertaken in accordance with an approved burn plan.

**Particulars**

Section 3 of the 1995 Code of Practice, paragraph 133; chapter 3 of the 2006 Code of Practice, paragraph 197.

100. Under the DEPI Codes of Practice, at all relevant times the DEPI was required to consider within its wildfire prevention operations fuel management on and around sites of known high hazard and/or risk to human life and property on public land.

**Particulars**

Section 2.2.5 of the 1995 Code of Practice, paragraph 109; chapter 4 of the 2006 Code of Practice, paragraph 263.

101. At all relevant times the DEPI Secretary through DEPI established a forest management plan for the Public Land Area within central Victoria and as part of such plan kept detailed records of the characteristics of the Murrindindi Fire Area Public Land including the kinds of trees and the fuel loads.

**Particulars**

- (i) Some of the Murrindindi Fire Area Public Land is within the Central Forest Management Area for the State of Victoria established by the DEPI for forest management, for which the DEPI maintains a Central Highlands Forest Management Plan issued in May 1998 (FMP).



- (ii) It was a stated purpose of the FMP that it conform to all relevant legislation including the Forests Act and the National Parks Act.
- (iii) The FMP records that forests of the Central Highlands are amongst the most fire-prone in the world because of the mountainous terrain, flammable vegetation and hot Summer winds: section 8.2 of the FMP.

The FMP also records that a key element of relevant regional fire protection plans is a fuel-management strategy based on five zones, and with fuel reduction burns to be undertaken in three of the strategically located zones to maintain fuel to defined hazard levels so as to ensure that fires that start within, or spread into, fuel reduced areas, burn at a lower intensity and are therefore easier to suppress than those in areas carrying higher fuel levels: section 8.2 of the FMP.

102. In view of the characteristics of the Murrindindi Fire Area Public Land including the ecological vegetation classes and fuel hazard, the DEPI Secretary knew or ought to have known that it was necessary to conduct planned burning in or through the Murrindindi Fire Area Public Land in order to reduce the risk of fire burning out of the Murrindindi Fire Area Public Land and into and through the Communities.

#### **Particulars**

- (i) The DEPI Secretary published a fire protection plan for an area which included the Murrindindi Fire Area Public Land (being the Alexandra Fire Protection Plan).
- (ii) The Alexandra Fire Protection Plan applied, inter alia, to the Toolangi State forest, the Black Range State forest, Marysville State forest, Upper Big River State forest, the Yarra Ranges National Park and Cathedral Range State.
- (iii) The DEPI Secretary also published a fire operations plan for an area which included the Murrindindi Fire Area Public Land (the **Fire Operations Plan**).
- (iv) At all relevant times, the Fire Operations Plan applied, inter alia, to the Toolangi State forest, the Black Range State forest, Marysville State forest, Upper Big River State forest, the Yarra Ranges National Park and Cathedral Range State Park.

103. At all relevant times, it was the intention of the DEPI Secretary that through the Alexandra Fire Protection Plan and the Fire Operations Plan the objectives under the DEPI Codes of Practice of, inter alia, protecting human life and assets by fire

suppression activities as aforesaid would be achieved in the Broadford Fire District which included the Murrindindi Fire Area Public Land by implementing the fire protection strategies detailed in the Alexandra Fire Protection Plan and the Fire Operations Plan for that district and area.

104. At all relevant times, there were approved burn plans for the Murrindindi Fire Area Public Land as contemplated by the DEPI Codes of Practice and/or the Alexandra Fire Protection Plan and/or the Fire Operations Plan pertaining to the Murrindindi Fire Area Public Land.

#### **Particulars**

A copy of such plans will be provided after discovery and prior to trial.

105. At all relevant times, a major feature of the Alexandra Fire Protection Plan was the classification of all the public land within the area covered by that plan and therefore the Murrindindi Fire Area Public Land into five fuel management zones (**Zones**) having regard, inter alia, to the following considerations:
- (a) the strategic importance of the area to fire protection;
  - (b) the appropriateness of burning (and the alternatives) as a means of fuel management;
  - (c) the natural and developed values on the area being considered;
  - (d) other management objectives for the area;
  - (e) suppression methods most appropriate to the area;
  - (f) the principles of environmental care;
  - (g) information contained in the DEPI's databases and, in particular, the land status, vegetation types, assets to be protected and fire history;

- (h) weather (especially temperature, relative humidity, drought factor, and wind speed) for the district, which provides a fire danger rating and the number of suitable burning days per year;
- (i) overall fuel hazards;
- (j) fire spotting distance, flame height and rates of spread under various forest fire danger indices;
- (k) experience obtained in implementing previous preparedness strategies.

106. At all relevant times, having regard to the matters referred to in the preceding paragraph, the DEPI Secretary designated various Zones to apply in the area covered by the Alexandra Fire Protection Plan and therefore the Murrindindi Fire Area Public Land including:

- (a) Zone 1 - Asset protection (includes lives, buildings, fences, stock, regenerating forest, flora and fauna values);
- (b) Zone 2 - Strategic fuel reduced corridors;
- (c) Zone 3 - Broad-area fuel reduced mosaic;
- (d) Zone 4 - Specific flora and fauna management
- (e) Zone 5 - Exclusion of prescribed burning.

#### **Particulars**

The Alexandra Fire Protection Plan, sections 4.2.13.2 - 4.2.13.6.

107. At all material times since 2000 and prior to 7 February 2009, the DEPI Secretary through the DEPI undertook planned burning in the Murrindindi Fire Area Public Land.

108. Further, at all reasonable times the DEPI Secretary knew or ought to have known that a report was published in 2008 dealing with, inter alia, the role of planned burning in relation to bushfire risk in the State of Victoria, following the Victorian Government's establishment of an *Inquiry into the Impact of Public Land Management Practices on Bushfires in Victoria*, in which report:

(a) the following findings of fact (inter alia were made):

- (i) there was a need for an increase in the extent and frequency of prescribed burning in catchment areas to mitigate the risks associated with future bushfires;

**Particulars**

Finding 2.3 of the Inquiry.

- (ii) the scale and intensity of the 2002/03 and 2006/07 bushfires in Victoria were the result of inappropriate fire regimes, and in particular, of an insufficient level of landscape-scale planned burning;

**Particulars**

Finding 3.2 of the Inquiry.

- (iii) previous land management practices, in particular an insufficient level of planned burning at a landscape-scale contributed to the scale and intensity of the 2002/03 and 2006/07 bushfires;

**Particulars**

Finding 3.5 of the Inquiry.

(b) as a consequence, the following recommendations, inter alia, were made:

- (i) that in order to enhance the protection of community and ecological assets, the DEPI increase its annual planned burning target from 130,000 hectares to 385,000 hectares, which should be a rolling target, and with any shortfalls to be made up in subsequent years;

**Particulars**

Recommendation 2.2 of the Inquiry.

- (ii) that a comprehensive review of the effectiveness of the increased [planned] burning target in meeting, inter alia, bushfire suppression needs, should be conducted every three years.

**Particulars**

Recommendation 2.3 of the Inquiry.

109. In or about June 2008, the DEPI Secretary developed a Living with Fire - Victoria's Bushfire Strategy document which recognized, inter alia, that high fuel loads due to decades of ineffective fire suppression had significantly raised the risk of bushfire threat, and that a key theme in the strategy was to significantly increase the amount of planned burning across Victoria to reduce fuel loads.

**Particulars**

A copy of the *Living with Fire - Victoria's Bushfire Strategy* document is available for inspection at the offices of the plaintiff's solicitors.

110. Further, in or around 2008, the DEPI Secretary developed a corporate plan for 2008-11 which recognised the need for increased planned burning by prescribing an increase to the planned burning target to 4-6% of public land in contrast with the then Treasury funded measure of only 1.7% of total public land.

**Particulars**

The DEPI corporate plan for 2008-11. A copy of the plan is available for inspection at the offices of the plaintiff's solicitors.

111. At all material times prior to on or about 7 February 2009, the three year rolling average for area burnt of public land in Victoria as planned burning by the DEPI was less than 150,000 hectares representing less than 1.9% of the total public land across Victoria.

112. In the period which was several months prior to 7 February 2009, there were excessive fuel loads and dryness in areas within the Murrindindi Fire Area Public Land.

113. Further, at all relevant times it was reasonably foreseeable to the DEPI Secretary that:

- (a) a discharge of electricity from the powerline could cause ignition of flammable material in the vicinity of the discharge;
- (b) such ignition could produce a fire which might spread over a wide geographic area, depending on inter alia wind direction and velocity;
- (c) such fire could enter the Murrindindi Fire Area Public Land;
- (d) if planned burning was not undertaken within the Murrindindi Fire Area Public Land in a timely and adequate way the risk of the fire in the Murrindindi Fire Area Public Land burning out of the Murrindindi Fire Area Public Land and into and through the Communities would be increased;
- (e) in the event of a fire the absence of proper and sufficient planned burning might cause death or injury to persons and loss of or damage to property within the fire area and consequential losses including economic losses;
- (f) such fire or its consequences could:
  - (i) disrupt or impair the income-earning activities of persons residing or having real or personal property located carrying on business in the fire area or affected areas; or
  - (ii) impede the use or amenity of real or personal property located in the fire area or affected areas; or
  - (iii) reduce the value of real or personal property or businesses located in the fire area or affected areas; or
  - ~~(iii)~~(iv) reduce the value of businesses owned by persons residing in or having real or personal property located in the fire area;

and thereby cause economic loss to those persons or the owners of those properties or businesses.

- (g) the risks referred to in paragraphs (a) to (f) (collectively the **DEPI risks**) were greater during periods of high or extreme bushfire risk.

114. At all material times, the claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimize the DEPI risks;
- (b) were vulnerable to the impact of the DEPI risks;
- (c) consequently, were to a material degree dependent for the protection against the DEPI risks upon the DEPI Secretary to ensure, alternatively to take reasonable care to ensure, that proper and sufficient planned burning for the prevention and suppression of fire was carried out in the Murrindindi Fire Area Public Land.

115. In the premises, at all material times the DEPI Secretary owed to the claimants a duty to ensure, alternatively to take reasonable care to ensure, that proper and sufficient planned burning for the prevention and suppression of fire was carried out in a timely and/or efficient manner for the Murrindindi Fire Area Public Land (the **DEPI Duty**).

***Breach of duty to the Claimants***

116. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached:

- (a) the First DEPI Fire Duty; and/or
- (b) the Second DEPI Fire Duty; and/or

- (c) the DEPI Duty.

### **Particulars**

- (i) During the period of 1 July 2000 to 6 February 2009 (the Relevant Period), the DEPI Secretary materially and unreasonably failed to implement the fire protection strategies detailed in the Alexandra Fire Protection Plan within the Murrindindi Fire Area Public Land.
- (ii) Further to (i), the quantity of planned burning carried out by the DEPI Secretary within the Murrindindi Fire Area Public Land was materially and unreasonably inadequate. Notwithstanding that the average annual area specified in the Alexandra Fire Protection Plan for treatment by planned burning in relation to land classified as zone 1 (asset protection), zone 2 (strategic fuel reduced corridors) and zone 3 (broad area fuel reduced mosaic) was as follows:
  - (a) Zone 1 – approximately 20% per annum;
  - (b) Zone 2 – approximately 12.5% per annum; and
  - (c) Zone 3 – approximately 5 to 10% per annum;
- (iii) in fact the quantity of planned burning carried out by the DEPI Secretary within the Murrindindi Fire Area Public Land during the Relevant Period in each of zones 1, 2 and 3 was materially and unreasonably less than the respective percentage quantity referred to.
- (iv) Further to (i), the quantity and quality of the planned burns carried out by the DEPI Secretary was materially and unreasonably inadequate in that the DEPI Secretary did not carry out planned burning to ensure that the overall fuel hazard during the Relevant Period on land within the Murrindindi Fire Area Public Land:
  - (a) classified as zone 1, did not exceed Moderate;
  - (b) classified as zone 2, did not exceed High; and
  - (c) classified as zone 3, did not exceed High.
- (v) Immediately prior to the ignition of the Murrindindi Fire, the overall fuel hazard within the Murrindindi Fire Area Public Land:
  - (a) on land classified as zone 1, exceeded Moderate;
  - (b) on land classified as zone 2, exceeded High; and
  - (c) on land classified as zone 3, exceeded High.

### ***Causation***

117. By reason of the breaches of:

- (a) the First DEPI Fire Duty; and/or



(b) the Second DEPI Fire Duty; and/or

(c) the DEPI Duty

the Murrindindi Fire:

(i) had very high intensity and speed; and

(ii) spread to the places evidenced by the red shading on the Murrindindi Bushfire Area Map filed by the plaintiff in this proceeding.

118. Had the DEPI Secretary not breached:

(a) the First DEPI Fire Duty; and/or

(b) the Second DEPI Fire Duty; and/or

(c) the DEPI Duty,

the fire which became the Murrindindi Fire would have:

(i) had reduced intensity and speed; and

(ii) burnt a much smaller area.

119. The Murrindindi Fire was a natural and foreseeable consequence of the breaches of duty as aforesaid alleged by the DEPI Secretary, in the preceding paragraphs.

***Damage***

120. Further or in the alternative to paragraph 40 (regarding ~~SP~~Ausnet), further or alternatively paragraph 69 (regarding ~~SP~~Ausnet and UAM), by reason of the breaches by the DEPI Secretary of:

(a) the First DEPI Fire Duty; and/or

(b) the Second DEPI Fire Duty; and/or

(c) the DEPI Duty

the claimants suffered loss or damage.

121. By reason of the matters set out in:

- (a) the preceding paragraph – the DEPI secretary is liable for the claimant’s loss and damage;  
  
further or alternatively,
- (b) (so far as the claimants make ELPD claims in an action for damages arising out of a failure to take reasonable care) paragraph 69 and the preceding paragraph – DEPI Secretary, together with ~~SPIAusnet~~, UAM, is together with one or more other persons a person whose acts or omissions caused the claimants’ loss or damage, within the meaning of Part IVAA of the Wrongs Act, and accordingly liable in proportion to its responsibility.

## **SECTION H - FAILURE TO WARN – VICTORIA POLICE (“POLICE”)**

### ***Bases upon which State is sued***

122. The State of Victoria (“**the State**”):

- (a) pursuant to section 23(1)(b) of the *Crown Proceedings Act 1958* (Vic) is liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him; and
- (b) pursuant to section 123(2) of the *Police Regulation Act 1958* (Vic) is liable for anything necessarily or reasonably done or omitted to be done in good faith by a member of the force as defined in section 3 of the *Police Regulation Act 1958* (Vic) (“**Victoria Police**”) in the course of his or her duty as a member of the Victoria Police.

***Statutory Powers, Functions and Duties of State Servants and Agents***

123. At all relevant times, pursuant to section 5 of the Police Regulation Act, the Chief Commissioner of Police (“the **Chief Commissioner**”) had the superintendence and control of the Victoria Police and all officers of police had superintendence and control of that portion of the Victoria Police which was placed under their charge subject to the authority conferred upon the Chief Commissioner.
124. At all relevant times, pursuant to section 6 of the Police Regulation Act, anything which the Chief Commissioner was authorised or required to do could be done by a Deputy Commissioner.
125. At all relevant times, the *Emergency Management Act 1986* (Vic) (“the **EMA**”) was in force in Victoria and, pursuant to section 4A of the EMA, the objectives of the EMA were ensuring that the following components of emergency management (defined in section 4 as the organisation and management of resources for dealing with all aspects of emergencies) were organised within a structure which facilitated planning, preparedness, operational co-ordination and community participation:
- (a) prevention, being the elimination or reduction of the incidence or severity of emergencies and the mitigation of their effects; and
  - (b) response, being the combating of emergencies and the provision of rescue and immediate relief services.
126. At all relevant times, section 4 of the EMA defined an “emergency” as an emergency due to the actual or imminent occurrence of an event which in any way endangered or threatened to endanger the safety or health of any person in Victoria or which destroyed or damaged, or threatened to destroy or damage, any

property in Victoria or endangered or threatened to endanger the environment or an element of the environment in Victoria, including a fire.

127. At all relevant times, pursuant to section 5 of the EMA, the Minister for Police and Emergency Services was the Co-ordinator in Chief of Emergency Management for the purposes of the EMA and was required to appoint a Deputy Co-ordinator in Chief of Emergency Management who was required to be the Chief Commissioner.
128. At all relevant times, pursuant to section 6 of the EMA, the role of the Co-ordinator in Chief was to ensure that adequate emergency management measures were taken by government agencies and co-ordinate the activities of government agencies carrying out their statutory functions, powers, duties and responsibilities in taking such measures.
129. At all relevant times, pursuant to section 4 of the EMA, “emergency management” meant the organisation and management of resources for dealing with all aspects of emergencies.
130. At all relevant times, pursuant to section 10(1) of the EMA, the Co-ordinator in Chief was required to arrange for the preparation and review from time to time of a state emergency response plan, to be called DISPLAN, for the co-ordinated response to emergencies by all agencies having roles or responsibilities in relation to the response to emergencies.
131. At all relevant times, pursuant to section 11 of the EMA:
  - (a) the State Co-ordinator of DISPLAN (“**the State Co-ordinator**”) was to be the Chief Commissioner who was to be responsible under DISPLAN for

the co-ordination of the activities of agencies having roles or responsibilities in relation to the response to emergencies; and

- (b) the State Co-ordinator was required to appoint a member of Victoria Police to be a Deputy State Co-ordinator of DISPLAN to assist the State Co-ordinator (“**the Deputy Co-ordinator**”).

