REGULATION, LIABILITY AND SMALL CUSTOMER RIGHTS IN THE ENERGY SUPPLY INDUSTRY

by

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This Thesis submitted for the Degree of Master of Laws (Hons)

School of Law, University of Western Sydney 2007
STATEMENT OF THE ORIGIN OF SOURCE MATERIAL

The work presented in this Thesis is to the best of my knowledge and belief, original, except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part for a degree in this or any other Institution

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R.H.Stillman
ACKNOWLEDGMENT

A work of this kind is not possible without the help of many people who provided data and facilities for research and not least of all an environment for the development and stimulation of ideas.

My principal debt is to my two supervisors, Professor Carolyn Sappideen and Professor Razeen Sappideen. It is doubtful if this work would have been undertaken without their insight and encouragement and the earlier work which I did with Professor Carolyn Sappideen in the area of Tort and liability for electrical accidents in the electricity supply industry.

Many years ago on completing an expert opinion for a country solicitor he gave me a copy of the fourth edition of the “Law of Torts” by John G. Fleming. The reason for the gift was that a later edition of the text was referenced by the Judge during the District Court hearing of the case. My interest in law and tort in particular probably goes back to that case and the Fleming text. Many years later I had the privilege through Professor Carolyn Sappideen, of meeting and listening to that rudite and enlightened legal scholar when he lectured at the University of Queensland Law School.

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<td><strong>Electricity Regulation 1994</strong></td>
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| **South Australia** |
| **Civil Liabilities Act 2003** |
| **Electricity Act 1996** |
| **Electricity Corporations (Restructuring and Disposal) Act 1999** |
| **Electricity Corporations Act 1994** |
| **Electricity (Principles of Vegetation Clearance) Regulations 1996** |
| **Electricity Corporations (Restructuring and Disposal) Regulations 1999** |

| **Tasmania** |
| **Electricity National Scheme (Tasmania) Act 1999** |
| **Electricity Companies Act 1997** |
| **Electricity Industry Safety and Administration (Consequential and Transitional Provisions) Act 1997** |
| **Electricity Industry Safety and Administration Act 1997** |
| **Electricity Ombudsman Act 1998** |
| **Electricity Supply Industry Act 1995** |
| **Electricity Supply Industry Restructuring (Savings and Transitional Provisions) Act 1995** |
| **Electricity Wayleaves and Easements Act 2000** |
| **Electricity Companies (Transitional Price Control) Order 1998** |
| **Electricity Industry Safety and Administration Regulations 1999** |
| **Electricity Supply Industry (Price Control) Regulations 2003** |
| **Electricity Supply Industry (Tariff Customers) Regulations 1998** |
| **Electricity Supply Industry Pricing Order 2002** |
| **Electricity Supply Industry Regulations 1996** |

| **Victoria** |
| **Wrongs Act 1958** |
| **Electricity Industry Act 2000** |
| **Electricity Industry Safety Act 2000** |
| **Electricity Industry (Confidentiality of Information) Regulations 2000** |
| **Electricity Industry (Prohibited Interest) Regulations 2003** |
| **Electricity Safety (Electric Line Clearance) Regulations 1999** |
| **Electricity Safety (Equipment) Regulations 1999** |
| **Electricity Safety (Equipment Efficiency) Regulations 1999** |
| **Electricity Safety (Installations) Regulations 1999** |
| **Electricity Safety (Management) Regulations 1999** |
| **Electricity Safety (Network Assets) Regulations 1999** |
| **Electricity Safety (Infringements) Regulations 1999** |
| **Electricity Safety (Bushfire Mitigation) Regulations 1999** |
| **Electricity Safety (Stray Current Corrosion) Regulations 1999** |
| **Electricity Distribution Code 2002** |
| **Occupational and Safety Act (Victoria)** |
| **Electricity Industry Guideline No. 11 Voltage Variation Compensation, April 2001.** |

