



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: P5/2022  
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Registry: Perth  
Document filed: Form 27F - 1st Respondent's Outline of oral argument - Herri  
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IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

No. P5 of 2022

BETWEEN:

**ELECTRICITY NETWORKS CORPORATION T/AS  
WESTERN POWER (ABN 18 540 492 861)**

Appellant

and

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

First Respondents

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

Second Respondents

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

Third Respondents

**NOREEN MERLE CAMPBELL**

Fourth Respondent

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

Fifth Respondent

## **HERRIDGE PARTIES' OUTLINE OF ORAL SUBMISSIONS**

### 30 **Part I: Certification**

1 The Herridge Parties certify that this outline is in a form suitable for internet publication.

### **Part II: Outline of propositions the Herridge Parties propose to advance**

2 The Herridge Parties have a significant community of interest:

(a) as to the WP appeal, with all other respondent parties, whose oral submissions are adopted without repetition; and

(b) as to the non-delegable duty proposed cross appeal [CAB 951], with the IAG / Allianz Parties, who will primarily orally address that ground.

#### ***Western Power appeal***

3 The case is properly approached as one concerning the duty of an enterprise to others  
40 who stand to be harmed by the activities of that enterprise. That it is State-owned is irrelevant. The analogy to the public authority cases is misconceived where there is an

uncontested finding that compliance with the duty is feasible (J[168]), and the costs associated with compliance could appropriately be passed on to those acquiring the service from the enterprise (J[173]).

4 As to the CA’s formulation of the duty (J[158]; *see* HPS[12] (duty formulation)):

(a) WP (A[2] and [41]; *c.f.* [28]-[29], and orally<sup>1</sup>) characterises the CA duty as a composite of the CA’s formulation of duty (J[152]) and breach (J[166]-[167]), and then wrongly found criticism of that ‘duty’ on that basis;

(b) The CA formulation of duty and breach is a product of the pleaded cases (6FASC<sup>2</sup> [29(a)(ii), (c)], [30], [30B(b)], [33(a)]);

10 (c) the CA reformulation (J[158]) requires reasonable care to avoid identified harm (CLA s. 5B) ‘in connection with’ delivery of electricity through the SWIS. Inspection, or systematic inspection, may be one precaution following from the CA duty. It is not the only one. The relation is an appropriate limitation; contrast the facts of this case with those in *Turano* [HPS[17]; [25]];

(d) ‘in connection with’ is of wide import, but is relational.<sup>3</sup> The relation connects reasonable care to the operation of the SWIS, i.e. the infrastructure by which WP conveyed electricity to consumers.

5 The componentry on the PA pole is set out at TJ[17]-[19], [33]-[35] and J[31]-[35] and is not in contest. There are two points of significance. One is that the s. 25(1)(b)  
20 ‘position’ is physically supported by the PA Pole, whether at the mains connection box or inside the switchboard enclosure. The other is that the plant on Mrs. C’s land was – no matter its ownership – a system (for powering Mrs. C’s premises) within a system (the SWIS), over which WP had control: HPS[19]-[20], [26]-[27].

6 Authority is mixed on the analytical starting point on the coherence question. There is support for the view that a statute operates ‘in the milieu of the common law’, and that conformity is therefore the last analytical step.<sup>4</sup> Equally, there is authority that the statute is the starting point.<sup>5</sup> The important point is the coherence of the result.<sup>6</sup> The

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1 *For example:* T3.15, .22; 8.238, .300; 15.585; 16.605; 26.1060; 28.1160; 34.1138, .1445; 35.1470; 38.1620-30; 41.1765-75; 42.1795.

2 First Respondent’s Book of Further materials, tab 1.

3 *R v. Khazaal* (2012) 246 CLR 601 [31].

4 *Crimmins* [26]-[30], [360]; *Stuart* [48].

5 *Crimmins* [159]-[160], [213]-[222]; *Sullivan* [62]-[64]; *Stuart* [111]-[116]; *McKenna* [32]-[33].

6 *Graham Barclay* [78]-[82].

methodological issue is not determinative here because WP had ample powers of management and maintenance (e.g. EC Act ss. 41; EOP Act ss. 28, 43, 49) in light of which it made choices (J[153]-[155]; HPS [20]). The CA duty (J[158]) reflects a principled approach to the control WP had and exercised when it made those choices.

7 A negative implication is unlikely to follow from a provision with such a limited field of operation as s. 25 (J[136]-[140]). The Legislature would not cover the field *by implication*. The inconsistency discerned in *Stuart* and *McKenna* followed from specific statutory prescriptions on action; HPS [34]-[39].

8 If the PA pole had fallen without causing damage, WP was empowered to cease supply  
10 (EI Act s. 31; EC Act s. 61). It was also empowered to remediate by its general powers of management (EC Act s. 41) and specific works powers (EOP Act s. 28); HPS [19].

***Apportionability of damages for private nuisance***

9 An ‘apportionable claim’ arises from a failure to take reasonable care: CLA ss. 5AI, 5AK. The appropriate focus is not on what a claim is *for* (e.g. damages, or debt) but on its essential character, looking to the relevant factual findings, framing of the claim, and its legal character: *Tanah Merah* [109], [115], [117], [127]; HPS [47], [50].

10 The fault element of a private nuisance ‘creation’ case is mere foreseeability, not a failure to take reasonable care: HPS [48]-[49]; R1RAR [11]-[13]. The pleading is not the determinant of the essential character of the cause of action (HPS [50]; R1RAR [12]).

20 ***Mrs. C’s appeal***

11 Mrs. C’s appeal is in substance an argument as to apportionment. The CA statement of duty (J[294]) is orthodox. Her *own* lack of knowledge is not to the point. A reasonable person’s is: R1R [7]. Her breach case ignores the facts as found: R1R [8], [9]-[10]. And her causation case is plainly a re-classified apportionment argument that ignores the Court’s instruction that a breach of the factual causation limb will ordinarily make out a breach of the normative limb: R1R [13].

12 No issue of principle arises from Mrs. C’s duty being concurrent with another party’s, or otherwise from her case. Special leave should be refused.

**Dated: 7 September 2022**



**Peter Dunning**