132. At all material times, pursuant to section 13 of the EMA, the State Co-ordinator was required to appoint a member of Victoria Police to be a Co-ordinator of DISPLAN for each region and municipal district.

133. At all material times, pursuant to section 15 of the EMA, DISPLAN was required to contain provisions:

- (a) identifying, in relation to each form of emergency specified, the agency primarily responsible for responding to the emergency;
- (b) relating to the co-ordination of the activities of other agencies in support of a responsible agency in the event of an emergency;
- (c) specifying the roles and responsibilities of co-ordinators appointed under section 13; and
- (d) defining regions for the purposes of section 13.

134. At all material times, pursuant to section 17 of the EMA, as soon as practicable after DISPLAN was prepared or reviewed, the Co-ordinator in Chief was required to publish DISPLAN or details of the results of the review (as the case required) in such manner as the Co-ordinator in Chief determined and to provide a copy of DISPLAN or the results of the review (as the case required) to every agency to which DISPLAN applied.

135. At all relevant times, the agencies to which DISPLAN applied included the CFA and the DEPI, which government agencies were “agencies” within the meaning of section 4(1) of the EMA.

***Emergency Management Manual and DISPLAN***

136. In about January 2005, the Minister for Police and Emergency Services in his capacity as Co-ordinator in Chief of Emergency Management published the Emergency Management Manual of the State of Victoria (“**the EM Manual**”).
137. Part 3 of the EM Manual comprised DISPLAN and was published pursuant to section 10 of the EMA.
138. Pursuant to DISPLAN, each of the emergency response co-ordinators referred to in DISPLAN (which included those appointees required under section 13 of the EMA) (“**Emergency Response Co-ordinators**”) were responsible for ensuring the co-ordination of the activities of agencies having roles or responsibilities in response to emergencies, including the CFA and the DEPI.

**Particulars**

EM Manual, Page 3-5.

139. Pursuant to DISPLAN, each of the Emergency Response Co-ordinators had principal roles which included ensuring that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency directly or through the media.

**Particulars**

EM Manual, Page 3-5.

140. Pursuant to DISPLAN, Emergency Response Co-ordinators included a municipal emergency response co-ordinator (“**MERC**”) appointed by the State Co-ordinator for each municipal district.

**Particulars**

EM Manual, Page 3-6.

141. Pursuant to DISPLAN, Emergency Response Co-ordinators included a divisional emergency response co-ordinator (“**DERC**”), being a commissioned officer of police appointed by the State Co-ordinator for each municipal district.

**Particulars**

EM Manual, Page 3-6.

142. Pursuant to DISPLAN, the roles, responsibilities and duties of each MERC included obtaining and forwarding regular advice to the DERC regarding the potential of an emergency which was not under substantial control by the relevant control agency.

**Particulars**

EM Manual, Page 3-6.

143. Pursuant to DISPLAN, the roles, responsibilities and duties of each DERC included obtaining and forwarding regular advice regarding the potential of an emergency which was not under substantial control by the relevant control agency and to ensure that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency, the need for evacuation and other public information.

**Particulars**

EM Manual, Page 3-7.

144. Pursuant to DISPLAN, each Emergency Response Co-ordinator was required, in order to ensure that their role was properly performed, to consider objectives

which included bringing relevant matters to the notice of appropriate agencies for action.

**Particulars**

EM Manual, Page 3-8.

145. Pursuant to DISPLAN, State Emergency Response Co-ordination Centres (“**SERCC**”), Divisional Emergency Response Co-ordination Centres (“**DERCC**”) and Municipal Emergency Response Co-ordination Centres (“**MERCC**”) were to be the locations at which Emergency Response Co-ordinators received, collated and disseminated intelligence and co-ordinated the provision of resources and conducted operations ancillary to an emergency operations centre.

**Particulars**

EM Manual, Page 3-8.

146. Pursuant to DISPLAN, SERCC was responsible for information collection, analysis of and dissemination of intelligence to emergency response agencies and dissemination of information to the media and general public.

**Particulars**

EM Manual, Page 3-10.

147. Pursuant to DISPLAN:
- (a) warnings were required to be issued where community action was necessary to protect lives, property or the environment;
  - (b) upon the request of a control agency to issue a warning it was the responsibility of an Emergency Response Co-ordinator to ensure that a warning was issued both to agencies and to the potentially affected community;



- (c) the content and format of the warning was required to be simple, arresting, brief, suited to the needs of the affected community and worded in accordance with advice from the control agency;
- (d) warning methods could include loud hailers, telephones, door knocks, radio or television announcements or local community networks;
- (e) for emergencies of major community significance, the warning should be authorised by an Emergency Response Co-ordinator in consultation with the control agency.

**Particulars**

EM Manual, Page 3-10.

148. Pursuant to DISPLAN, the principles required to be kept in mind by Emergency Response Co-ordinators when managing the flow of information to participating agencies, person affected and the wider community during emergency response activities were:
- (a) get information to the people who need it;
  - (b) get the right information to the right people; and
  - (c) make sure the information is timely, user-friendly, accurate, compatible and useful.

**Particulars**

EM Manual, Page 3-11.

149. In accordance with section 15 of the EMA, Parts 7 and 8 of the EM Manual specified the agencies primarily responsible for responding to specified emergencies, provided for the co-ordination of agencies' activities in support of responsible agencies and specified the roles of agencies in the emergency response.
150. Pursuant to Part 7 of the EM Manual:

- (a) a “control agency” was an agency identified in a table therein that was assigned to control the response activities to a specified type of emergency and a “support agency” was an agency which was to provide essential services, personnel or material to assist a control agency or affected persons;
- (b) in respect of fire, the identified control agencies included the CFA and the DEPI;
- (c) in addition to control agencies and support agencies there were a range of generic support services for responses to emergencies identified in a table therein which also identified the agency to which each support service was assigned;
- (d) the primary agency assigned responsibility for the “public warnings” support service was Victoria Police;
- (e) Victoria Police was identified as the agency responsible for the effective co-ordination of resources or services in response to emergencies, the provision of media co-ordination where no other facility existed and the provision of support to other agencies in dissemination of public information.

### **Particulars**

EM Manual, Page 7-4; 7-72.

### ***Relevant servants and agents of the State***

- 151. On 7 February 2009 the State Co-ordinator, pursuant to section 11 of the EMA, was the Chief Commissioner of Police, Christine Nixon.
- 152. On 7 February 2009 the Deputy Co-ordinators appointed by the State Co-ordinator pursuant to section 11(2) of the EMA, were the members of Victoria

Police for the time being holding, acting in or performing the duties of the Deputy Commissioner of Police.

**Particulars**

Instrument of Appointment of Deputy State Co-ordinators of DISPLAN dated 1 August 2005. A copy of the instrument is in the possession of the plaintiff's solicitors and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0095.

153. On 7 February 2009 the member of Victoria Police holding, acting in and performing the duties of Deputy Commissioner of Police and who was, accordingly, the Deputy Co-ordinator was Mr Kieran Walshe, Deputy Commissioner of Police.

**Particulars**

Deputy Commissioner Walshe was appointed by Order in Council from 2 July 2006 until 1 July 2009. A copy of the Order in Council is in the possession of the plaintiff's solicitors and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0127.

154. By 7 February 2009, all of the powers and functions vested in the State Co-ordinator under the EMA had, pursuant to section 12 of the EMA, been delegated to, and were exercisable by, the Deputy Co-ordinator.

**Particulars**

Instrument of Delegation dated 1 August 2005. A copy of the instrument is in the possession of the plaintiff's solicitors and bears the 2009 Victorian Bushfires Royal Commission document identification number VPO.001.081.0096.

155. On 7 February 2009, Stephen Fontana, Assistant Commissioner, Counter Terrorism Co-ordination and Emergency Management Department, was the member of Victoria Police:

- (a) acting in or performing the duties of Deputy Commissioner of Police together with Mr Kieran Walshe and was, accordingly, Deputy Co-ordinator; and/or
- (b) who assumed and performed the duties and responsibilities of the State Co-ordinator under the EM Manual, which duties and responsibilities had purportedly been informally delegated to him.

156. In the premises, on 7 February 2009, the members of Victoria Police responsible for exercising the powers and functions of:

- (a) the State Co-ordinator under the EMA and the EM Manual were:
  - (i) Commissioner of Police, Christine Nixon;
  - (ii) Deputy Commissioner of Police, Kieran Walshe; and
  - (iii) Assistant Commissioner of Police, Stephen Fontana;
- (b) the Deputy Co-ordinator under the EMA and the EM Manual were:
  - (i) Deputy Commissioner of Police, Kieran Walshe; and
  - (ii) Assistant Commissioner of Police, Stephen Fontana.

Hereafter, any reference to “State Co-ordinator” or “Deputy Co-ordinator” is a reference to the persons exercising the responsibilities of those positions on 7 February 2009.

157. On 7 February 2009 senior members of the Victoria Police were assigned, or assumed responsibility for discharging, the responsibilities, duties and functions imposed upon the SERCC under the EM Manual including:

- (a) the responsibility referred to in paragraph 146 above for information collection, analysis and dissemination of intelligence to emergency response agencies and dissemination of information to the media and general public; and

- (b) the responsibility referred to in paragraph 139 above of ensuring that consideration was given to alerting the public to existing and potential dangers arising from a serious emergency directly or through the media.

(“the SER personnel”).

#### **Particulars**

The SER personnel were:

- (a) Superintendent Rod Collins, the State Emergency Response Officer with responsibility for the State Emergency Response Co-ordination Unit within Victoria Police. He was the senior Victoria Police liaison officer in the Integrated Emergency Co-ordination Centre established at Nicholson Street, Melbourne, Victoria (“**IECC**”) on 7 February 2009 until about 5:00pm when he moved to the SERCC. Superintendent Collins in that capacity co-ordinated and chaired most of the meetings of the State Emergency Strategy Team, which took place at 9:00am, 11:00am, 1:00pm, 2:00pm, 3:00pm, 5:00pm, 7:00pm, and 8:00pm. Although in attendance at the IECC through most of 7 February 2009, Superintendent Collins maintained functional control of the SERCC.
- (b) Superintendent Ross McNeil, the acting Chair of the Emergency Management Joint Public Information Committee, who was in attendance at the IECC throughout most of 7 February 2009 and was responsible for monitoring information provided to the public by agencies with responsibilities under the EM Manual.
- (c) Inspector Doug Hocking, the Deputy State Emergency Response Officer on 7 February 2009. Inspector Hocking assumed management of the SERCC under the ultimate control and supervision of Superintendent Collins, who was primarily in the IECC.
- (d) Inspector Bruce Knight who was in attendance at the IECC from about 3:00pm and formally took over the responsibilities of Superintendent Collins at about 5:00pm.

158. On 7 February 2009 the members of Victoria Police with responsibilities, functions and duties under the EM Manual referred to above in relation to the Murrindindi bushfire area were:

- (a) the DERC for the Seymour division; and
- (b) the MERC for the municipal district of Murrindindi;
- (collectively “**the Murrindindi Fire Emergency Response Co-ordinators**”).

**Particulars**

- (a) The DERC for the Seymour division was Peter Billing.
- (b) The MERC for the municipal district within the Seymour division which included any of the Murrindindi bushfire area was David Rowles (Murrindindi MERCC).

***Reasonable foreseeability***

159. Further, prior to on or about 7 February 2009 the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators each knew or ought to have known that fire agencies (the CFA and DEPI had made key announcements about the high risk faced by Victoria for the 2008-9 fire season and had advised on 5 and 6 February 2009 that Victoria was at a very serious risk of wildfire breakouts over the coming days.

**Particulars**

The announcements included the following:

- (i) On 27 October 2008 the Premier, the Minister for Police and Emergency Services, and the Chief Fire Officers of each of the CFA, the DEPI and the Metropolitan Fire and Services Board announced the beginning of the 2008-9 fire season, emphasising the need for preparedness, the significant investment of the State in fire response, and the high risk outlook for the 2008-9 fire season.
- (ii) Further announcements in the week leading up to 7 February 2009 including a prediction for 7 February 2009 that the landscape was pre-disposed to a catastrophic event.

160. Further, at all material times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfires, rather than generalised warnings addressed and referring to the general public, were necessary to enable persons in those areas to take steps to avoid the risk of personal injury and death.

161. Further, at all relevant times the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that:

- (a) if a fire started in an area near Murrindindi, with northerly and/or north westerly winds and high temperatures the fire might head south or south east quickly and spread over a wide geographic area, depending on, inter alia, wind speed and direction and any changes in wind direction and velocity, including the Murrindindi bushfire area ("**fire area**");
- (b) a large proportion of the fire area comprised state forests, national parks and/or protected public land (the "**forested area**") and townships and/or communities and/or residential homes adjacent or proximate to the forested area;
- (c) such fire may cause personal injury and death to persons who were present in the fire area ("**persons at risk**");
- (d) such personal injury and death to persons at risk could cause personal injury loss and damage to the claimants (including, but not limited to, persons at risk) ("**personal injury claimants**");
- (e) the risks referred to in paragraphs (a) to (d) (collectively "**the Murrindindi fire risks**") were greater during periods of high or extreme bushfire risk.

162. Further, at all relevant times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that the provision of warnings of the risk that a bushfire might or would be likely to reach a particular place by a particular time (including within the Murrindindi bushfire area) was necessary to enable members of the public endangered by such risk (including persons at risk) to take steps to avoid the risk so as to avoid personal injury and death.

### Particulars

- (i) The State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known of the establishment by the GFA-DEPI of the Alexandra ICC prior to 7 February 2009.
- (ii) In relation to the wind change risk referred to in paragraph 161 (a) hereof, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire becomes its front after the change. The State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.
- (iii) If so warned, the persons at risk would be able to act so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

### ***Vulnerability of Personal Injury Claimants***

163. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimise the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do; and
- (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the State Co-ordinator, the Deputy Co-ordinator and the Murrindindi Fire Emergency Response Co-ordinators



to ensure, alternatively to take reasonable steps to ensure, that persons at risk would be provided with bushfire warnings.

### ***Duty of Care***

164. In the premises set out in paragraph 122 - 163 above, at all material times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators owed the personal injury claimants a duty to take reasonable care to ensure, that bushfire warnings were given to persons at risk so as to enable the persons at risk to take steps to avoid personal injury loss and damage to themselves and/or their dependants (“the **Victoria Police Duty to Warn**”).

### **Particulars**

The warnings required to be given included where appropriate the provision of the following information:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.
- (viii) Information as to the approximate time (using reasonable estimates) at which the fire might or would be likely to impact particular communities.
- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.
- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

***Commencement and Progress of the Murrindindi Bushfire***

165. At approximately 2:45pm on 7 February 2009 the Murrindindi bushfire commenced near the Murrindindi Sawmill on Wilhelmina Falls Road at Murrindindi.
166. At all relevant times, the commencement, course and conduct of the Murrindindi bushfire and the associated weather conditions included the following:
- (a) fanned by a strong north to north westerly wind, the Murrindindi bushfire spread quickly in a south easterly direction through grass paddocks, a privately owned blue gum plantation and into the Toolangi State Forest where it crowned almost immediately;
  - (b) at this stage, the Murrindindi bushfire was moving at a speed of approximately 11 kilometres per hour and was “very, very intense” with flames up to 20 ~~metres~~meters high;
  - (c) the Murrindindi bushfire burned up the Western flanks of the Black Range, between the Melba and the Maroondah Highways, reaching the top of the Black Range at approximately 4:15pm;
  - (d) from approximately 4:15pm, the Murrindindi bushfire created spot fires and ember attacks up to 15 kilometres ahead of the main head of the fire;
  - (e) from approximately 4:30pm, spot fires ignited in and around Granton, Narbethong, St Fillans, Mt Gordon and the Maroondah Highway;
  - (f) the weather conditions on 7 February 2009 were extreme and included strong north/north westerly winds and temperatures across much of the State of Victoria in excess of 40 degrees with low humidity;
  - (g) during the course of mid to late afternoon a significant wind change occurred across the State of Victoria with the effect that strong winds

which had been travelling from a north westerly direction travelled from a south westerly direction;

- (h) the wind change moved through Narbethong between 6:15pm and 6:45pm and through Marysville between 6:35pm and 7:05pm;
- (i) at the time of the wind change referred to in sub-paragraph (h) moved through Marysville, the Murrindindi bushfire had travelled a distance of approximately 40 kilometres;
- (j) the wind change referred to in sub-paragraph (h) caused the north east flank of the Murrindindi bushfire (approximately 40 kilometres long) to become the main fire front;
- (k) the Murrindindi bushfire began impacting the communities in and around Narbethong at approximately 4:30pm, Marysville at approximately 6:35pm, Buxton at approximately 7:30pm and Taggerty soon after 10:00pm.

### ***Breach of Duty***

167. At all relevant times, the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators knew or ought to have known of the matters in paragraphs 159-162 hereof, or their likelihood of occurring, by virtue of information available from the CFA and/or the DEPI, information available at each relevant MERCC, DERCC, the SERCC, from the information available at the IECC and from information available from police officers present in the Murrindindi fire area.

### **Particulars**

- (i) Such information included the specific information available to the CFA and the DEPI in relation to the Murrindindi bushfire, its path, its intensity, its spread and its speed, during the course of the afternoon of 7 February 2009 and thereafter, including the information referred to in paragraphs 185, 204, 221 and 237.