<p>| <strong>Western Australia</strong> |
| <strong>Civil Liability Amendment Act 2003</strong> |</p>
<table>
<thead>
<tr>
<th>Act/Regulation</th>
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<tr>
<td>Electricity Act 1945</td>
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<td>Electricity Corporations Act 1994</td>
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<td>Electricity (Licensing) Regulations 1991</td>
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<td>Electricity (Supply Standards and System Safety) Regulations 2001</td>
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<td>Electricity Distribution Regulations 1997</td>
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<td>Electricity Referee and Dispute Resolutions Regulations 1997</td>
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<td>Electricity Regulations 1947</td>
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<td>Electricity Transmission Regulations 2003</td>
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ABSTRACT

The transfer of energy and water utilities to private or state owned corporations raises important questions of service obligations, access, and dispute resolution for small end customers. The aim of this thesis is to explore the legal issues that confront small end users and service providers in what is a highly regulated market environment. This thesis examines the duties and obligations of energy service providers in terms of the product being fit for its expected purpose and in a manner not causing economic loss to the user. Correspondingly, the thesis examines also the rights and obligations of the user. These respective rights and liabilities of the partis are examined by reference to contracts law, consumer protection law under the *Trade Practices Act*, torts law and adjudication powers of the Ombudsman. The term “user” in this context refers to the small end-user, even though the analytical framework used in this thesis can, with appropriate modifications be also used in relation to others in the provider-user relationship identified here. With this in mind, the thesis examines:

1. whether the legal mechanisms created by national and state legislation and the regulatory regime have enhanced consumer sovereignty and reinforced small end customer rights relative to the old regime of franchised monopolies; and
2. whether, the legal tradition of reasonable care with its roots in interpersonal equity has been undermined by economic criteria.

Despite Governments relinquishing ownership of production, transmission and distribution of energy supplies to the corporate sector, the State remains as a significant presence as a regulator of essential public utility services. Essential service utilities occupy too important a place in the social well being of society for governments to abandon them to the vagaries of market economics. Given the difficulties the courts have had of establishing reasonable care as applied to government or semi-government utilities, an important legal issue is, what is the appropriate standard of liability for negligence which should be applied to the highly regulated private and state owned service corporations which have no immunities under the Crown? In this regard, the thesis is concerned with the legal responsibility under both common law and statute to small end users for everyday power disturbances, failure to supply, and defective supply causing property damage or economic loss. In this context the basic arguments set out in the Thesis are as follows:

- Chapter 1 sets the background to the thesis.
- Chapter 2 examines regulation and the national electricity market with emphasis on the role of the Australian Energy Regulator, the Rules of the market and the liability exclusion clauses contained in the National Electricity Law. It argues that the
complicated commercial and statutory structure of the market is beyond the legal ability of a small end user to challenge a negligent action of a market participant.

♦ Chapter 3 takes up the issue of whether under the *Trade Practices Act 1974 (Cth)* a strict liability regime should apply to service providers as argued in the *Electricity Supply Association of Australia v Australian Competition and Consumer Commission* case.¹ It argues that electricity as “goods” (s. 4) should be subject to strict liability for defective supply.

♦ Chapter 4 examines standard form connection and supply contracts which are deemed (unseen and unsigned) to exist between service providers and small end customers. It concludes that liability exclusion clauses deny the small end customer common law contractual justice.

♦ Chapter 5 focuses on the impact of civil liability legislation in negligence, the rationalist concept of care and safety,² and decision tree analysis in causation. It is considered that the legislation severely restricts the ability of the small end user to access the legal system when dealing with corporate energy providers.

♦ Chapter 6 looks at economic loss in respect of the loss of energy supplies. It argues that the common law regime does not assist the small end consumer as one of a large indeterminate class of plaintiffs who cannot recover.³

♦ Chapter 7 examines the jurisdiction of the Energy Ombudsman scheme. It argues that whilst there is some scope to provide compensation to small end users, the capacity is both limited and small in amount.

♦ Chapter 8 provides some concluding arguments.