- (ii) On 5 February 2009 an email was circulated within Victoria Police (including to the Murrindindi Fire Emergency Response Co-ordinators) advising Victoria Police members that Saturday 7 February 2009 would be a day of extreme fire danger.
- (iii) On 6 February 2009 Sergeant David Rowles spoke to Mr Ian Ellett, the Municipal Emergency Response Officer ("**MERO**") for the Murrindindi Shire Council about the need to have the Murrindindi MERCC activated on 7 February 2009 if required. Sergeant David Rowles was the designated MERC in the event that the Murrindindi MERCC was activated.
- (iv) On 7 February 2009 at 3.00pm, Assistant Commissioner Stephen Fontana chaired, and Deputy Commissioner Kieran Walshe and Superintendent Ross McNeil dialled into, a State Emergency Strategy Team meeting at which a briefing was provided in relation to the weather forecast and the predicted wind change, among other things.
- (v) At 3:35pm, Senior Constable Gavin Skerritt, who had called into the Alexandra CFA Group headquarters, was informed by Mr Peter Rice that he was concerned about how the Murrindindi bushfire was developing, that it may impact on "townships down towards Narbethong" and that he should quickly communicate this to Sergeant David Rowles (the MERC).
- (vi) At 4:00pm, the MERCC for the Murrindindi bushfire was activated by Sergeant Rowles upon the direction of Inspector Ross Smith and, at this time, Sergeant Rowles asked Mr Mark Leitinger, one of the Deputy Municipal Emergency Response Officers, to open the Murrindindi MERCC.
- (vii) Throughout 7 February 2009 Sergeant David Rowles obtained information regarding the movement and direction of the Murrindindi fire from David Butterworth, the CFA Liaison Officer at the Murrindindi MERCC.
- (viii) At around 4:00pm Acting Sergeant Ian Thompson requested Leading Senior Constable Brett Tanian to form a road block on the Marysville-Narbethong Road to prevent vehicles from travelling in the direction of the area that the Murrindindi fire was impacting or expected to impact.
- (ix) By 4:10pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the Murrindindi fire had the potential to impact Kinglake and/or Warrandyte.
- (x) By 4:15pm Senior Constable Thompson was aware of a report of the Murrindindi fire and had contacted his wife to ask that she begin preparations to leave their home in Marysville if that became necessary. At approximately 4:15pm the report of the fire was confirmed to Senior Constable Thompson by a Wangaratta D24 operator and separately by Sergeant David Rowles.
- (xi) From at least 4:15pm, Senior Constable Ian Thompson was in the Murrindindi fire area, was aware of the Murrindindi bushfire and communicated with Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, regarding spot fires.

- (xii) At around 4:30pm Senior Constable Thompson:
- (xiii) was informed by Sergeant David Rowles that the Murrindindi fire was spotting at a farm in Narbethong; and
- (xiv) formed the view that the fire posed a serious risk to Marysville given its proximity to Narbethong, the worsening weather conditions and the high fuel loads in the State forest and that he should attempt to warn local residents after attending the spot fire.
- (xv) At around 4:40pm Sergeant David Rowles informed Leading Senior Constable Ian Hamill of the Alexandra Police Station that there was a spot fire at Narbethong.
- (xvi) By 5:00pm:
- (xvii) Senior Constable Collyer made the decision that it was unsafe to stay in Buxton and made arrangements for the evacuation of his family from Buxton to Alexandra.
- (xviii) Senior Constable Harvey was directing traffic from the direction of Marysville and Narbethong to Alexandra.
- (xix) Senior Constable Harvey received reports about the fire south of his location from a number of motorists travelling north along Maroondah Highway from the direction of Narbethong.
- (xx) At around 5:00pm:
- (xxi) Senior Constable Thompson was advised by DEPI members that the fire had crossed Maroondah Highway and into the State forest.
- (xxii) Leading Senior Constable Ken Dwight of the Woods Point Police Station was informed that the wind at Matlock Hill was blowing ninety-five kilometres an hour from the north, north-west.
- (xxiii) At around 5:20pm Leading Senior Constable Ian Hamill and Acting Sergeant Bruce Colville of the Eildon Police Station had established a road block at Taggerty to prevent traffic from going towards Marysville.
- (xxiv) At some time after 5:20pm Sergeant David Rowles:
- (xxv) informed Senior Constable Hamill that a large bushfire had jumped the Maroondah Highway at Narbethong and was approaching Marysville; and
- (xxvi) directed Senior Constable Hamill to go to Marysville to find Senior Constable Thompson as Sergeant Rowles had lost contact with him.
- (xxvii) At around 5:25pm Senior Constable Collyer observed that there were extremely strong gusts of wind and extremely high temperatures at Alexandra and believed that Marysville was at risk from the fire.
- (xxviii) By 5:30pm Senior Constable Thompson at Marysville had observed heavy smoke being carried by strong northerly winds.
- (xxix) By 5:50pm Sergeant David Rowles had received information that the fire was spotting in Marysville.

- (xxx) At 5:55pm, Sergeant Rowles rang Mr Andrew Miller of DEPI who was at the Alexandra Incident Control Centre ("**ICC**") and asked about the evacuation of Marysville.
- (xxxi) From at least 6:15pm, Senior Constables Hamill, Walker and Collyer were in the Murrindindi fire area and were travelling in one or more police vehicles that were equipped with radios that could be used to contact the D24 dispatch operator in Wangaratta.
- (xxxii) At around 6:30pm Senior Constable Hamill saw that the fire had crested the ranges and was travelling at great speed towards Marysville.
- (xxxiii) At around 6:30pm Senior Constable Collyer, Leading Senior Constable Walker and Senior Constable Hamill arrived at Marysville with the intent of warning residents of the fire which they believed was travelling towards Marysville.
- (xxxiv) At 6:33pm Senior Constable Collyer called Senior Constable Ian Thompson and had a conversation about the fire during which Senior Constable Collyer agreed to immediately evacuate Senior Constable Thompson's family from Marysville. Shortly after this conversation Senior Constable Collyer drove to Senior Constable Thompson's house and directed Senior Constable Thompson's wife to leave Marysville immediately because of the risk posed by the approaching fire.
- (xxxv) Between 6:30pm and 6:40pm Senior Constable Collyer, Leading Senior Constable Walker and Senior Constable Hamill drove through the streets of Marysville in a police vehicle with the police lights flashing and siren sounding with the intent of warning residents that the fire was approaching and that residents should immediately leave the town.
- (xxxvi) From approximately 6:30pm, while in the Murrindindi fire area, including Marysville, Buxton and Taggerty, Senior Constable Collyer, Senior Constable Hamill, Leading Senior Constable Walker and Leading Senior Constable Dwight each directed a number of persons they came into contact with to travel north towards Buxton and/or Alexandra because of the risk from the fire.
- (xxxvii) By 7:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the wind change was going through the centre of the State.
- (xxxviii) By 7:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information that the Murrindindi fire was impacting on Melbourne Water catchments.
- (xxxix) By 7:50pm, Sergeant Rowles was aware that Buxton Hotel was on fire and that Taggerty was under threat.
- (xl) At approximately 8:00pm Sergeant Rowles spoke to Senior Constable Andrew Walker regarding the evacuation of Taggerty to Alexandra.
- (xli) By 8:00pm Superintendent Rod Collins and/or other Victoria Police personnel at the IECC had received information about the Murrindindi fire and that Marysville was 'still a concern'.

- (xlii) Throughout the afternoon and evening of 7 February 2009 Sergeant Rowles was in frequent communication with Superintendent Peter Billing (the relevant DERC), and provided verbal situation reports.
- (xliii) Throughout the afternoon and evening of 7 February 2009 Superintendent Billing was in contact with, or was able to contact, the SERCC.
- (xliv) On 7 February 2009:
  - (xlv) Chief Commissioner of Police Christine Nixon was at the IECC from approximately 3pm to 5.55pm:
  - (xlvi) Assistant Commissioner of Police Stephen Fontana was at the IECC from approximately 2:35pm to 6pm:
  - (xlvii) Superintendent Rod Collins was at the IECC until approximately 5pm:
  - (xlviii) Superintendent Ross McNeil was at the IECC from approximately 7.30pm:
  - (xlix) Superintendent Bruce Knight was at the IECC from approximately 3pm; and
- (l) Superintendent Rod Collins was at the SERCC from approximately 5:00pm.
- (li) Throughout the afternoon and evening of 7 February 2009 Superintendent Rod Collins and Superintendent Ross McNeil participated (either in person or via telephone conference) in State Emergency Strategy Team meetings, including meetings at 5pm, 7pm and 8pm, which were also attended (either in person or via telephone conference) by senior members of the CFA and/or DEPI.
- (lii) Throughout the afternoon and evening of 7 February 2009 Superintendent Ross McNeil participated in Emergency Management Joint Public Information Committee ("**EMJPIC**") meetings (either in person or via telephone conference) which were also attended by senior members of the CFA and/or DEPI.
- (liii) On 7 February 2009 Victoria Police Liaison Officers were present at the Alexandra Incident Control Centre (the ICC in control of the Murrindindi fire) and/or the Seymour Regional Emergency Co-ordination Centre.
- (liv) The EM Manual provides that:
  - a. the response roles, responsibilities and duties of a MERC include obtaining and forwarding regular advice to the DERC regarding the potential of an emergency which is not under substantial control by the control agency;
  - b. the response, roles, responsibilities and duties of the DERC include obtaining and forwarding regular advice regarding the potential of an emergency which is not under substantial control by the control agency;
  - c. the SERCC, DERCC and MERCC are the locations where emergency response co-ordinators and liaison officers of

control and support agencies receive, collate and disseminate intelligence; and

- d. when activated, the SERCC is responsible for information collection, analysis of, and dissemination of intelligence to emergency response agencies.
- (lv) By reason of the facts, matters, circumstances and things set out in subparagraphs (i) to (xxxix) above, it is to be inferred that the State Co-ordinator, Deputy Co-ordinator, SER personnel and Murrindindi Fire Emergency Response Co-ordinators knew of the matters in paragraphs 165-166.
- (lvi) By reason of the facts, matters, circumstances and things out in subparagraphs (i) to (xxxix) above, and the matters set out in paragraphs 140 - 146, the State Co-ordinator, Deputy Co-ordinator, SER personnel and Murrindindi Fire Emergency Response Co-ordinators ought to have known of the matters in paragraphs 165-166.

Further particulars may be provided following the completion of discovery and inspection.

168. Before and on 7 February 2009 the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators breached the Victoria Police Duty to Warn in that they failed to take reasonable care to ensure that bushfire warnings were given to persons at risk so as to enable the persons at risk to take steps to avoid personal injury loss and damage to themselves and/or their dependants by reason of the Murrindindi bushfire.

#### **Particulars**

- (a) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning of the kind required as set out in the particulars to paragraph 164.
- (b) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning that the Murrindindi bushfire would be affected by the wind change forecast to occur mid to late afternoon on 7 February 2009 and this would place communities east and north east of the fire front at serious risk of personal injury or death.
- (c) Failing to disseminate or cause to be disseminated to persons at risk any information, advice or warning that the Murrindindi bushfire had reached the top of the Black Range at about 4:15pm and was out of control with spotting and ember attack many kilometres ahead of the fire front.
- (d) Failing to co-ordinate and supervise the activities of the CFA and/or the DEPI so as to ensure that those agencies disseminated or caused to be disseminated to persons at risk the information, advice or warnings referred to in paragraphs (a)-(c) above.



### ***Causation and damage***

169. Further and in the alternative to paragraphs 8 to 121 inclusive above, by reason of the breaches by the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators of the Victoria Police Duty to Warn during the Murrindindi bushfire the personal injury claimants suffered personal injury loss or damage.

### **Particulars**

But for the breaches of duty referred to above, the persons at risk would have taken steps to avoid injury or death.

Particulars of causation in respect of a sample personal injury claimant will be provided prior to the trial of common questions in accordance with directions given by the Court. Particulars of causation in respect of other personal injury claimants will be given following the trial of common questions or otherwise as the Court may direct.

- (a) The house at 2 Hull Road was a hardwood timber cottage built in the sixties. It had a steel roof. It was located within the township of Marysville.
- (b) The plaintiff and her husband were fire conscious. They ensured that they cleared up around 2 Hull Road. In late 2008, the plaintiff had arranged for some trees to be cut back to reduce fire risk to the property. The plaintiff had also arranged for fire retardant to be installed under the outside decking. Woollen carpet, woollen curtains and woollen blankets were inside the house, because they were fire retardant.
- (c) The plaintiff had downloaded information from the CFA website about fires, including the 2004 version of the Living in the Bush booklet.
- (d) The fire plan of the plaintiff and her husband was dependent on the information available to them on the day. The plan was to prepare the property but leave early if based on the information they received they would not be able to manage.
- (e) The plaintiff and her husband were aware in the lead up to 7 February 2009 that 7 February 2009 was predicted to be a hot day.

#### 6-7 February 2009

- (f) At some stage during 6 February 2009, the plaintiff's husband received a call from the CFA. The plaintiff is unable to say what the detail of that call was other than

that her husband Ken was told that 7 February 2009 was going to be a bad day.

- (g) The plaintiff's husband drove from Surrey Hills to Marysville on Friday 6 February 2009, leaving from Surrey Hills at around 3.00pm. He did so to make 2 Hull Road as fire ready as he could. Consistently with the CFA material she had read, the plaintiff had asked her husband to undertake some tasks to ready the property in the event of fire risk. He also took with him various items the plaintiff had packed for him into two backpacks, including a portable radio, batteries, boots, towels and an old blanket.
- (h) After his arrival on 6 February 2009 and throughout the day on 7 February 2009, the plaintiff's husband undertook the tasks directed by the plaintiff. He cleaned up around the property and undertook various preparations including filling the bath and trough, placing wet towels by the doorways, closing the woollen curtains, filling the gutters and hosing the house down.
- (i) Early in the morning of 7 February 2009, the plaintiff's husband attended the CFA in Marysville.
- (j) At around 8.00am on 7 February 2009, the plaintiff's husband called the plaintiff. He told her he had spoken with person(s) from the CFA and they had given him the same advice as the plaintiff the previous day, including what items he should have with him.
- (k) The plaintiff's husband spoke with various neighbours and Marysville residents throughout the course of the day, including during the afternoon.
- (l) It is probable that the plaintiff's husband listened to the radio throughout the course of the day, or at least throughout the course of the afternoon. It is likely that he was listening to the local radio station. The plaintiff is unable to recall the frequency or name of the local radio station.
- (m) It is also possible that the plaintiff's husband accessed the CFA website throughout the course of the day, including after the power went out because he had his laptop and was able to access the internet.
- (n) At around 5.00pm, the plaintiff commenced listening to an ABC radio station, probably 774. She did not hear any mention of the Murrindindi fire. She thereafter listened to the radio consistently throughout the evening of 7 February 2009. The plaintiff recalls mention of fire reaching Marysville in the late evening of 7 February 2009, but not before.
- (o) At around 5.20pm, the plaintiff's husband called the plaintiff. The conversation was a casual one, with each reporting on their respective days. The plaintiff's husband described the tasks he had undertaken around 2 Hull Road, such as hosing down the house. He said that the

power was out and that he had his backpack ready with everything in it. He sounded calm, and gave no indication that he was at risk or expected fire to directly impact him.

- (p) The plaintiff attempted to contact her husband again approximately one hour later but was unable to reach him. She continued to try to contact him by phone throughout the evening but was unsuccessful.
- (q) At around 6.20pm, Ken's son David called him but the plaintiff is unable to say what the content of the conversation was
- (r) From around 6.30pm, the plaintiff accessed the CFA website to check for warnings and had the television on.
- (s) At around 6.46pm, the fire arrived at 2 Hull Road.
- (t) The plaintiff tried to contact her husband throughout Sunday 8 February 2009, but was unable to reach him. By late that day, the plaintiff believed that her husband had probably died in the fire because he could not be contacted and had not contacted her or other members of the family, and because she had heard that most of the Marysville township had been evacuated to Alexandra. The police later confirmed that a body had been located at 2 Hull Road, and later again the Coroner confirmed the plaintiff's husband's death at the property. Had warnings as particularised at paragraph 164 been disseminated, the plaintiff or her husband would have received such warnings directly or through family, friends and/or neighbours where persons becoming aware of the danger would have advised the plaintiff or her husband of that danger.
- (u) Had the plaintiff's husband received the information particularised at paragraph 164, he would have left. Alternatively, he would have telephoned the plaintiff and conveyed the information to her and the plaintiff would then have demanded that her husband leave. In response to such demand, he would have left.
- (v) Had the plaintiff received the information particularised at paragraph 164, she would have telephoned her husband Ken and demanded that he leave, and he would have left.

*Particulars of loss and damage*

- (w) The plaintiff refers to and repeats the particulars of loss and damage set out in paragraph 40 above relating to the plaintiff's personal injuries.

170. The personal injury loss and damage was a natural and foreseeable consequence of the breaches of the Victoria Police Duty to Warn alleged against the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators.

***Duties not delegated***

171. Further:

- (a) the statutory and/or common law duties of the CFA in relation to warnings to the public as referred to below; and/or
- (b) the common law duties of the DEPI in relation to warnings to the public as referred to below; and/or
- (c) the agreement reached between Victoria Police, CFA and DEPI as referred to below that CFA and/or the DEPI would in lieu of the Victoria Police undertake warnings to the public about bushfire risk;

did not abrogate, discharge or delegate the responsibilities of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators pursuant to the Victoria Police Duty to Warn.

172. In the premises, at all relevant times the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators remained liable to the personal injury claimants irrespective of the acts or omissions of CFA and/or DEPI as alleged in paragraph 174 and following below.

***Liability of State***

173. In the premises set out in paragraphs 122 to 172 above, the State is liable for the negligent acts and omissions of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and each of the Murrindindi Fire Emergency Response Co-ordinators alleged above pursuant to:

- (a) section 23(1)(b) of the *Crown Proceedings Act 1958* (Vic);
- (b) section 123(2) of the *Police Regulation Act 1958* (Vic).

## SECTION H – FAILURE TO WARN – CFA

### *First CFA duties*

#### *First CFA statutory duty to personal injury claimants*

174. Further, at all material times, the CFA was a body corporate capable of suing and being sued.

#### **Particulars**

Sub-section 6(2) of the CFA Act.

175. Further, and in the alternative to paragraphs 8 to 173 inclusive above, at all relevant times the CFA was established for the more effective control of the prevention and suppression of fires in the country area of Victoria.

#### **Particulars**

Sub-section 6(1) of the CFA Act.

176. At all relevant times, it was the responsibility of the CFA to provide factual and timely advice and information to members of the Victoria Police with responsibilities in respect of bushfire, namely the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Emergency Response Co-ordinators, so as to enable those members of the Victoria Police to issue or cause to be issued warnings to the public in relation to bushfires for the protection of life and property in accordance with DISPLAN and/or the EM Manual (**the First CFA statutory warnings duty**).

#### **Particulars**

Part 8, page 20 within Appendix 5 of the EM Manual.

177. The First CFA statutory warnings duty was owed by the CFA to the personal injury claimants.

### Particulars

The object of protecting the persons at risk is to be inferred from a proper construction of the EM Manual.

#### *First CFA common law duty to personal injury claimants*

178. Further, at all relevant times, the CFA was aware or ought to have been aware of:
- (a) the duties owed by the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators to the personal injury claimants;
  - (b) the dependency of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators in giving bushfire warnings on the CFA complying with the EM Manual.

### Particulars

At all material times the CFA was aware of the terms of DISPLAN and the EM Manual.

179. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the CFA.

### Particulars

- (i) Prior to 7 February 2009, the CFA had available "all available IMT staff" to be allocated to an ICC when a fire incident demanded.
  - (ii) The plaintiff refers to and repeats paragraph 166.
  - (iii) In relation to the wind change risk within the Murrindindi fire risks, the CFA knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire becomes its front after the change. The CFA knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.
180. Further, at all relevant times, the CFA knew or ought to have known that if the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators gave or caused to be given

bushfire warnings to the public, the public would be likely to regard those warnings and their content as a principal source of information on which to act in order to protect themselves from the risk or danger of a bushfire.

181. At all material times the personal injury claimants:
- (a) had no ability, or no practical and effective ability, to prevent or minimise the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
  - (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
  - (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the CFA to ensure, alternatively to take reasonable steps to ensure, that the CFA would provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators to enable those members of Victoria Police to provide or cause to be provided bushfire warnings to persons at risk.
182. At all relevant times, the CFA knew or ought reasonably to have known that if it provided factual and timely advice and information about a bushfire to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators, this would enable those members of the Victoria Police to provide or cause to be provided bushfire warnings of the risk

that a bushfire might or would be likely to reach a particular place by a particular time and would thereby enable persons at risk to take steps to avoid personal injury or death.

### **Particulars**

If so warned, persons at risk would be able to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

183. In the premises, at all material times, the CFA owed to the personal injury claimants a duty:
- (a) to take reasonable care, by its officers, servants and agents; and
  - (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,
- to ensure, alternatively to take reasonable steps to ensure, that the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators were provided with factual and timely advice and information to enable those members of the Victoria Police to provide or cause to be provided bushfire warnings to persons at risk of the risk that a bushfire might or would be likely to arrive at a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death **(the First CFA common law warnings duty)**.
184. The CFA was required by
- (a) the First CFA statutory warnings duty; and/or
  - (b) the First CFA common law warnings duty
- to provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators so that those members of the Victoria Police could provide or cause to be provided bushfire warnings to persons at risk that a



bushfire might or would be likely to reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

### **Particulars**

The factual and timely advice and information required to be given to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators included advice which would enable those members of the Victoria Police to issue or cause to be provided timely and adequate warnings containing, depending on the particular fire circumstances and risk, where appropriate the provision of the following or parts of the following information to the public:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.
- (viii) Information as to the approximate time (using reasonable estimates) at which the fire might or would be likely to impact particular communities.
- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.
- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

#### *Breach of "first" CFA duty to personal injury claimants*

185. At all relevant times during the afternoon of 7 February 2009, the CFA was aware of the likely direction, path, intensity and spread of the Murrindindi bushfire, taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.

### Particulars

- (i) The DEPI Secretary and the CFA were in partnership as aforesaid so as to ensure a close working relationship for the management of bushfire emergencies.
- (ii) The State Fire Emergency Coordination Plan of 3-6 February 2009 provided a risk management assessment and strategies for the next four days in response to the extreme weather forecasted to occur, and identified the high risk area in the arc from the Otways, Macedon, Kinglake, Marysville, to the Dandenong Ranges.
- (iii) The DEPI Secretary and the CFA had established in consultation with the Victoria Police and other agencies the IECC.
- (iv) At all relevant times, personnel from the CFA, including the Chief Fire Officer, Mr Russell Rees, the CFA State Coordinator, Mr Geoffrey Conway, the CFA State Duty Officer, Mr Gregory Paterson, and a Strategic Planning Officer, Mr Steven Warrington, were present and active participants in the affairs of the IECC in the management of the fire emergencies on 7 February 2009 including in relation to the Murrindindi bushfire.
- (v) By reason of the above matters, the CFA knew or ought to have known what the DEPI knew about the Murrindindi bushfire and its likely direction, path, intensity and spread taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.
- (vi) The Murrindindi bushfire was reported to the CFA at 2:55pm. The fire was observed at the Mt Despair fire tower and the CFA was told by the fire tower operator Mr Colin Hind to “get everything you’ve got to throw at this”.
- (vii) CFA resources were deployed and arrived at the scene of the Murrindindi bushfire at approximately 3:08pm. From that time, Mr Neil Beer, Yea Group Officer, received reports from the CFA crew attending to the Murrindindi bushfire.
- (viii) Fanned by a strong north to north westerly wind, the Murrindindi bushfire spread quickly in a south easterly direction through grass paddocks, a privately owned blue gum plantation and into the Toolangi State Forest where it crowned almost immediately;
- (ix) At this stage, the Murrindindi bushfire moved at a speed of approximately 11 ~~kilometres~~kilometers per hour and was “very, very intense” with flames up to 20 ~~metres~~meters high;
- (x) At approximately 3:30pm the Mt Gordon fire tower operator, Mr Andy Willans, told Ms Pauline Harrow, Communications Officer for the Marysville CFA, that “[t]his fire was huge”, Marysville was under urgent threat and that she should get to the fire station and alert as many people to get out of Marysville as soon as possible.
- (xi) At 3:35pm, Mr Peter Rice of CFA’s Alexandra Group, advised Senior Constable Gavin Skerritt at the Alexandra CFA headquarters that he had concerns about how the Murrindindi bushfire was developing and that it may well impact on “townships down towards Narbethong”.

- (xii) The Murrindindi bushfire burned up the Western flanks of the Black Range reaching the top of the Black range at approximately 4:15pm;
- (xiii) From approximately 4:15pm, the Murrindindi bushfire created spot fires and ember attacks up to 15 kilometres ~~kilometres~~ ahead of the main head of the fire;
- (xiv) From at least 4:00pm, the Murrindindi bushfire was out of control;
- (xv) The CFA was aware that DEPI was monitoring the Murrindindi bushfire from the air from approximately 4:20pm.
- (xvi) From approximately 4:20pm, the communities of Narbethong and Buxton were affected by ember attacks from the Murrindindi bushfire;
- (xvii) At 4:40pm Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, made observations about the location of spot fires and the behaviour of the main fire including that there were numerous spot fires burning in the triangle between Marysville, Buxton and Narbethong and he communicated these to Mr Greg Williamson, Divisional Commander, of the CFA.
- (xviii) Some time between 5:00pm and 5:30pm, the CFA State Coordinator at the IECC, Mr Geoffrey Conway, advised the CFA Chief Fire Officer, Mr Russell Rees, and the DEPI Chief Officer, Mr Ewan Waller, that concerns existed that the Murrindindi fire would impact on Marysville
- (xix) At 5:20pm, the CFA State Duty Officer at the IECC, Mr Gregory Paterson was told by Mr Andrew Graystone, the DEPI State Duty Officer at the IECC, that the Murrindindi mill fire had crossed the Maroondah Highway at Narbethong.
- (xx) At 6:20pm, the CFA was aware that there was a spot fire burning near the intersection of Kings Road and Martin Road in Marysville and by 6:30pm that it was burning approximately 100m from houses.
- (xxi) The weather conditions on 7 February 2009 were extreme and included strong north/north westerly winds and temperatures across much of the State of Victoria in excess of 40 degrees with low humidity;
- (xxii) At all relevant times the CFA knew that after the wind change the north eastern flank of the fire would become its head and therefore the potential of the fire to cause loss and damage would be significantly increased.
- (xxiii) At all relevant times during the afternoon of 7 February 2009, the CFA had access to information stored on the DEPI's fire management and prediction product called 'FireWeb' which was able to and did inform the CFA of the speed, direction, spread, and extent of the Murrindindi bushfire including its forward spotting into communities
- (xxiv) To the CFA's knowledge, there was a material risk that there would be a wind change which would affect the Murrindindi bushfire causing the north eastern flank of the bushfire to become

its front, thereby putting communities east of the bushfire at substantial risk and danger.

- (xxv) The CFA's knowledge as aforesaid included a weather briefing given to it within the IECC on 3 February 2009, which included an 'extended outlook' forecast identified for 7 February 2009 as a day of particular concern. The briefing note stated that "the cold front developing in the Southern Ocean will catch up (sic) will impact on the western half (of) the State during the afternoon. Ahead of the frontal passage strong hot dry north westerly winds will impact on the State, including the east, with central and elevated areas seeing winds above 40km/hr – possibly up to 60-80km/hr, in the morning to early afternoon, before cooler fresh to strong south westerly winds push through, with scattered showers and thunderstorms behind. Fire danger will be extreme in both forest and grass due to the strong winds, low RH and temps again in the 40s. Timing of the change may vary, so areas impacted the most may differ depending on the change timing."
- (xxvi) In the premises, the CFA had not less than four days advance notice of the likely weather conditions on 7 February 2009 and of the likelihood and timing of a change in wind direction.
- (xxvii) Further, on Wednesday, 4 February 2009, the CFA was further briefed by BoM about the likely weather conditions, and the wind change, which would occur on 7 February 2009. The briefing described the weather on that day as an 'Absolute Extreme Fire Weather spike day' and indicated that the wind change would come through across Melbourne at approximately 5:00pm.
- (xxviii) The CFA was further aware of the likely wind change and the timing of it from information provided to it by the BoM from on or about 12:00pm on 7 February 2009. The CFA works in conjunction with the BoM to capture and assess fire weather information, which is provided to the CFA by BoM according to the Australian Government Bureau of Meteorology Fire Weather Directive (January 2006). It was at all material times the practice of the BoM that during a fire season the BoM would provide staffing to operate a routine fire weather forecasting shift, with real time fire weather matters being communicated between the Victorian Severe Weather section of BoM on the one hand, and, inter alia, the State Duty Officers of CFA on the other. At all relevant times, the BoM also administered a registered user web page which provided current data for fire management personnel within the CFA. On days when a significant wind change is being forecast, a wind change chart displaying the current and forecast positions of the change would be and was prepared by the BoM, updated every three hours, and made available electronically to the CFA.
- (xxix) To support the CFA, for the 2007-08 fire season, the BoM had placed a meteorologist in the then emergency co-ordination centre for that fire season, and again in 2008-9 in the IECC, who provided information to the CFA during the afternoon of 7 February 2009 in relation to weather conditions, including wind direction and the likely changes in wind and the timing of such change.
- (xxx) Further, during the afternoon of 7 February 2009, the CFA received advice from the South Australian Country Fire Service

about weather conditions and the progress of the wind change in South Australia, and the movement of the front was continually monitored by the CFA.

- (xxxix) In the premises, at all material times after 12:00pm on 7 February 2009, the CFA was aware from information it had received from the BoM and other sources that the predominant north/north westerly wind blowing across Victoria would swing to become a south westerly some time between 3:00pm – 6:00pm.
- (xxxii) Wind change forecasts were issued to the CFA (within the IECC) at 12:00pm, 1:50pm, 4:30pm, and 6:30pm on 7 February 2009.
- (xxxiii) The potential effect of the south westerly change on fires was appreciated by the CFA at the IECC including as to the dangers posed by the change to communities. A proposed media release was prepared within the IECC and signed by Russell Rees the then Chief Fire Officer of the CFA at 6:09pm. It referred to erratic winds accompanying the change and the potential for unpredictable fire behaviour. The media release was never released to the public.
- (xxxiv) In the premises, the CFA knew that accurately tracking and monitoring of the fire, forecasting/predicting its movement, and assessing the likely timing of the wind change, was vital in being able to assess the potential impact of the fire and the risk and danger posed by it to persons at risk.

186. At all relevant times prior to and on 7 February 2009, the CFA breached:

- (a) the First CFA statutory warnings duty; and/or
- (b) the First CFA common law warnings duty

by not providing factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators to enable those members of Victoria Police to issue or cause to be issued bushfire warnings to persons at risk.

### **Particulars**

The vast majority of the information known to the CFA referred to in the preceding paragraph was not provided by the CFA to the members of Victoria Police at the SERCC, the MERCC or within the IECC in a timely manner or at all.

*CFA "first duties" – causation and damage*

187. Further and in the alternative to paragraphs 8 to 173 above, in the premises set out in paragraphs 174 to 186 inclusive the breaches by CFA of:

- (a) the First CFA statutory warnings duty; and/or
- (b) the First CFA common law warnings duty

during the Murrindindi bushfire caused the personal injury claimants personal injury loss and damage.

**Particulars**

But for the breaches of the duties as aforesaid and/or any of them, persons at risk would have been provided with timely and adequate warnings and would have taken steps to avoid injury or death.

The plaintiff refers to and repeats the particulars to paragraph 169 set out above, except that the references at paragraphs (r), (s) and (t) to paragraph 164 be references to paragraph 184.

188. The personal injury loss and damage resulting from the Murrindindi bushfire was a natural and foreseeable consequence of the breaches of the duties as aforesaid alleged against the CFA in the preceding paragraphs.

***Second CFA duties****Second CFA statutory duty to personal injury claimants*

189. Further, at all relevant times, the CFA was under a duty, inter alia, to take superintend and enforce all necessary steps for the prevention and suppression of fires and for the protection of life and property in case of fire in the country area of Victoria (the **Second CFA statutory warnings duty**).

**Particulars**

Section 20 of the CFA Act.

190. The Second CFA statutory warnings duty, inter alia, imposed on the CFA an obligation:

- (a) to prepare emergency warnings to be given to the public containing relevant information in a timely, clear and adequate manner;
- (b) to disseminate those warnings to those members of the public who needed it where community action would be necessary to protect lives and property (CFA bushfire warnings).

**Particulars**

- (i) The obligation arising from the duty as aforesaid is inferred from a proper construction of section 20 of the CFA Act.
- (ii) The CFA was obliged to include within the warnings the information referred to in the particulars sub-joined to paragraph 184 hereof.

191. The Second CFA statutory warnings duty was owed by the CFA to the personal injury claimants.

**Particulars**

The object of protecting the personal injury claimants is to be inferred from the proper construction of the CFA Act.

*Second CFA common law duty to the personal injury claimants*

192. Further, at all relevant times, the CFA had knowledge and expertise in relation to bushfire risks and the need to warn the public of such risks in order to protect the public from personal injury loss and damage.

**Particulars**

- (i) At all relevant times the CFA was under the Second CFA Statutory Duty.
- (ii) In the CFA's submission to the Victorian Bushfire Inquiry of 2002/03, the CFA stated:

“CFA considers provision of information to the community before and during a major incident as one of its core responsibilities. Research following the Ash Wednesday fires found that residents reported having ‘little or no warning or information about where the fire was, the rate at which it was moving and the predicted wind change’ [Lazarus and Elley 1984: 22]. Krusel and Petris [1998] found that twelve of the Ash Wednesday civilian deaths occurred because the victims did not appear to recognise the real threat to their safety in time to implement an effective survival strategy... since the events of Ash Wednesday coronial reports and fire investigations have repeatedly encouraged the development of an information flow strategy that meets community needs to information during wildfire.”