The research concludes that the legal and regulatory mechanisms governing the dis-aggregated energy supply industry has failed to provide adequate protection for small end users. It is concluded that in the context of the existing regime, the small end user of energy services is not only disadvantaged but disenfranchised.

¹ (2001) FCA 1296.
² Kirby P, *Cekan v Haines* (1990) 21 NSWLR 296
³ *Johnson Tiles & Others v Esso Oil Pty Ltd* (2003) VSC 27.
Chapter 1: INTRODUCTION

“Consumer protection is meaningless if it is so complicated and inaccessible to ordinary people that they remain either unaware of their rights or are unable to act on them”.¹

1.1 Public Utility Services and Regulation

The sale of public service utilities, such as electricity, gas and water to private interests or their conversion to state owned corporations raises important questions in respect of customer service obligations and access to information. The objective of this thesis is to explore the legal issues that arise between an end user and a network service provider operating in a market environment. With this in mind, this thesis examines the duties and obligations of energy service providers in terms of the product being fit for its expected purpose and in a manner not causing loss to the user. Correspondingly, the thesis examines also the rights and obligations of the user. These respective rights and liabilities of the parties are examined by reference to contracts law, consumer protection law under the Trade Practices Act, torts law and adjudication powers of the Ombudsman. The term “user” in this context refers to the small end-user, even though the analytical framework used in this thesis can, with appropriate modifications be also used in relation to others in the provider-user relationship identified here. It will in this context examine whether the rights of small end users such as domestic consumers, shops and small factories are unfairly disadvantaged.

The subject of this thesis, the electricity supply industry represents 57 percent of the total proceeds from all state sell-offs of public utilities which have occurred in Australia in the past decade. Furthermore, in the decade since 1995 a national electricity market has been in operation catering for some 9 million end users connected to a transmission system which extends from Port Lincoln in South Australia to Port Douglas in Queensland, a transmission line distance of more than

There is a wealth of experience as to the impact of power system restructuring in countries having a western tradition in law. In this regard the corporate electricity enterprise presents an ideal basis for legal study.

While Australia has not experienced a catastrophic event such as the Auckland electricity blackout of February 1998 which affected the central business district for two months, or the blackouts affecting millions of people, which have plagued the United States and Europe this may have been due to good fortune, if nothing else. Drought, grass and bush fire which are endemic to the Australian environment have brought in their wake major disasters such as the Ash Wednesday fires of 16 February 1983 in which 75 people died. Of the 400 reported fires which swept the south eastern area of South Australia and Victoria, 273 were initiated by electricity power lines involving claims for injury and property damage exceeding $122 million dollars. In this respect, the research examines not only the legal responsibility to the small end user for catastrophic events but also liability for everyday power disturbances, failure to supply, and defective supply causing injury, loss and damage.

An essential service, such as the supply of electricity, or gas, or water, is recognised as a basic quality of life benchmark which is critical to every day modern living. In this regard the provision of electricity, or gas, or water, has traditionally been the preserve of highly regulated, vertically integrated, franchised corporate or government owned monopolies based on economies of scale. In the application of market driven theories to public utilities delivering an essential service, the critical issue is whether the community is prepared to accept a regime in which the provision of an essential service is like any other commodity sold in the market place. If so, should the supplier of such a service have no more responsibility for the care of a customer than what can generally be expected of any other enterprise selling goods

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2 NEMMCO, “Australia’s National Electricity Market, 2003”.
6 As to what constitutes an essential service in a statutory sense, eg electricity, gas, water, transport, is defined in the various State Essential Services Acts in respect of industrial disputes and the right to strike.
in a market? It is further argued that it is conceivable that the conversion to private market oriented essential service providers can create a conflict between social objectives and the pursuit of commercial gain as was instanced in the Californian and Auckland crises.  