- (iii) The CFA was aware that the Report of Inquiry into the 2002-03 Victorian Bushfires (para 23.21) had recommended that the CFA (and DEPI) ensure in relation to the provision of information to communities affected by fires that, among other things, incident management teams understood that one of their primary responsibilities was to keep the community informed as to where the fire was, its likely path, what was being done to combat the fire, and any preparations the community should undertake, and that information units were effectively integrated into incident management teams.
- (iv) In 2005, the Australasian Fire Authorities Council, of which the CFA is a member, published a position paper on bushfires and community safety which stated that “access to accurate and timely information during periods of high fire danger and fire events is crucial to enable people to make appropriate decisions concerning their safety.”
- (v) The CFA was at all relevant times aware of the content of DISPLAN.
- (vi) Further, in or about 2006, the CFA, jointly with the DEPI, undertook a review of the effectiveness of information flow to communities and the media during fire incidents, which review recognised, inter alia, the value of providing timely and accurate information to the public during times of crisis, including natural disasters such as fires. The findings of the review are contained in a document entitled “Joint CFA/ DEPI Review of Effectiveness of Information Flow to Communities and Media During Fire Incidents”, prepared by John Schauble, July 2006. A copy of the report is available for inspection at the offices of the plaintiff’s solicitors by appointment.

193. Further, at all material times, the CFA knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfire, rather than generalised warnings addressed and referring to the general public, were



necessary to enable people in such areas to take steps to avoid the risk of personal injury and death.

194. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the CFA.
195. Further, the CFA knew that the EM Manual prescribed that the ultimate goal of emergency management was to ensure a “safer more sustainable community.”
196. Further, at all relevant times, the CFA knew or ought to have known that if the CFA gave CFA bushfire warnings about the risks and dangers of bushfires (including via its website), the public would be likely to regard those warnings and their content as a reliable and principal source of information on which to act in order to protect themselves from risk or danger of bushfire.
197. At all material times the personal injury claimants:
  - (a) had no ability, or no practical and effective ability, to prevent or minimise the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
  - (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
  - (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the CFA to ensure, alternatively to

take reasonable steps to ensure, that CFA bushfire warnings were issued to persons at risk.

198. Further, at all relevant times, the CFA knew or ought reasonably to have known that CFA bushfire warnings would enable persons at risk to take steps to avoid personal injury and death.

#### Particulars

- (i) If so warned, persons at risk would be able to consider acting so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.
- (ii) If so warned, persons at risk would be able to consider staying and if staying taking protective action to ameliorate the impact of the fire should it arrive and thereby improving the chances of them remaining safe and free from injury and/or death despite the fire's presence.

199. Further, as at and on 7 February 2009, the CFA:

- (a) had control of:
  - (i) systems, procedures and means to obtain information and predications about the progress and impact of bushfires;
  - (ii) systems, procedures and means to formulate and disseminate bushfire warnings via ABC Radio, the CFA website and the Victorian Bushfire Information Line, based on the information and predications referred to in sub-paragraph (i); and
- (b) assumed responsibility to issue CFA bushfire warnings.

#### Particulars

- (i) In 2005, the CFA and DEPI, amongst other parties, entered into a memorandum of understanding with the Australian Broadcasting Corporation (**ABC**) Radio pursuant to which the ABC undertook that ABC Radio would broadcast emergency messages as requested by Victoria's emergency services (including the CFA and DEPI in order to notify listeners that a significant emergency was occurring in their area – the memorandum

is in writing and is referred to in Part 7, p10 of the EM Manual.

- (ii) In or about 2008, the CFA and DEPI sought to establish the IECC for the management of bushfire emergencies.
- (iii) The establishment of the IECC was based on an earlier decision to merge the CFA and DEPI bushfire operations for the 2008/9 fire season.
- (iv) The IECC was initially intended to include the Victoria Police as a further emergency agency but in March 2008 the Victoria Police formally informed the CFA and the DEPI that the Police Operation Centre and the SERCC would remain within the Victoria Police Centre.
- (v) As a consequence, the Victoria Police's core operations continued to be conducted within its own headquarters at the SERCC and not within the IECC.
- (vi) At all relevant times prior to and on 7 February 2009, the CFA had established a dedicated page on its website on which warnings would be posted so as to warn the public of the risk and danger of bushfire. The warnings were to be called, inter alia, 'awareness' messages and 'urgent threat' messages.
- (via) At all relevant times prior to and on 7 February 2009, the CFA had control of systems, procedures and means to obtain information and predictions about the progress and impact of bushfires from a range of sources including fire tower personnel, fire ground personnel, personnel in Incident Control Centres and other emergency response and co-ordination centres and the CFA's Incident Management System, and DSE's FireWeb system.
- (vib) At all relevant times prior to and on 7 February 2009, the CFA had control of Information Units staffed by personnel trained and equipped for the formulation and dissemination of bushfire warnings.
- (vii) At all relevant times prior to and on 7 February 2009, the CFA had established a fire prediction programme called CFA Emergency Information Management System to enable it to predict the path of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (viii) At all relevant times on 7 February 2009, the CFA had access to the expertise of the DEPI, including persons retained by the DEPI in fire prediction and modelling, for the purposes, inter alia, of predicting the path and spread of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (ix) At all relevant times prior to and on 7 February 2009, the CFA had established, with the DEPI, the Victorian Bushfire Information Line (**VBIL**). The VBIL was established as a joint initiative of the DEPI and CFA and operated from the DEPI Customer Service Centre at Ballarat, established to

provide one point of contact for the community needing information on bushfire activity in Victoria. The VBIL was a means, inter alia, of the CFA providing information to the public to warn them of bushfire risk and danger. According to a CFA publication, 'Advice to Community Before and During Wildfire – Guide for CFA Personnel', the VBIL was set up by the CFA and DEPI to provide information to the community before and during bushfires, with VBIL frequently responding to questions from the community about, inter alia, information for people who need to respond to a wild fire. According to the publication, during significant wild fires, CFA will activate the Information Unit within CFA as part of its incident management structure, the Information Unit being responsible for the delivery of accurate and timely messages from the relevant incident management team to the community. Further, according to the publication, the threat messages provided to the community are significantly more detailed than a simple alerting system as they aim to provide information to enable people to make appropriate decisions and respond to the threat more safely. According to the publication, the messages are sent out to the community through the media, with particular emphasis on regional and local radio, with ABC radio being the official broadcaster for Victoria during an emergency, and information also being available through the CFA website. According to the publication, CFA personnel should advise residents to seek information about wild fires through: ABC statewide and regional radio or an appropriate local radio; the CFA public website ([www.cfa.vic.gov.au](http://www.cfa.vic.gov.au)), and VBIL.

- (x) Further, on 5 February 2009, the CFA issued a media release (with the DEPI) headed 'Fire Services Warn of Continuing Fire Threat'. In the release, the CFA stated that 'Important steps to take to avoid the threat of fire include: ... if travelling, listen to ABC Local Radio or community radio station; For bushfire information, check the CFA and DEPI websites or call the [VBIL]'. The same message was contained in a further media release published by the CFA on 6 February 2009.
- (xi) In the premises, the CFA had control of and assumed responsibility for the issue of warnings to the public from the IECC and/or relevant control centres or divisional headquarters about bushfire risk.
- (xii) CFA personnel were deployed to the Alexandra ICC being operated by the DEPI to take up roles including Deputy Incident Controller, Deputy Operations Officer, and Information Officers.

200. By (inter alia) its media releases on 5 and 6 February 2009 the CFA represented to the public that in order to obtain bushfire information and avoid the threat of bushfires members of the public should check the CFA website or call the VBIL.

201. The CFA knew and intended that members of the public including members of the public in the country area of Victoria and persons at risk would rely on the CFA website and the VBIL in order to obtain bushfire information and avoid the threat of bushfires.

202. In the premises, and having regard to the statutory duties of the CFA as aforesaid, at all material times, the CFA owed to the personal injury claimants a duty:

- (a) to take reasonable care, by its officers, servants and agents; and
- (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,

to ensure, alternatively to take reasonable steps to ensure, the issue of CFA bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (the **Second CFA common law warnings duty**).

203. The CFA was required by:

- (a) the Second CFA statutory warnings duty and/or
- (b) the Second CFA common law warnings duty

to issue CFA bushfire warnings to members of the public in the country area of Victoria including persons at risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

### **Particulars**

The plaintiff refers to and repeats the particulars to paragraph 184 above.

*CFA breach of "second" duties to personal injury claimants*

204. At all relevant times prior to and on 7 February 2009, the CFA breached:

- (a) the Second CFA statutory warnings duty; and/or
- (b) the Second CFA common law warnings duty

by not issuing CFA bushfire warnings to the persons at risk which were timely or adequate.

**Particulars**

- (i) The following warnings were posted on the CFA website by the CFA and read out on ABC radio as a result of "Urgent Threat Messages" issued by DEPI, or jointly by the CFA and DEPI, but they were untimely, inadequate, and information poor, and did not adequately warn persons at risk of the risks posed to those persons by the Murrindindi bushfire and/or provide any real opportunity for persons at risk to avoid the risks.
- (ii) An "Urgent Threat Message" was issued at 4.45pm, broadcast on ABC 774 at approximately 4.47pm (not in full), 5.10pm and 6.00pm and posted to the CFA website at 4:55pm stating that the Murrindindi bushfire in the Mount Despair State Forest was burning in a south easterly direction with spotting well ahead of the fire and that the community of Narbethong could expect to come under direct ember attack from this fire.
- (iii) Another "Urgent Threat Message" was issued at approximately 5.15pm, broadcast on ABC 774 (not in full) at approximately 5.34pm (not in full) and 5.40pm and posted to the CFA website by no later than 5.52pm stating that the Murrindindi bushfire in the Mount Despair State Forest was burning in a south easterly direction with spotting well ahead of the fire and that the communities of Narbethong, Marysville and Buxton could expect to come under direct attack from this fire.
- (iv) Another "Urgent Threat Message" was issued at 5.45 pm, read out on ABC 774 at 6.10pm, 6.15pm and 6.50pm, and posted on the CFA website at 6:35pm stating that the Murrindindi bushfire was burning in a south easterly direction with spotting well ahead of the fire, the fire was now directly impacting on Narbethong, and that the communities of Marysville and Buxton could expect to come under direct attack.
- (v) Another "Urgent Threat Message" was issued at 6.45pm, referred to on ABC 774 at 7.07pm and posted to the CFA website at 7.50pm stating that the Murrindindi bushfire was

burning in a north easterly direction with spotting well ahead of the fire, the fire had directly impacted on Narbethong and Marysville, and that the community of Buxton could expect to come under direct attack from this fire.

- (vi) Another "Urgent Threat Message" was issued at 7.35pm, read out on ABC 774 at 8.19pm and posted on the CFA website at 8.00pm stating that the Murrindindi bushfire was burning in a north easterly direction and was spotting well ahead of the fire, the fire had directly impacted on Narbethong and Marysville, Marysville residents were encouraged to assemble at the muster point at the town oval and the community of Buxton could expect to come under direct attack from the fire.
- (vii) An "Urgent Threat Message" was issued at 8.15pm, posted to the CFA website at 8.33pm and at 9.00 pm and read out on ABC 774 at 8.48pm, 9.00pm and 9.19pm stating that the Murrindindi bushfire was still burning in a south easterly direction with spotting well ahead of the fire, the fire was now directly impacting on Narbethong and that residents around Murrindindi and Limestone were in the direct path of the fire, needed to prepare for imminent impact and could expect to come under heavy ember attack.
- (viii) Another "Urgent Threat Message" was issued at 9.49-9.51pm and posted to the CFA website at 10.05pm advising that residents of Alexandra should have fire plans in place.
- (ix) Another "Urgent Threat Message" was issued at 10.02-10.04pm, read on ABC 774 at 10.32pm, 10.52pm and 11.05pm and posted to the CFA website at 10.40pm stating that the Murrindindi bushfire was now burning in a north easterly direction, and that the communities of Taggerty, Acheron, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and Molesworth could expect thick smoke and ember attack and were advised to implement fire plans.
- (x) In addition, an "Awareness Message" was issued by the Benalla IFACC which was read on ABC 774 at 4:07pm which stated that a fire was burning two kilometres south east of Murrindindi in a south easterly direction. It was made clear that this was not a threat message.
- (xi) The above information and warnings were not timely and did not accurately reflect the fire information available to the CFA and the predictions the CFA had made, or were aware of, for the path, intensity, spread and timing of the movement of the Murrindindi bushfire during the course of the afternoon of 7 February 2009.
- (xii) The first warning to Narbethong was when ember attacks had already reached the community.
- (xiii) The first warning to Taggerty was when the Murrindindi bushfire was on the southern edge of the town.

- (xiv) The first warning that Marysville would come under attack was only approximately one hour before spot fires began burning on and ember attacks had reached the edge of the town.
- (xv) From approximately 3:30pm on 7 February 2009, the CFA was aware that Marysville was at serious risk of being impacted by the Murrindindi bushfire but this was not communicated in any warnings until 5:34pm.
- (xvi) From 3:35pm on 7 February 2009, the CFA was aware that the Murrindindi bushfire may impact on Narbethong, but this was not communicated until 4:45pm.
- (xvii) At 4.07pm, the CFA caused an "Awareness Warning" to be announced on ABC 774 which indicated that the Murrindindi bushfire was not currently posing a threat to communities, when it had information that Marysville was clearly under threat.
- (xviii) From at least 4:15pm on 7 February 2009, the CFA was aware that the Murrindindi bushfire had reached the top of the Black Range, that it was burning out of control, and that there was a high potential that life and property in communities forward of the path of the fire would be endangered by the fire.
- (xix) The "Urgent Threat Message" posted at 8:33pm and at 9.00pm and read out on ABC 774 at 8.48pm, 9.00pm and 9.19pm was inaccurate as the wind change had already occurred and the Murrindindi bushfire was then moving in a north easterly direction.
- (xx) No warnings issued by the CFA conveyed the size, intensity, ferocity, speed or destructive capacity of the Murrindindi bushfire or, after 4:00pm, that it was completely out of control.
- (xxi) No warnings issued by the CFA gave an indication as to the arrival time of the fire in any location.
- (xxii) No warnings issued by the CFA concerning the Murrindindi bushfire included information as to the anticipated impact of the south westerly change on the behaviour and direction of the fire even though the CFA was aware of the impending wind change and its likely impact.
- (xxiii) No warnings issued by the CFA included any information that after the wind change the north eastern flank of the Murrindindi bushfire would become its head and that therefore and thereafter the potential of the Murrindindi bushfire to cause loss and damage would be significantly increased.
- (xxiv) Further, the warnings issued by the CFA did not satisfy best practice requirements for warnings.
- (xxv) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given



so as to eliminate or minimise the risk that members of the public might not take action to avoid injury or death.

205. [BLANK]

206. The CFA should have issued timely and adequate bushfire warnings to persons at risk which specified not less than the following information:

- (a) that the Murrindindi fire was likely to reach a particular place or places at a particular time or times:
- (b) that the wind change forecast to occur mid to late afternoon on 7 February 2009 would have a profound effect upon the Murrindindi fire and this would put communities east/north east of the fire front at a serious and material risk and danger and that those communities should take heed that the risk posed by the effects of that wind change on the fire was life threatening.

*CFA "second duties" – causation and damage*

207. Further and in the alternative to paragraphs 8 to 188 above, in the premises set out in paragraphs 189 to 206 above the breach by CFA of:

- (a) the Second CFA statutory warnings duty; and/or
- (b) the Second CFA common law warnings duty

during the Murrindindi bushfire caused the personal injury claimants personal injury loss and damage.

#### **Particulars**

- (i) The warnings as aforesaid were untimely and inadequate and did not enable persons at risk to take steps to avoid or minimise the risk of personal injury loss and damage.
- (ii) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to enable persons at risk to take steps to avoid injury or death.

208. The personal injury loss and damage caused by the Murrindindi bushfire was a natural and foreseeable consequence of the breaches of duty as aforesaid alleged against the CFA in the preceding paragraphs.

**Particulars**

The plaintiff refers to and repeats the particulars to paragraph 169 set out above, except that the references at paragraphs (r), (s) and (t) to paragraph 164 be references to paragraph 203.

*CFA duties not delegated*

209. Further:

- (a) the common law duties of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators as referred to above; and/or
- (b) the statutory and/or common law duties of the DEPI to issue warnings as referred to below; and/or
- (c) any agreement reached between Victoria Police, CFA and DEPI that CFA and/or DEPI would undertake warnings to the public about bushfire risk as referred to above,

did not abrogate, discharge or delegate the responsibilities of the CFA so as to satisfy:

- (i) the First CFA statutory warnings duty; and/or
- (ii) the Second CFA statutory warnings duty; and/or
- (iii) the First CFA common law warnings duty; and/or
- (iv) the Second CFA common law warnings duty.

## SECTION I – FAILURE TO WARN – DEPI SECRETARY

### *First DEPI warnings duty*

210. At all relevant times the DEPI Secretary was a body corporate capable of being sued in its corporate name.

#### **Particulars**

- (i) Under section 3 of the *Forests Act 1958* (Vic) (the **Forests Act**), “Secretary” means the body corporate established by Part 2 of the *Conservation, Forests and Lands Act 1987* (Vic) (the **Conservation, Forests and Lands Act**).
- (ii) Under sub-section 6(1) of that Part, the person who is for the time being the Department Head (within the meaning of the *Public Administration Act 2004* (Vic)) of the DEPI and the successors in office of that person are a body corporate under the name “Secretary to the Department of Sustainability and Environment.”
- (iii) Further, under sub-section 6(2) of that Part (inter alia), the Secretary may sue and be sued in its corporate name.
- (iv) Under Schedule 1 of the *Public Sector Reform (Miscellaneous Amendments) Act 1998* (Vic), in section 6 of the *Conservation, Forests and Lands Act* for “Department of Conservation and Natural Resources” (wherever occurring) was substituted “Department of Sustainability and Environment”.
- (v) By notice published in the Victoria Government Gazette on 9 April 2013. the Department of Sustainability and Environment changed its name to the Department of Environment and Primary Industries.