Privatisation of essential services is premised on the economic concept of achieving cost efficiencies through competition and that in the long term efficient markets operate in a self regulating environment. Historically no market in the real world is known to have ever achieved or operated in a self regulatory fashion. Governments recognise that community interests cannot be left to market devices; that politically they cannot allow markets to fail, as was the case in the Californian electricity market of 1998. To this end, the regulatory framework is designed to address price setting, service standards and access, and to provide redress mechanisms through the operation of an independent tribunal and industry Ombudsman schemes. In respect of the latter, this work examines the role and jurisdiction of the private industry Ombudsman scheme (EWON) funded by market members to resolve disputes between members and aggrieved parties. It examines the nature of that jurisdiction and the limitations imposed and asks whether these limits are fair in the circumstances. It makes recommendations to extend the Ombudsman’s jurisdiction.

It is further argued that the national electricity market, which has been operative for a decade, is essentially an economic and technical concept designed to ensure a secure and reliable operating environment for its participating members. As to whether it has brought benefits to the small end user is a matter of conjecture. The so called advent of competing entities delivering an essential service masks the true political

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10 The New South Wales Government has attempted to protect small customers from unfettered retail competition through default tariffs until 2007 coupled with a electricity trading and equalisation fund which forms a hedge for retailers and generators. Whether this remains under the new Australian Regulator regime after 2007 remains to be decided.
nature of the regulatory regime; government having created the market, for better or for worse, government is obligated to ensure that the market does not fail. Restructuring of the energy supply industry while transferring economic and fiscal risk from government to corporate interests has in effect resulted in significantly enhanced regulation when compared to that imposed on the old state owned franchise monopolies. In essence it is a hybrid of regulatory and corporate interests. The end result has been to progressively enhance the powers of the regulatory regime as instanced by the powers given to the newly created Australian Energy Regulator. It has increased corporate sensitivities in regard to legal and contractual liability, and, despite customer codes, has less regard for small party interests. This raises interesting questions of equity and responsibility under common law. Specifically, the laws and the interrelated contractual nature of market participants is sufficiently complex as to place small end users in an information void leaving them with little if any understanding of their rights. While there may be potential for legal proceedings against market operators by a small end user, it is doubtful if such persons would have the resources to do so, let alone the inclination. The thesis explores this issue in depth.

The thesis sets out to identify the relevant contractual relationships and the type of obligations that can arise under deemed contracts between the service provider and the end user. Of particular interest is the imposition of immunity from liability provisions and exclusion clauses in the deemed standard form supply contract where power system disturbing events cause injury or loss to consumers or other aggrieved parties. These clauses are weighted against the small end consumer. Their impact may be ameliorated by the implied warranties under the Trade Practices Act 1974 (Cth). The impact of the Trade Practices Act 1974 and whether it imposes strict liability on the network provider is examined in Chapter 3 which analyses the Federal Court case of Electricity Supply Association of Australia Ltd (ESAA) v Australian Competition and Consumer Commission (ACCC).

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11 A good example is the British rail system where the government has had to bail out the rail track company.
A key part of the research is the role of the Energy Ombudsman scheme in the resolution of disputes between a network service provider and an aggrieved small end users. The role is difficult as there will always be the question of independence from the market licensed industry members who provide the operating funds. Ombudsman schemes are a creation of state jurisdictions and are private companies limited by guarantee of its members under the Corporations Act 2001(Cth). The Ombudsman’s scheme is in essence about alternative dispute resolution with the Ombudsman as the arbitrator having the power to make a binding decision. The legal challenge to the powers of the Ombudsman to make a binding decision in respect of a dispute between one of its own members and a claimant was confirmed by the judgment in Citpower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd. In this regard, the small end user has access to an inexpensive means of settling complaints. However, this is not to say that energy service providers do not attempt to use their economic and legal resources to frustrate and stall the resolution of claims. Once internal processes are exhausted an action in contract, tort, or under fair trading legislation or the Trade Practices Act 1974(Cth) may be available to a dissatisfied consumer against a service provider.

1.2 Structure of the Thesis

Chapter 2 sets out the regulatory framework. It defines the interrelationship between the national electricity market, the elements which make up a power system and the regulatory environment which accounts for some 80 pieces of national and state legislation. Examined are the powers of the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER). The Australian Energy Regulator has penal and economic powers in dealing with the providers of energy services. This can have a decided impact on their ability to provide the reasonable care expected of an essential service.

The market is a co-operative arrangement between the five eastern states and the ACT who form the interconnecting transmission link, with the Commonwealth, Western Australia and the Northern Territory having a participating role in respect energy planning. Corporations and competition policy is the prerogative of the

Commonwealth. The responsibility of licensing market participants is with state jurisdictions, in this context, emphasis is on the New South Wales structure, which in all essentials is mirrored by the other states. The major differences are that New South Wales has state owned corporations whereas Victoria has private shareholder companies. South Australia followed Victoria into full privatisation, whereas Queensland, Tasmania and the ACT are modelled on that of NSW. A specific part of the chapter examines the mechanisms used by way of exclusion clauses in the National Electricity Law to protect the market operator, the National Electricity Market Management Company (NEMMCO) and the transmission and distribution service providers.

Having established the regulatory framework, **Chapter 3** of the thesis proceeds to discuss whether strict liability under the *Trade Practices Act 1974* protects small end users. In the *Electricity Supply Association of Australia (ESAA) v Australian Competition and Consumer Commission (ACCC)* \(^{14}\) an issue was whether liability exists in cases in which failure occurs without fault on the part of the network provider. The first part of the chapter examines the key concepts utilised in the *Trade Practices Act* as applied to the supply of electricity. Electricity is defined as “*goods*” as in s 4. It also examines the concept of “*supply time*” in s 75AK(2) of the *Trade Practices Act (Cth) 1974* and the potential for Part VA (defectively manufactured products) to apply to electricity consumers. The chapter concentrates on the arguments in the *ESAA v ACCC* case on the issue of strict liability in respect of an electricity supply under s66(2), merchantable quality and s71 fitness for purpose. Also addressed is the provision of s 74 in respect of warranties in relation to the supply of services. Following on from this, **Chapter 4** of the thesis addresses contractual liability issues associated with customer standard form contracts.

**Chapter 4** is concerned with standard form contracts to supply small end consumers. The legislation in New South Wales is used as an illustrative example. The first part of the Chapter concerns the provisions required of such contracts by the New South Wales state legislation. This is followed by an examination of contractual relationships between a service provider and end users in the electricity market. The

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\(^{14}\) *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission (2001) FCA 1296.*
final part of the Chapter deals with issues which arise in the use of exclusion clauses in standard form connection contracts. The thesis then turns to look at tort liability. Liability for pure economic loss is discussed in a separate chapter.

Chapter 5 focuses on the impact of common law negligence on service providers and the effect of Civil Liability Acts utilising the NSW legislation as a vehicle to examine tort liability for electrical accidents. Corporations, private or state owned public authorities do not represent the crown and as such have no immunities under the crown. In an environment of market economics and regulation there exists many pressures to balance cost against network reliability, security and safety. In this context examined is the concept of the marginal utility of safety and reasonable care based on the proposition that negligence has a price-system rationale in which the cost of mitigation can be balanced against that of the cost of the accident or harm. The chapter also looks at causation. Causation is characterized by means of conditional states utilising event or decision tree risk diagrams. The technique is applied to a number of leading negligence cases and case studies including power systems. The diagrams are conceived as an analytical tool in determining a connection between the risk of harm and negligent conduct. The thesis then examines liability in tort for economic loss.

Chapter 6 is concerned with the issue of recovery for financial loss by a plaintiff as the result of the loss of an energy supply. The cases are associated with power blackouts where a defendant’s negligence results in the following.

♦ Damage by a third party to equipment or plant such as a power cable, or a water or gas pipe owned by a service provider which in turn interferes with the contractual rights of others who are dependent on that service but suffer no physical harm.