211. At all relevant times, the DEPI Secretary was statutorily required to carry out proper and sufficient work for the prevention and suppression of fire in, inter alia, State forests and national parks.

#### **Particulars**

- (i) Sub-section 62(2) of the *Forests Act*.
- (ii) A statutory duty in substantially the same terms was initially imposed on the Forests Commission after the extensive and devastating wildfires in Victoria in 1939. The DEPI Secretary subsequently assumed the duty, by operation of the provision referred to in sub-paragraph (i) above.
- (iii) Recognition of the statutory duty is referred to on p1-2 of the DEPI’s *Fire Management Manual* (version 8.1) – Fire

Suppression (the **DEPI Fire Management Manual**) published by the DEPI in 2006, a copy of which may be inspected at the offices of the plaintiff's solicitors by appointment.

212. At all relevant times, the DEPI Secretary and the CFA had partnership arrangements to provide seamless and effective services to the Victorian community in relation to bushfires.

#### **Particulars**

The arrangements are detailed in section 3.2 of the DEPI Fire Management Manual: DEPI -CFA partnership Arrangements.

212A At all relevant times, the DEPI Secretary was required by the 2006 Code of Practice alleged in paragraph 86 above to participate in interagency coordination in accordance with relevant legislation, arrangements put in place under the state emergency response plan (DISPLAN), and arrangements agreed between agencies.

#### **Particulars**

- (i) The 2006 Code of Practice (DSE.HDD.0012.1267) was made in accordance with sub-section 31(1) of the Conservation, Forests and Lands Act.
- (ii) Sub-section 67(1) of the Conservation, Forests and Lands Act provided among other things that a public authority must not take action contrary to a Code of Practice unless (a) the authority is satisfied that there is no feasible and prudent alternative, and (b) all measures that can reasonably be taken to minimize the adverse effect of the action are taken.
- (iii) Sub-section 3(1) of the Conservation, Forests and Lands Act defined a "public authority" to mean a body corporate created for a public purpose by or under an Act. The DEPI Secretary fell within this definition.
- (iv) Paragraph 320 in section 4.2.10 of the 2006 Code of Practice provided that the DEPI "must participate in interagency coordination in accordance with relevant legislation and arrangements put in place under the State Emergency Response Plan, and interagency arrangements."
- (v) Paragraph 389 in section 4.3.5 of the 2006 Code of Practice provided that interagency coordination "must be in accordance with relevant legislation, agreements, the State Emergency Response Plan and agreed reciprocal arrangements."
- (vi) Part 7 of the 2006 Code of Practice relevantly defined "State Emergency Response Plan" as the plan formerly

known as DISPLAN which is incorporated in the Emergency Management Manual Victoria and identifies organization arrangements for managing the response to emergencies in Victoria.

213. At all relevant times, the DEPI Secretary and the DEPI maintained 'FireWeb' which was the primary system of the department for storing and sourcing all data and fire suppression information.

**Particulars**

FireWeb was and is an intranet controlled and operated within the DEPI.

214. At all relevant times, the DEPI Secretary was aware or ought to have been aware of:

- (a) the obligation on the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and Murrindindi Fire Emergency Response Co-ordinators to give or cause to be given bushfire warnings;
- (b) the dependency of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators in giving or causing to be given bushfire warnings on the DEPI Secretary (through the DEPI) providing relevant information known to the DEPI Secretary's department about a bushfire.

215. Further, at all relevant times the Murrindindi fire risks were reasonably foreseeable to the DEPI Secretary.

**Particulars**

- (i) At all relevant times, the DEPI Secretary knew or ought to have known that prior to 7 February 2009, the ~~GFA~~-DEPI had established an ICC at Alexandra.
- (ii) In relation to the wind change risk within the Murrindindi fire risks, the DEPI Secretary knew or ought to have known that wind changes in relation to major bushfires cause substantial risk because the relevant flank of the fire

becomes its front after the change. The DEPI Secretary knew or ought to have known that the impact of wind change on the Victorian bushfires in 1983 was found to be the cause of 46 out of 47 deaths.

- (iii) The DEPI Secretary knew or ought to have known that a bushfire as referred to in paragraph 161 (a) hereof might reach into public lands such as State forests and/or national parks in respect of which the DEPI Secretary had fire prevention and suppression obligations as referred to in paragraph 211 and 212 hereof and would have or ought to have knowledge about the fire risks.

216. Further, at all relevant times, the DEPI Secretary knew or ought to have known that if the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators gave or caused to be given bushfire warnings to the public (including via any relevant website), the public would be likely to regard those warnings and their content as a reliable and principal source of information on which to act in order to protect themselves from the risk or danger of a bushfire.

217. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimise the Murrindindi fire risks, to prevent or minimise the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;
- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
- (c) consequently, was to a material degree dependent for protection against personal injury loss and damage upon the DEPI Secretary to ensure,

alternatively to take reasonable steps to ensure, that the DEPI Secretary would provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators to enable those members of the Victoria Police to provide or cause to be provided bushfire warnings.

218. At all relevant times, the DEPI Secretary knew or ought to have known that if it provided factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators about a bushfire, this would enable those members of Victoria Police to provide or cause to be provided bushfire warnings of the risk that a bushfire might or would be likely to reach a particular place by a particular time and would thereby enable persons at risk to take steps to avoid personal injury and death.

#### **Particulars**

If so warned, persons at risk would be able to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

219. In the premises, at all material times, the DEPI Secretary owed to the personal injury claimants a duty:
- (a) to take reasonable care, by its officers, servants and agents; and
  - (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,
- to ensure, alternatively to take reasonable steps to ensure, that the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators were provided with factual and timely advice and information to enable those members of Victoria Police to provide or cause to

be provided bushfire warnings to persons of risk of the risk that a bushfire might or would be likely to arrive at a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (**the First DEPI warnings duty**).

220. The DEPI Secretary was required by the First DEPI warnings duty to provide factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators so that those members of Victoria Police could provide or cause to be provided bushfire warnings to persons at risk of the risk that a bushfire might or would be likely to reach a particular place by a particular time so as to enable persons at risk to take steps to avoid the risk so as to minimise or avoid personal injury and death.

### **Particulars**

The factual and timely advice and information required to be given to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Emergency Response Co-ordinators included advice and information which would enable those members of the Victoria Police to issue or cause to be provided timely and adequate warnings containing, depending on the particular fire circumstances and risk, where appropriate the provision of the following or parts of the following information to the public:

- (i) Information as to the source of the fire.
- (ii) Information as to the direction of the fire.
- (iii) Information as to the spread and speed of the fire.
- (iv) Information as to the intensity and ferocity of the fire.
- (v) Information as to the destructive capacity of the fire.
- (vi) Information as to whether the fire was out of control.
- (vii) Information as to the communities who might or would be likely to be impacted by the fire.
- (viii) Information as to the approximate time (using reasonable estimates) at which the fire might or would be likely to impact particular communities.
- (ix) Information as to the impact if any of any wind change forecast during the relevant run of the fire.



- (x) The unpredictability of the fire as to intensity and/or speed and/or spread.
- (xi) Information as to the possible consequences of not heeding the warning.
- (xii) Information as to what actions persons at risk should take and by when.

***Breach of First DEPI warnings duty***

221. At all relevant times during the afternoon of 7 February 2009, the DEPI Secretary was aware of the likely direction, path, and spread of the Murrindindi bushfire, taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.

**Particulars**

- (i) The DEPI Secretary and the CFA were in partnership as aforesaid so as to ensure a close working relationship for the management of bushfire emergencies.
- (ii) The State Fire Emergency Coordination Plan of 3-6 February 2009 provided a risk management assessment and strategies for the next four days in response to the extreme weather forecasted to occur, and identified the high risk area in the arc from the Otways, Macedon, Kinglake, Marysville, to the Dandenong Ranges.
- (iii) The DEPI Secretary and the CFA had established in consultation with the Victoria Police and other agencies the IECC.
- (iv) At all relevant times, personnel from the DEPI Secretary's Department, including the DEPI's Chief Officer, Fire and Emergency Management, Mr Ewan Waller, the DEPI State Duty Officer, Mr Andrew Graystone, and the DEPI Chief Officer Contact, Mr Alen Slijepcevic, were present and active participants in the affairs of the IECC in the management of the fire emergencies on 7 February 2009 including in relation to the Murrindindi bushfire. Personnel from the DEPI Secretary's Department at the IECC took the lead role in the management of the Murrindindi bushfire.
- (v) On 7 February 2009, the Alexandra ICC was based at a DEPI facility and was staffed by DEPI officers. The DEPI Incident Management Team took control of the Murrindindi bushfire at approximately 4:15pm. Mr Andrew Miller of Parks Victoria assumed the role of Incident Controller when the fire started. Mr Tony Lovick of DEPI subsequently assumed the role of Incident Controller.
- (vi) DEPI resources were deployed and arrived at the scene of the Murrindindi bushfire at approximately 3:15pm, although

the DEPI Division Commander for the fire, Dale Young, arrived shortly after 3.45pm.

- (vii) By reason of the above matters, the DEPI knew or ought to have known what the CFA knew about the Murrindindi bushfire and its likely direction, path, intensity and spread taking into account the weather conditions including the temperature and prevailing wind direction and the impending wind change.
- (viii) In this regard the plaintiff refers to and repeats the particulars sub-joined to paragraph 185 hereof as to what the CFA knew and in turn the DEPI knew or ought to have known about the Murrindindi bushfire in the above regard and, in addition, refers to the matters below.
- (ix) At 2:55pm, Mr Colin Hind, DEPI fire tower operator at Mt Despair, reported the Murrindindi bushfire to the DEPI. Shortly after reporting the bushfire, he advised to “throw everything they have at it because it was nearly in the Toolangi State Forest...”
- (x) At 3:51pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr David Hayse, the DEPI North East Regional Duty Officer, advising that the Murrindindi bushfire was building south of the Murrindindi Scenic Reserve.
- (xi) At approximately 4:00pm, Mr Andy Willans, DEPI fire tower operator at Mt Gordon, communicated to Mr Bowdern, Alexandra ICC Operations Officer, of DEPI regarding the location and spread of the fire, the location of spot fires and the potential for the fire to reach Narbethong and Marysville.
- (xii) At 4:00pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr Stuart McDonald, of the Toolangi DEPI office, advising that the DEPI team fighting the Murrindindi bushfire was assisting campers to protect themselves from that fire in the Murrindindi River. Mr Graystone passed this information to Mr Stephen Smith, the Planning Officer at the Alexandra ICC.
- (xiii) DEPI was monitoring the Murrindindi bushfire from the air from approximately 4:50pm on 7 February 2009 and DEPI aircraft arrived at the fire from approximately 4.20pm.
- (xiv) By approximately 4:30pm, when Mr Willans left the Mr Gordon tower for his own safety, Mr Willans had observed that the Murrindindi bushfire was “massive”, “huge, absolutely huge” and unlike anything he had seen before.
- (xv) Between 4:00 – 5:00pm, Mr Peter Cobb, DEPI Marysville Ranger and Crew Leader, made observations about the location of spot fires and the behaviour of the main fire including that there were numerous spot fires burning in the triangle between Marysville, Buxton and Narbethong.

- (xvi) At 5:10pm, Mr Shaun Lawlor, a DEPI Air Attack Supervisor, told Mr William Twitchett, Deputy Operations Officer, Alexandra ICC, of DEPI that Narbethong was under direct attack and that "Maryville and Buxton were not being impacted" but that "if the predicted south west wind change occurred, they would be directly in the path of the new fire front".
- (xvii) Some time between 5:00pm and 5:30pm, the CFA State Coordinator at the IECC, Mr Geoffrey Conway, advised the CFA Chief Fire Officer, Mr Russell Rees, and the DEPI Chief Officer, Mr Ewan Waller, that concerns existed that the Murrindindi fire would impact on Marysville.
- (xviii) At 5:20pm, the DEPI State Duty Officer at the IECC, Mr Andrew Graystone, received a telephone call from Mr David Hayse, the DEPI North East Regional Duty Officer, advising that the Murrindindi bushfire had crossed the Maroondah highway at Narbethong. He relayed this information to the IECC Planning Officer and the DEPI Chief Officer Contact, Mr Alen Slijepcevic.
- (xix) At 5:35pm, Ms Robyn Rattray-Wood, DEPI Information Officer at the Alexandra ICC, and Mr Alex Konrad, DEPI Information Officer at the Benalla Integrated Fire Agency Coordination Centre ("IFACC") discussed the wind change and the fact that Marysville was under urgent threat.
- (xx) At 5:36pm, DEPI Incident Controller at the Alexandra ICC, Mr Tony Lovick knew that the south west change was already in Melbourne.
- (xxi) At 5:55pm, Sergeant Rowles (MERC) rang Mr Andrew Miller, who was at the DEPI Alexandra ICC, to discuss contingency plans to evacuate Marysville.
- (xxii) At 6:10pm, a hand drawn map entitled the "Murrindindi Fire Prediction Map, As of 1800 hrs, 7 Feb 2009" (the "Hand Drawn Fire Prediction Map") was prepared by fire behaviour analysts at the IECC and shown shortly thereafter to the DEPI State Duty Officer at the IECC, Mr Andrew Graystone. This map predicted the direction and spread of the Murrindindi bushfire based on a predicted wind change at 6:00pm and showed that the communities likely to be impacted by the Murrindindi bushfire included Marysville, Buxton and just South of Taggerty.
- (xxiii) At approximately 6:10pm, Mr Andrew Graystone participated in a meeting with Mr Mike Sutton, Team Leader of the Fire Behaviour Analysis Unit, Mr Alen Slijepcevic and others. The Hand Drawn Fire Prediction Map was then approved by Mr Slijepcevic for distribution to DEPI Regional Duty Officers.
- (xxiv) At 7:25pm, DEPI had information that Taggerty, Acheron, Molesworth, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and nearby communities between Murrindindi and Yea were under threat.

- (xxv) At 8:43pm, a digital map entitled the "Murrindindi Predicted Fire Spread Map, 1800hrs to 2300hrs, 7 February 2009" was completed by the IECC and, at 8:51pm, a digital map entitled the "Murrindindi Potential Fire Impact Zone, 1745hrs to 2300hrs, 7 February 2009" was completed by the IECC (collectively the "Fire Prediction Maps"). The Fire Prediction Maps predicted the direction and spread of the Murrindindi bushfire based on a predicted wind change at 6:00pm and showed that the communities likely to be impacted by the Murrindindi bushfire included Marysville, Buxton and Taggerty.
- (xxvi) At 9:19pm, the Fire Prediction Maps and a Fire Spread Prediction Report for the Murrindindi mill fire (entitled the "Fire Spread Prediction Report for Kilmore Saunders Road Fire") were emailed from the IECC to DEPI staff at the Benalla IFACC. The Fire Spread Prediction Report stated on page 2 that "[f]ire behaviour will increase in intensity with the wind change".
- (xxvii) At 10:09pm, this email, the Fire Predictive Maps and the Fire Spread Prediction Report were forwarded by Mr Peter Farrell, DEPI's Land and Fire Manager for the North East Region, to Mr Tony Lovick, the Incident Controller at the Alexandra ICC and Mr John Steer, the Situation Officer at the Alexandra ICC.
- (xxviii) The DEPI Secretary was aware of the weather information and forecasting which the BoM had provided to the CFA as set out in the particulars sub-joined to paragraph 185 hereof.
- (xxix) Further, at all relevant times during the afternoon of 7 February 2009, the DEPI Secretary had personnel with access to the information on the DEPI's 'FireWeb' as aforesaid, which enabled it to and did inform the DEPI Secretary's personnel of the speed, direction, spread, and extent of the Murrindindi bushfire including its forward spotting into communities.
- (xxx) To the DEPI Secretary's knowledge, there was a material risk that there would be a wind change which would affect the Murrindindi bushfire causing the north eastern flank of the fire to become its front and thereby putting communities east of the Murrindindi bushfire at substantial risk and danger.
- (xxxi) Further, during the afternoon of 7 February 2009, the DEPI Secretary through the IECC received advice from the South Australian Country Fire Service about weather conditions and the progress of the wind change in South Australia, and the movement of the front was continually monitored by the DEPI Secretary's personnel at the IECC.
- (xxxii) In the premises, at all material times after 3:00pm on 7 February 2009, the DEPI Secretary was aware from information it had received from the BoM and other sources that the predominant northerly wind blowing across Victoria

would swing to become a south westerly some time between 3:00 – 6:00pm.

- (xxxiii) Wind change forecasts were issued to the DEPI Secretary's personnel (within the IECC) at 12:00pm, 1:50pm, 4:30pm, and 6:30pm on 7 February 2009.
- (xxxiv) At all relevant times during the afternoon of 7 February 2009, DEPI and personnel at the ICC had access on request to Spot Fire Weather Forecasts which provide highly detailed fire weather information for specific locations where a fire is burning, including the timing of any wind changes.
- (xxxv) At all relevant times during the afternoon of 7 February 2009, DEPI had access to automated weather station information including an automated weather station at Coldstream (40 kilometres south west of Marysville) which recorded a south west change at 5:48pm.
- (xxxvi) The potential effect of the south westerly change on fires was appreciated by the personnel of the DEPI Secretary at the IECC including as to the dangers posed by the change to communities. To the knowledge of personnel of the DEPI Secretary, a proposed media release was prepared within the IECC and signed by Russell Rees the then Chief Fire Officer of the CFA at 6:09pm. It referred to erratic winds accompanying the change and the potential for unpredictable fire behaviour. The media release was never released to the public.
- (xxxvii) In the premises, the DEPI Secretary's personnel knew that accurately tracking and monitoring of the Murrindindi bushfire, forecasting/predicting its movement, and assessing the likely timing of the wind change, was vital in being able to assess the potential impact of the Murrindindi bushfire and the risk and danger posed by it to the public.

222. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached the First DEPI warnings duty by not providing factual and timely advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or the Murrindindi Fire Emergency Response Co-ordinators to enable those members of the Victoria Police to issue or cause to be provided bushfire warnings to persons at risk.

### **Particulars**

The vast majority of the information known to the DEPI Secretary's personnel referred to in the preceding paragraph was not provided by the DEPI to the members of the Victoria Police at

the SERCC, the MERCC or within the IECC in a timely manner or at all. Further particulars will be provided after discovery and prior to trial.

***First DEPI warnings duty – causation and damage***

223. Further and in the alternative to paragraphs 8 to 209 above, in the premises set out in paragraphs 210 to 222 above, the breaches by the DEPI Secretary of the First DEPI warnings duty during the Murrindindi bushfire caused the personal injury claimants personal injury loss and damage.

**Particulars**

But for the breaches of the duties as aforesaid and/or any of them, the persons at risk would have been provided with timely and adequate warnings and would have taken steps to avoid injury or death.

The plaintiff refers to and repeats the particulars to paragraph 169 set out above, except that the references at paragraphs (r), (s) and (t) to paragraph 164 be references to paragraph 220.

224. The personal injury loss and damage caused by the Murrindindi bushfire was a natural and foreseeable consequence of the breach of the First DEPI warnings duty.

***Second DEPI warnings duty***

225. Further, at all relevant times, the DEPI Secretary had knowledge and expertise in relation to bushfire risks and in relation to the need to warn the public of such risks in order to protect the public from personal injury loss and damage.

**Particulars**

- (i) The DEPI was aware that the Report of Inquiry into the 2002-03 Victorian Bushfires (paragraph 23.21) had recommended that the DEPI (and CFA) ensure in relation to the provision of information to communities affected by fires that, among other things, incident management teams understood that one of their primary responsibilities was to keep the community informed as to where the fire was, its likely path, what was being done to combat the fire, and any preparations the community should undertake, and that

information units were effectively integrated into incident management teams.

- (ii) The DEPI was at all relevant times aware of the content of DISPLAN.

226. Further, at all material times, the DEPI Secretary knew or ought to have known that specific warnings provided and referring to specific groups and/or communities and/or localities and/or local residents in areas threatened by bushfire, rather than generalised warnings addressed and referring to the general public, were necessary to enable those persons in those areas to take steps to avoid the risk of personal injury and death.

227. Further, at all relevant times the DEPI Secretary knew or ought to have known of the Murrindindi fire risks.

228. Further, at all relevant times, the DEPI Secretary knew or ought to have known that if the DEPI gave bushfire warnings to the public (including via any relevant website), the public would be likely to regard those warnings and their content as a reliable and principal source of information on which to act in order to protect themselves from the risk or danger of a bushfire.

229. Further, the DEPI Secretary knew that the EM Manual prescribed that the ultimate goal of emergency management was to ensure a “safer more sustainable community.”

230. At all material times the personal injury claimants:

- (a) had no ability, or no practical and effective ability, to prevent or minimise the Murrindindi fire risks, or to access adequate warnings or information about the Murrindindi fire other than from the State Co-ordinator, the Deputy Co-ordinator, the SER personnel, the Murrindindi Fire Emergency Response Co-ordinators, the CFA and the DEPI Secretary;

- (b) were vulnerable to the impact of the Murrindindi fire risks, and to the absence of adequate warnings or information about the Murrindindi fire that would enable them to make an informed decision about what was safe to do;
- (c) consequently, were to a material degree dependent for protection against personal injury loss and damage upon the DEPI Secretary to ensure, alternatively to take reasonable steps to ensure, that bushfire warnings would be issued to persons at risk.

231. Further, at all relevant times, the DEPI Secretary knew or ought reasonably to have known that bushfire warnings would enable persons at risk to take steps to avoid personal injury and death.

#### Particulars

If so warned, persons at risk would act so as to protect themselves in a timely way in safety including if appropriate, leaving their properties or moving to a safer area.

232. Further, as at and on 7 February 2009, the DEPI Secretary:

(a) had control of:

- (i) systems, procedures and means to obtain information and predications about the progress and impact of bushfires;
- (ii) systems, procedures and means to formulate and disseminate bushfire warnings via ABC Radio, the DEPI website and the Victorian Bushfire Information Line, based on the information and predications referred to in sub-paragraph (i); and

~~(a)~~(b) assumed responsibility for the provision of bushfire warnings.



### Particulars

- (i) During the fires of 2002-03, extensive use was made of the DEPI website to provide incident information to the community to assist their personal decision making.
- (ii) In 2005, the CFA and DEPI entered into the memorandum with the ABC referred to in paragraph 199 above.
- (iii) The DEPI Fire Suppression Manual stated that the relevant Incident Controller in relation to a fire is responsible for ensuring that members of the general public, particularly people in potentially affected local communities, are properly informed of the wildfire situation and the support effort, and that local communities under direct threat or potentially under direct threat of fire will require specific up-to-date information at regular intervals: Chapter 7.1 of the Manual.
- (iv) In or about 2008, the DEPI and CFA sought to establish the IECC for the management of bushfire emergencies, and did so thereafter.
- (v) The establishment of the IECC was based on an earlier decision to merge the DEPI and CFA bushfire operations for the 2008/9 fire season.
- (vi) The IECC was initially intended to include the Victoria Police as a further emergency agency. However in March 2008 the Victoria Police formally informed the DEPI and the CFA that the Police Operation Centre and the SERCC would remain within the Victoria Police Centre.
- (vii) As a consequence, the Victoria Police's core operations continued to be conducted within its own headquarters at the SERCC and not within the IECC.
- (viii) At all relevant times, the DEPI had prepared a North East Area Readiness and Response Plan, setting out the desirable levels of readiness of personnel, systems and equipment and their location and availability for the detection and control of wildfire.
- (ix) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established a dedicated page on its website on which warnings would be posted so as to warn the public of the risk and danger of bushfire. The warnings were to be called, inter alia, 'awareness' messages and 'urgent threat' messages.
- (x) According to the DEPI Fire Suppression Manual, the DEPI website, at [www.dse.vic.gov.au/fires](http://www.dse.vic.gov.au/fires) provides up-to-date information on the current fire situation, with the DEPI State Duty Officer, through the ECC Information Officer (the Emergency Coordination Centre, the precursor to the IECC) being responsible for ensuring that current, accurate information is provided on the DEPI website: Chapter 7.1 of the DEPI Fire Suppression Manual.

- (xa) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had control of systems, procedures and means to obtain information and predictions about the progress and impact of bushfires from a range of sources including fire tower personnel, fire ground personnel, personnel in Incident Control Centres and other emergency response and co-ordination centres, the CFA's Incident Management System, and DSE's FireWeb system.
- (xb) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had control of Information Units staffed by personnel trained and equipped for the formulation and dissemination of bushfire warnings.
- (xi) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established a fire prediction programme to enable it to predict the path of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (xii) At all relevant times on 7 February 2009, the DEPI Secretary had access to the expertise of fire prediction experts, including Dr Tolhurst, for the purposes, inter alia, of predicting the path and spread of fire for the purposes of, inter alia, being able to warn members of the public of bushfire risk and danger.
- (xiii) At all relevant times prior to and on 7 February 2009, the DEPI Secretary had established, with the CFA, the VBIL. The VBIL was a means, inter alia, of the DEPI Secretary providing information to the public to warn them of bushfire risk and danger. The VBIL was established as a joint initiative of the DEPI and CFA and operated from the DEPI Customer Service Centre in Ballarat, established to provide one point of contact for the community needing information on bushfire activity in Victoria.
- (xiv) Further, on 5 February 2009, the DEPI Secretary issued a media release with the CFA headed 'Fire Services Warn of Continuing Fire Threat'. In the release, the DEPI stated that 'Important steps to take to avoid the threat of fire include: ... if travelling, listen to ABC Local Radio or community radio station; For bushfire information, check the CFA and DEPI websites or call the [VBIL]'. The same message was contained in a further media release published by the DEPI on 6 February 2009.
- (xv) In the premises, the DEPI Secretary had control of and assumed responsibility for the issue of warnings to the public from the IECC and/or relevant control centres or divisional headquarters about bushfire risk by way of a complement to the warnings issued by the CFA.
- (xvi) DEPI personnel were deployed to the Alexandra ICC being operated by the CFA/DEPI to take up roles including Incident Controller and Information Officer, and roles in resources, situation, air operations, liaison and recovery.

233. By (inter alia) its media releases on 5 and 6 February 2009 the DEPI represented to the public that in order to obtain bushfire information and avoid the threat of bushfires members of the public should check the DEPI website or call the VBIL.
234. The DEPI Secretary knew and intended that the members of the public including the persons at risk would rely on the DEPI website and the VBIL in order to obtain bushfire information and avoid the threat of bushfires.
235. In the premises, and having regard to the statutory obligations owed by the DEPI Secretary as aforesaid, at all material times, the DEPI Secretary owed to the personal injury claimants a duty:
- (a) to take reasonable care, by its officers, servants and agents; and
  - (b) to ensure that reasonable care was taken, by any agents, contractors, or other persons engaged by it,
- to ensure, alternatively to take reasonable steps to ensure, the issue of bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury and death (the Second DEPI warnings duty).
236. The DEPI Secretary was required by the Second DEPI warnings duty to issue bushfire warnings to persons at risk of the risk that a bushfire might or would reach a particular place by a particular time so as to enable persons at risk to take steps to avoid personal injury or death.

### **Particulars**

The plaintiff refers to and repeats the particulars to paragraph 220 above.

***Breach of Second DEPI warnings duty***

237. At all relevant times prior to and on 7 February 2009, the DEPI Secretary breached the Second DEPI warnings duty by not issuing bushfire warnings to the persons at risk which were timely or adequate.

**Particulars**

- (i) The warnings referred to in particulars (ii) to (ix) to paragraph 204 were as a result of "Urgent Threat Messages" issued by DEPI, or jointly by DEPI and the CFA.
- (ii) In addition, an "Awareness Message" was issued by the Benalla IFACC which was read on ABC 774 at 4:07pm which stated that a fire was burning two kilometres south east of Murrindindi in a south easterly direction. It was made clear that this was not a threat message.
- (iii) At 7:07pm, Mr Alex Konrad, DEPI Information Officer at the Benalla IFACC, was interviewed on ABC 774. He provided an urgent threat message for Marysville, where he said the Murrindindi bushfire was already on the edge of the township, although he could not say which edge, and Buxton.
- (iv) At 8:30pm, Ms Robyn Rattray-Wood, DEPI Information Officer at the Alexandra ICC, prepared a correction to the most recent DEPI "Urgent Threat Message" (being the message that was read on ABC 774 at 8:48pm, 9:00pm and 9:19pm stating that the Murrindindi bushfire was now burning in a north easterly direction, and that the communities of Taggerty, Acheron, Thornton, Rubicon, Snobs Creek, Alexandra and Molesworth could expect thick smoke and ember attack and were advised to implement fire plans. This message was not distributed by the Benalla IFACC.
- (v) The above information and warnings were not timely and did not accurately reflect the fire information available to the DEPI and the predictions the DEPI had made, or were aware of, for the path, spread, intensity and timing of the movement of the Murrindindi bushfire during the course of the afternoon of 7 February 2009.
- (vi) The first warning to Narbethong was when ember attacks had already reached the community.
- (vii) The first warning to Taggerty was when the Murrindindi bushfire was on the southern edge of the town.
- (viii) The first warning that Marysville would come under attack was only approximately one hour before spot fires began burning on and ember attack had reached the edge of the town.

- (ix) By 4.00pm on 7 February 2009, the DEPI was aware that Marysville was at risk of being seriously impacted by the Murrindindi bushfire but this was not communicated in any official warnings until 5:34pm.
- (x) At 4:07pm DEPI caused an "Awareness Warning" to be announced on ABC 774 which indicated that the Murrindindi bushfire was not currently posing a threat to communities, when it had information that Marysville was clearly under threat.
- (xi) At 7:25pm DEPI knew that new "Urgent Threat Messages" were needed for Taggerty, Acheron, Molesworth, Thornton, Rubicon, Snobs Creek, Eildon, Alexandra and nearby communities between Murrindindi and Yea but such alerts were not included in the threat message issued at 7:35pm which was posted on the CFA website at 8.00 pm and read on radio at 8:19pm.
- (xii) The correction to the "Urgent Threat Message" issued at 8:30pm was not distributed.
- (xiii) No warnings issued by the DEPI conveyed the size, intensity, ferocity, speed or destructive capacity of the Murrindindi bushfire.
- (xiv) No warnings issued by the DEPI gave an indication as to the arrival time of the Murrindindi bushfire in any location.
- (xv) No warnings issued by the DEPI concerning the Murrindindi bushfire included information as to the anticipated impact of the south westerly change on the intensity, behaviour and direction of the fire even though the DEPI was aware of the impending wind change and its likely impact.
- (xvi) Further, the warnings issued by the DEPI did not satisfy best practice requirements for warnings.
- (xvii) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to eliminate or minimise the risk that members of the public might not take action to avoid injury or death.

238. The DEPI Secretary should have issued timely and adequate bushfire warnings to persons at risk which specified not less than the following information:

- (a) that the Murrindindi fire was likely to reach a particular place or places at a particular time or times:
- (b) that the wind change forecast to occur mid to late afternoon on 7 February 2009 would have a profound effect upon the Murrindindi fire and this would put communities east/north east of the fire front at a serious and material

risk and danger and that those communities should take heed that the risk posed by the effects of that wind change on the fire was life threatening.

***Second DEPI warnings duty – causation and damage***

239. Further and in the alternative to paragraphs 8 to 209 above, in the premises set out in paragraphs 210 to 238 above the breaches by the DEPI Secretary of the Second DEPI warnings duty during the Murrindindi bushfire caused the personal injury claimants personal injury loss and damage.

**Particulars**

- (i) The warnings as aforesaid were untimely and inadequate and did not enable persons at risk to take steps to avoid or minimise the risk of personal injury and death.
- (ii) But for the breaches of the duties as aforesaid and/or any of them, the warnings as aforesaid would have been given so as to enable persons at risk to take steps to avoid injury or death.
- (iii) The plaintiff refers to and repeats the particulars to paragraph 169 set out above, except that the references at paragraphs (r), (s) and (t) to paragraph 164 be references to paragraph 236.

240. The personal injury loss and damage caused by the Murrindindi bushfire was a natural and foreseeable consequence of the breaches of duty alleged against the DEPI Secretary in the preceding paragraphs.

***DEPI duties were not delegated***

241. Further:

- (a) the common law duties of the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators to warn the public (including persons at risk) referred to above; and/or

- (b) the statutory and/or common law duties of the CFA in relation to warnings to the public (including persons at risk) referred to above; and/or
- (c) the agreement reached between Victoria Police, CFA and DEPI and/or the DEPI Secretary that CFA and/or DEPI would undertake warnings to the public about bushfire risk referred to above,

did not abrogate, discharge or delegate the responsibilities of the DEPI Secretary so as to satisfy:

- (i) the First DEPI warnings duty; and/or
- (ii) the Second DEPI warnings duty.

## **SECTION J – JOINT TORTFEASANCE BY CFA AND DEPI SECRETARY**

242. Further, at all relevant times, there was an agreement, alternatively a concurrence, alternatively a common design, alternatively a common end, between the CFA and the DEPI Secretary:

- (a) to provide bushfire warnings to persons at risk of personal injury and death from a bushfire;
- (b) alternatively, to provide advice and information to the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and/or Murrindindi Fire Response Co-ordinators to enable those members of Victoria Police to provide or cause to be provided bushfire warnings to persons at risk of personal injury and death from a bushfire.