♦ A Transmission and Distribution service provider’s negligence which interferes with a customer’s contractual rights to the service, or other parties who are dependent on that service.

sections 9, 20F, State Corporations Act (NSW) 1989
The analysis of economic loss examines the history and policy underpinning judicial approaches to the recovery of economic loss. This is followed by authoritative cases involving economic loss pertinent to utilities.

**Chapter 7** concentrates on the role of the New South Wales Energy, Water and Gas Ombudsman (EWON) in compensation claims by end users against network service providers and the procedures adopted to resolve disputes between parties. The Ombudsman’s scheme is about small claim alternative dispute resolution. It examines the impact of limitations on compensation that can be awarded, whether claims are limited to contractual consumers, and how far the Ombudsman has a broader mandate that simply applying the law. It argues that the Ombudsman should have the power to arbitrate where third parties such as family members and shops which function within a supermarket or an industrial complex of small industries are involved in a claim against a service provider, despite having no direct contractual relationship with the service provider.

**Chapter 8** the concluding chapter of the thesis argues for amendments to the *Trade Practices Act* 1974 (Cth) to clarify the definition of electricity as goods and its delivery. It also argues that legislation should force providers to bring to the attention of the customer contract exclusion clauses. It will be argued that the legal and regulatory mechanisms created by National and State laws, Regulations and Rules of which there are 81 have not enhanced consumer sovereignty nor reinforced small end customer rights relative to the old regime of franchised monopolies. The energy market is in essence a technical-economic concept designed to protect the licensed participants rather than the small end customer. The legal system which has been created to regulate its operation and management is complicated and generally inaccessible to ordinary people who are invariably unaware of their rights and have only very limited means of acting upon them. As a consequence, the small end user of energy services is both disadvantaged and disenfranchised.

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16 Tenants can bring claims where specific requirements such as separate metering by the landlord required under *Electricity Supply Act* 1975 (NSW) ss.72(3),96A are met.
Chapter 2: REGULATION AND THE NATIONAL ELECTRICITY MARKET

2.1 Introduction

This chapter will examine the interrelationship between the national electricity market, the elements which make up a power system and the regulatory environment which governs their operation placing emphasis on the laws and rules which impact on service providers and end users. It will demonstrate the complicated nature of the system, examine and comment on the liability clauses in the National Electricity Laws and Rules and its potential impact on the end consumer\(^1\). It will argue that the market is designed to suit its licensed participants rather than the small end customer.

The old regime of essential services provided by state owned monopolies existed within a framework which emphasized equity and access. In this context the disadvantaged in the community, e.g. low income and rural users, were internally subsidized by way of customer service obligations. Such services also brought access to formal accountability mechanisms and administrative law remedies for the protection of community interests, e.g. direct ministerial responsibility, judicial review of government action in the courts, and access to administrative tribunals, freedom of information regimes and a public ombudsman\(^2\). In contrast, with the privatisation and corporatisation of electricity supply, the application of rationalist economic theories gives rise to the concept that such services can be treated and traded as commodities like any other product in a market economy. It follows therefore, that if these services are of the same fundamental character as that of any product purchased in the conventional market place, then suppliers of these services have no more, nor less responsibility for customer care than is generally applicable in the market place. As a consequence, it does not require that attention be given by a utility to access, equity and distributional impacts as they affect different classes of consumers. Such considerations are seen as exclusively within the policy domain of government, as with other essential commodities, like housing, clothing and food.\(^3\)

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1. The National Electricity Law, Regulations and Rules provide for the operation of a national electricity market.
In such an environment, the question which confronts the policy maker is: can energy and water services reasonably be viewed as commodities like any other? Do they have internal and external properties that differentiate them from other goods and services traded in the general market place? And if they are more than mere commodities, what are the broad implications of this for public policy? In this context, the unique combination of social and economic characteristics that differentiate utilities delivering an essential service from other industries in the economy requires a regulatory regime which will offset the limitations and vagaries of applying conventional market principles and market processes to the utility sector to ensure that (1) the market does not fail; and (2) there is accountability particularly when it comes to ordinary small vulnerable consumers.⁴

It is argued that the transformation of state owned monopolies to commercial entities has not meant a shift to a truly “free market” environment, neither in Australia or other countries which have dis-aggregated essential public services. It has involved a shift from ownership by the state to regulation by independent agencies, with the state defining the regulatory framework. The application of market rhetoric to competition within essential services, such as an electricity supply, masks the true nature of the regulatory regime. In essence, the market is designed to ensure market security and reliability. In this regard the immunity clauses in the National Electricity Laws (see Table 2.2) are to protect those who manage and operate the market to ensure that they are not inhibited by litigation in performing their functions rather than enhance the sovereignty of the small end user. An end user’s ability to produce evidence to successfully challenge an operational action by providers which negligently causes physical or economic harm will be beyond any small customers capabilities and resources.

With each successive change in the regime governing the energy supply industry, the trend seems to be to significantly enhance and centralise the regulatory environment leaving the impression that the service provider is in essence subject to a regulatory dictatorship, benign as it may appear. The 2004/5 changes in creating the Australian

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Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) giving the latter an overriding authority in industry policy and capital investment and as such pricing and revenues, begs the question, is this not a form of management by government leaving the service provider to shoulder the commercial risk? The fact that the AER can impose economic restraints and compliance as it affects transmission service providers and distribution service providers, raises issues of legal liability and immunity if such restraints can be shown to impact on the duty of care expected of a utility providing an essential service such as electricity.

2.2 The Power System Model
The classical definition of the complete power system from an engineering point of view, includes power stations having an aggregate of generators and their ancillaries, extra high voltage transmission line interconnections which connect the power stations and deliver power to zone bulk power substations, high voltage subtransmission lines which interconnect regional or area substations, primary feeders out of the area substations operating at medium voltages, distribution transformers, and secondary low voltage feeders and services supplying end users. These elements, apply to all types of power systems, regardless of classification by type of electrical load areas, urban or rural, such as domestic, commercial and industrial, or by type of construction, such as underground cables or overhead lines. Figure 2.1 is a pictorial view of a power system illustrating its component parts and Table 2.1 is indicative of the functional relationships.

Electrical energy cannot be stored in a manner which satisfies the demands of large populations of end users. It is a product which is required to be delivered at incrementally varying demand rates depending on the time of day and at the discretion of domestic, commercial and industrial end users. Each class of user imposes their own peculiar energy requirement which impacts on the characteristic of the demand cycle. In this respect the real time delivery of power and the constraints placed upon the elements which make up the power system are a function of physical laws rather than some commercial arrangement or contractual relationship between producer and user of a discrete quantity of goods.

5 Trade Practices Act 1974(Cth) s4 defines electricity as “goods” (see Chapter 3).

Reuben Stillman LLM (Hons) Thesis
Table 2.1: Functional Classification of the Power System

<table>
<thead>
<tr>
<th>System Components</th>
<th>Function</th>
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<tbody>
<tr>
<td>Generators and their ancillaries, e.g. step up transformers and control gear for connection to the transmission system.</td>
<td>the production of electrical energy from primary energy forms, e.g. coal, water, wind, solar.</td>
</tr>
<tr>
<td>Extra High Voltage Transmission interconnectors</td>
<td>Lines which connect power stations and bulk supply substations at regional nodes. Because of distance and the bulk power which must be transmitted, these interconnectors will operate at extra high voltages, e.g. in Australia at 500 kV, 330 kV, and 275kV and 220kV.</td>
</tr>
<tr>
<td>Bulk Supply Substations</td>
<td>Receives power from the transmission system and transforms it to a subtransmission voltage.</td>
</tr>
<tr>
<td>Subtransmission system</td>
<td>Circuits that emanate from the bulk power source and supply distribution system substations. In Australia usually operate at 132kV to 33kV.</td>
</tr>
<tr>
<td>Distribution Zone Substation</td>
<td>Power from the subtransmission circuits and transforms it to the primary feeder voltage</td>
</tr>
<tr>
<td>Primary Feeder</td>
<td>Circuits emanating from the distribution zone substations to distribution transformers - primary feeder voltage is 22kV and 11kV.</td>
</tr>
<tr>
<td>Distribution transformer</td>
<td>Steps power down from the primary feeder voltage to the consumer utilization voltage</td>
</tr>
<tr>
<td>Consumer Lines and services</td>
<td>Distributes power at secondary or utilization voltage which in Australia is at 415/240 volts</td>
</tr>
</tbody>
</table>
2.3 The National Market Participants