### **Particulars**

- (i) On or about 25 October 2006 the CFA and DEPI Secretary agreed on *Heads of Agreement Partnership and Joint Service Delivery* (CFA.008.502.0092) which provided among other things that the agencies:

- (A) were committed to conducting integrated emergency management activities, including the sharing of knowledge, resources and systems between agencies (Principle A);
  - (B) would establish and maintain a series of protocols and planning documents that detailed operating procedures for service delivery, including the DEPI-CFA Partnership Guidelines and the Joint Standard Operating Procedures (Principle B);
  - (C) would present a united front to the community at all times, reflecting the principles of seamless service delivery for emergency management activities (Principle C); and
  - (D) agreed that emergency management activities would be conducted in accordance with the Australasian Inter-Service Incident Management System (AIIMS), and would operate within Victoria's Emergency Management Arrangements, agreed Partnership Guidelines and associated documentation (Principle D);
- (ii) On or about 25 October 2006, the CFA and DEPI agreed on *Partnership Guidelines* (CFA.505.002.0007) which provided among other things that:
- (A) CFA and DEPI will provide timely, accurate, relevant and consistent information to communities, agencies and other stakeholders to enable appropriate response to an incident (Principle – Community Information);
  - (B) for jointly attended incidents, all publicly released incident information must reflect a joint agency incident management approach (Guideline (b) - Community Information);
  - (C) information to the community must be a priority for the Incident Controller, and will be disseminated in a timely manner (in cooperation with the Municipal Emergency Response Coordinator as required) based on the actual or perceived risk to the community (Guideline (d) -Community Information);



- (D) the Victorian Bushfire Information Line (VBIL) is the jointly operated bushfire information service (Guideline (i) - Community Information);
- (iii) On or about 19 September 2008, the CFA and DEPI agreed on a *Standard Operating Procedure- Incident Information Unit Management* (CFA.0718.0011.0011) which provided among other things that:
- (A) it applies to all CFA and DEPI members working in the Information Unit established for a multi-agency incident (Scope), being an incident where more than one agency has suppression responsibilities or when both agencies' areas of responsibility are threatened or included within the operational area of a fire incident (Definitions);
- (B) information released during an incident shall be issued by the control agency on behalf of all agencies and must reflect multi-agency involvement. In addition, all information for distribution must carry both agencies' identification (Procedure, 1.4);
- (C) the Information Unit also has responsibilities to disseminate information relating to the incident to the Division Emergency Response Coordinator (DERC)/ Municipal Emergency Response Coordinator (MERC) (Procedure, 1.9);
- (D) once information is authorised by the Incident Controller, a range of dissemination tools must be used following the CFA-DEPI Information Unit Guidelines (Procedure. 2.1), including the ABC (Procedure, 2.1.1.1), VBIL via iECC Information Unit (Procedure, 2.1 2.1), and the agencies' websites via the iECC Information Unit (Procedure, 2.1.3.1);
- (E) when providing information to websites during joint incidents website links should be provided to the Information Unit of the support agency (2.1.3.1).
- (iv) On or about 28 September 2007, the CFA and DEPI agreed on a *Standard Operating Procedure- Planning for Joint Incident*

Management Teams (DSE.USB9.0035.1602) which provided among other things that:

(A) it applies to all CFA and DEPI members engaged in integrated responses to fire and other emergencies (Scope);

(B) its objective is to ensure that fires and incidents are managed by CFA and DEPI members who possess the appropriate competencies, endorsements and experience (Objective);

(C) the positions of Incident Controller and Deputy Incident Controller should be selected, one from each agency, so that they can interchange according to the need to change the designated control agency (Procedure,1.4);

(D) every effort should be made to balance the Incident Management Team from both DEPI and CFA (Procedure, 2.1.2);

(v) On or about 28 September 2007, the CFA and DEPI agreed on a Standard Operating Procedure- Integrated Fire Agency Co-ordination Centres (IFACC) (DSE.HDD.0032.0148) which provided among other things that:

(A) it applies to all CFA and DEPI members engaged in integrated responses to fire and other emergencies (Scope);

(B) where normal business arrangements are unable to provide the level of coordination required to manage the fire activity in a region/area, an IFACC will be established (Procedure, 2) as the location from which agency representatives provide multi-agency coordination under the guidance of the IFACC Manager (Definitions);

(C) an IFACC is responsible for providing coordination of information management as required and assisting as necessary the flow of information depending on the situation prevailing at each fire or fire complex (Procedure. 4. 4.1);

(D) the IFACC is responsible for liaising with the Division Emergency Response Coordinator (DERC) at a strategic

level where coordination is required across incidents

(Procedure, 4.5, 5.1);

(E) each Incident Management Team is responsible for informing the communities being impacted by the incident, and liaison with the Municipal Emergency Response Coordinator (MERC) specific to their incident (Procedure, 4.4 & 4.5 Notes, 5.2);

(F) both the DERC and MERC should be encouraged to have a representative located at the IFACC and ICC respectively so that they have real time access to information on the incident and in the case of the MERC, be able to inform and report to the MECC (Procedure, 5.4).

(vi) In or about August 2008, the CFA and DEPI agreed on *Guidelines for AIIMS Information Unit* (DSE.0200.0001.2431) which among other things:

(A) stated that the background to the Guidelines was a 2006 joint project, guided by a joint CFA/DEPI Steering Committee, to develop systems, tools and processes to enable the provision of relevant, timely and accurate information to communities and stakeholders during fire-related emergency events (Background);

(B) stated that expected outcomes of this joint project included:

(1) the development of best practice guidelines, procedures, templates and information dissemination tools to support the functioning of the Information Unit under the AIIMS structure in a coordinated and integrated way between agencies,

(2) a multi-agency pool of trained staff,

(3) the integration of CFA and DEPI Information Units with both agencies' State Emergency Co-ordination facilities to create one operating unit (Background);

(C) provided guidelines and information for the operation of Information Units, including duties, roles and responsibilities,

structures, sources of information, tools, processes and dissemination methods;

- (D) provided that the objectives of the Information Unit include gathering and delivering accurate timely, relevant, consistent and authorised messages to communities directly impacted, or likely to be directly impacted by an incident, that support and encourage appropriate response and proactive measures (Section 3);
- (E) provided that priority must be given to providing information to communities that are near the incident, who are or may come under direct threat, and who require specific detail on the incident at a local level, how it is likely to impact them and what they should be considering for the protection of their lives and property (Section 4 Part 1);
- (F) provided that the sources of information relevant to an incident available to the Information Unit included: (I) the CFA's Incident Management System (IMS), (II) DEPI's FireWeb system, (III) the CFA or DEPI Regional Duty Officer, (IV) other ICC Information Units, (V) IMT briefings, (VI) the IMP Planning Section, (VII) the IMT Situation Unit (Section 4 Part 2);
- (G) provided a set of templates and tools available on the CFA/DEPI Online IMT Toolbox or IMT Toolbox CD, including a set of Fire Information Release templates (Section 4 Part 3);
- (H) provided information dissemination methods including ABC Radio, the CFA and DEPI websites and VBIL (Section 4 Part 4);
- (I) stated that a project was underway, due to be completed by the 2008/09 fire season, which would result in one website for the display of emergency information, but until that project was completed, both CFA and DEPI needed to continue to work together to ensure that website content is consistent (Section 4 Part 4);

(J) stated that the VBIL is a joint initiative of CFA and DEPI utilising the DEPI Customer Service Centre (CSC) to provide one point of contact for people needing information on bushfire activity in Victoria (Section 4 Part 4);

(K) stated that the Municipal Emergency Coordination Centre (MECC) needs to be provided with copies of all information releases sent out and there needs to be a link between information the MECC may need to provide to stakeholders affected by an incident so there can be a coordinated approach to information dissemination from a variety of sources (Section 3, 'Functional Levels in Information Flow').

(vii) The joint project referred to in sub-paragraphs (vi)(A) and (vi)(B) above was the subject of a July 2006 report by John Schauble titled *Joint CFA/DSE Review of Effectiveness of Information Flow to Communities and Media During Fire Incidents* (DSE.HDD.0010.5977) which was jointly commissioned by the CFA and DEPI and which, among other things:

(A) reproduced terms of reference provided to Mr Schauble by the CFA and DEPI which stated among other things that:

(1) (the CFA and DEPI have a commitment to informing the community of impending danger during fire incidents and that the provision of timely information is regarded by both agencies as integral to the management of the incident, and

(2) on a joint DEPI/CFA Group would review the report at its draft to ensure relevance of recommendations;

(B) further stated among other things that:

(1) the general public cares little about whose 'turf' the fire is on or which agency 'owns' it;

(2) in reality fire events often cross borders between public and private lands and almost invariably threaten communities in which both agencies necessarily are stakeholders,

- (3) it is crucial that information provided to communities during wildfires is accurate, useful, timely and consistent.
- (viii) On or about 4 February 2004, the CFA and DEPI, together with other Victorian Emergency Services Organisations, agreed on the ABC Victoria and Victorian Emergency Services Organisations Memorandum of Understanding (CFA.007.505.0049) under which, among other things, ABC Local Radio Victoria provided a telephone 'hotline', accessible 24/7 by any person authorised by the Emergency Services, and undertook to broadcast emergency messages.
- (ix) On or about 30 October 2008, the CFA and DEPI agreed on the Victorian Bushfire Information Line Service Level Agreement 2008/2009 (DSE.USB9.0055.0001) which provided among other things that:
- (A) CFA and DEPI work in partnership to provide emergency information via VBIL;
  - (B) CFA and DEPI are to provide authorised, accurate and up-to-date information to the Customer Service Centre as soon as it becomes available;
  - (C) CFA and DEPI are to ensure that information is consistent and current on both the CFA and DEPI external fire websites.
- (x) In or about 2008, the CFA in partnership with the DEPI published a guide for residents of the bush titled *Living in the Bush: Bushfire Survival Plan Workbook* (CFA.019.502.0177) which stated among other things that:
- (A) CFA and DEPI have developed Information Units that can provide up to date information to the community during major fires;
  - (B) the Information Units work closely with the incident's fire management team to provide information to the community through a number of channels including radio web sites and through a statewide call centre;

- (C) radio stations such as ABC Radio and local radio regularly broadcast accurate and up to date messages straight from CFA/DEPI fire management teams;
- (D) the CFA and DEPI websites provide information about mayor bushfires burning in Victoria; and the sites are regularly updated during a fire, to provide accurate information as quickly as possible to residents in fire-affected areas;
- (E) the VBIL is a call centre established by DEPI and CFA; trained staff provide residents with incident updates as well as advice on appropriate actions to take during a bushfire.
- (xa) At all relevant times, the DEPI Secretary was required by the 2006 Code of Practice to participate in interagency coordination in accordance with relevant legislation, arrangements put in place under the state emergency response plan (DISPLAN), and arrangements agreed between agencies, as alleged in paragraph 212A above.
- (xi) In the days preceding 7 February 2009, the CFA and DEPI issued joint media releases including:
- (A) a joint media release on or about 4 or 5 February 2009 titled "Fire Services Warn of Continuing Fire Threat" (VPO.6000.0010.0707);
- (B) a joint media release on 6 February 2009 titled "Avoid all unnecessary travel tomorrow" (DSE.1005.0001.0005);  
which stated among other things that important steps to avoid the threat of fire included, if travelling, listening to ABC Local Radio or community radio station, and for bushfire information, checking the CFA and DEPI websites or calling the VBIL.
- (xii) On 7 February 2009, the CFA and DEPI jointly staffed the Integrated Emergency Coordination Centre (IECC) which included:
- (A) the CFA Chief Fire Officer Russell Rees and the DEPI Chief Officer Ewan Waller;

(B) the CFA State Coordinator Geoffrey Conway and DEPI Chief Officer Contact Alen Slijepcevic;

(C) the CFA State Duty Officer Gregory Paterson and the DEPI State Duty Officer Andrew Graystone;

(D) the DEPI Fire Behaviour Analysis Unit; and

(E) the CFA and DEPI Information Units;

and which, among other things:

(F) monitored and predicted the progress of bushfires;

(G) monitored and contributed to bushfire warnings provided by the CFA and DEPI to the community; and

(H) published Fire Information Releases on the CFA and DEPI websites.

(xiii) On 7 February 2009, the CFA and DEPI jointly staffed the Incident Management Team (IMT) at the Alexandra Incident Control Centre (ICC), which included:

(A) DEPI Incident Controllers Andrew Miller and Tony Lovick, and CFA Deputy Incident Controller Graeme Fergus;

(B) DEPI Information Officer Robyn Rattray-Wood and CFA Information Officers Mark Williams and Sue Sheldrick;

and which, among other things:

(C) monitored and predicted the progress of the Murrindindi fire; and

(D) prepared and issued Fire Information Releases in relation to the Murrindindi fire.

(xiv) On or around 7 February 2009, the DEPI and CFA jointly established the Benalla Integrated Fire Agency Co-ordination Centre (IFACC), which included DEPI Information Officers Alex Konrad and Darren Skelton, and which among other things:

(A) monitored and predicted the progress of the Murrindindi fire; and

(B) prepared and issued Fire Information Releases in relation to the Murrindindi fire.



243. The acts and omissions of the CFA alleged in paragraphs 185, 186 and 204 above were engaged in in furtherance of the agreement, alternatively, in furtherance of the concurrence, alternatively, in furtherance of the common design, alternatively, in concert with the DEPI Secretary towards the common end, alleged in paragraph 242 above.

244. The acts and omissions of the DEPI Secretary alleged in paragraphs 221,222 and 237 above were engaged in in furtherance of the agreement, alternatively, in furtherance of the concurrence, alternatively, in furtherance of the common design, alternatively, in concert with the CFA towards the common end, alleged in paragraph 242 above.

245. In the premises, by engaging in those alleged acts and omissions, the CFA and DEPI Secretary were joint tortfeasors.

### **SECTION J-K – COMMON QUESTIONS OF LAW AND FACT**

242-246. The questions of law or fact common to the claims of the plaintiff and each of the group members or subgroup members are:

- (a) how the Murrindindi bushfire started;
- (b) whether the Statutory Duties were owed by SPIAusnet to the claimants, and if so the content of those duties;
- (c) whether the General Duty was owed by SPIAusnet to the claimants, and if so the content of the duty;
- (d) whether the Murrindindi bushfire was caused by a breach by SPIAusnet of any of the Statutory Duties or the General Duty;

- (e) as between the plaintiff and subgroup members, and SPIAusnet – whether the plaintiff and subgroup members suffered actionable nuisance created by SPIAusnet;
- (f) in relation to the SECV duty:
  - (i) whether the duty was owed by SECV and ES-Victoria to the class of persons (including the claimants or any of them) described in paragraph 34;
  - (ii) if the duty was owed as alleged, whether, and if so how and when, it was breached;
  - (iii) whether the breach caused the Murrindindi fire;
  - (iv) whether SPIAusnet is liable for loss and damage caused by the breach;
- (g) so far as ELPD reasonable care claims are made against SPIAusnet:
  - (i) whether the said claims are apportionable under Part IVAA of the Wrongs Act;
  - (ii) if the ELPD reasonable care claims are apportionable, whether UAM is a concurrent wrongdoer for the purposes of Part IVAA of the Wrongs Act, and the proportionate responsibility of any such concurrent wrongdoer;
- (h) whether the UAM duty was owed by UAM to the claimants, and if so the content of the duty;
- (i) whether the Murrindindi bushfire was caused by a breach by UAM of the UAM duty;
- (j) so far as ELPD reasonable care claims are made against UAM:
  - (i) whether the said claims are apportionable under Part IVAA of the Wrongs Act;
  - (ii) if the ELPD reasonable care claims are apportionable, whether SPIAusnet is a concurrent wrongdoer for the purposes of Part IVAA

of the Wrongs Act, and the proportionate responsibility of any such concurrent wrongdoer;

- (k) whether the DEPI Secretary owed any and, if so, which of the duties alleged and, if so, the content of any such duty;
- (l) whether the DEPI Secretary breached any such duty;
- (m) whether any such breach of duty by the DEPI Secretary caused or contributed to any and if so what behaviour, features or characteristics of the Murrindindi bushfire;
- (n) so far as ELPD reasonable care claims are made against the DEPI Secretary:
  - (i) whether the said claims are apportionable under Part IVAA of the Wrongs Act;
  - (ii) if the ELPD reasonable care claims are apportionable, whether any other defendant is a concurrent wrongdoer for the purposes of Part IVAA of the Wrongs Act, and the proportionate responsibility of any such concurrent wrongdoer;
- (o) whether CFA owed any and if so which of the duties alleged, and if so the content of each such duty;
- (p) whether CFA breached any such duty;
- (q) whether the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators owed any and if so which of the duties alleged, and if so the content of each such duty;
- (r) whether the State Co-ordinator, the Deputy Co-ordinator, the SER personnel and the Murrindindi Fire Emergency Response Co-ordinators breached any such duty;

- (s) what are the principles for identifying and measuring compensable losses suffered by the claimants resulting from the breaches of duty or nuisance alleged herein.

**AND THE PLAINTIFF CLAIMS on ~~his~~her own behalf and on behalf of the group members:**

**Against ~~SPI~~Ausnet:**

- (A) Damages;
- (B) Interest pursuant to statute;
- (C) Costs.

**Further or alternatively, against UAM:**

- (D) Damages;
- (E) Interest pursuant to statute;
- (F) Costs.

**Further or alternatively, against the DEPI Secretary:**

- (G) Damages;
- (H) Interest pursuant to statute;
- (I) Costs.

**Further or alternatively, against CFA:**

- (J) Damages;
- (K) Interest pursuant to statute;
- (L) Costs.

**Further or alternatively, against the State:**

- (M) Damages;
- (N) Interest pursuant to statute;

(O) Costs.

**Dated: ~~17~~29 October 2014**

**F. M. McLeod SC**

**A. J. Fraatz**

**F. K. Forsyth**

**M. Szydzik**

*Maurice Blackburn Lawyers*

.....  
**Maurice Blackburn**

Solicitors for the Plaintiff

**Schedule of parties**

**KATHERINE ROWE**

Plaintiff

- and -

**AUSNET ELECTRICITY SERVICES PTY LTD (ACN 064 651 118) (formerly SPI  
ELECTRICITY PTY LTD) (ACN 064 651 118)**

First Defendant

**ACN 060 674 580 PTY LTD (ACN 060 674 580)**

Second Defendant

**SECRETARY TO THE DEPARTMENT  
OF ENVIRONMENT AND PRIMARY INDUSTRIES**

Third Defendant

**COUNTRY FIRE AUTHORITY**

Fourth Defendant

**STATE OF VICTORIA**

Fifth Defendant