The National electricity market is a co-operative creation of the states of South Australia, Victoria, New South Wales, Queensland, Tasmania and the ACT as defined by the National Electricity (SA) (New National Electricity Law) Amendment Act 2005 and the National Electricity Regulations. They are physically and electrically linked by the interconnection of their respective transmission networks. It is the world’s longest transmission system extending over 4000 kilometres. The Northern Territory and Western Australia are considered too remote to become part of this system. With the 2004 changes the Commonwealth is now a member of the National Energy Market Ministers Forum (NEMMF) and Western Australia and the Northern Territory are participating observers.

Figure 2.2 illustrates this scheme of arrangement. It will be noted that it includes distributed generation (DG), e.g. wind power, solar, etc. The system is a three part subdivision of competing generators, a monopoly transmission system, and competing distribution network service providers. Each jurisdiction is responsible for its own participants with the National electricity Marketing Management Company (NEMMCO) responsible for operational control and market management. Transmission network service providers, such as Powerlink (Queensland), Transgrid (NSW), own and maintain the high voltage transmission assets within their state jurisdictions that transport electricity between generators and distribution networks. Distribution network service providers, such as Energy Australia (NSW), AGL (ACT), Country Energy (NSW), Energex (Queensland) own and operate the distribution network of medium and low voltage substations and feeders that deliver electricity from bulk supply substations to distribution centres to end users within each jurisdiction and also provide technical services. The operating transmission and distribution voltages are given in Table 2.1.

A market network service provider (MNSP) owns and operates a network that is linked to the national grid at terminals in different market regions. A provider must have a capacity of 30 MW or greater, and participate in NEMMCO’s centrally coordinated dispatch process. Providers offer their capacity to deliver power in the national market.

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6 Subsequently the National Electricity (South Australia) (New National Electricity Law) (Amendment) Act 2005.
pay participant fees, and obtain their revenue from trading in the market. Three market network service providers operate in the market. Directlink, between Queensland and New South Wales, Murraylink between Victoria and South Australia, and Basslink between Victoria and Tasmania all of whom form part of the national transmission system.

![Diagram of the interconnected electricity supply model](image)

**Figure 2.2: The Simplified Interconnected Electricity Supply Model**

Market customers purchase electricity supplied to a connection point on the power system through a transmission system or a distribution system. Market customers may be either electricity retailers, such as the retail arm of Energy Australia or end-use electricity consumers such as Supermarkets, or an Airport complex. Retailers purchase electricity through the spot market or from local generators who commit to on-sell the electricity to end-users. End-users may register with NEMMCO, pay participant fees, and purchase electricity directly from the market at spot prices. The contractual arrangement is shown in commercial model of Figure 2.3. There are:

- first-tier customers who purchase electricity through the national grid and are supplied at a connection point through an electricity retailer – eg, industrial, commercial and domestic small end consumers.
- Second tier small end customers, such as small shops and workshops, who purchase through an industrial or commercial complex.
Traders who trade on the spot market and on sell to large customers.

2.4 The National Regulatory Structure

2.4.1 Introduction

The national electricity market originated from Prime Minister Keating’s “One Nation Statement” of 1992 and the National Grid Management Council (NGMC). In 1994 the Council of Australian Governments decided that the operation of a national grid would be subject to regulation by way of a code of conduct to be developed and administered by the National Code Administrator Limited (NECA) and be subject to the authorization process under the Trade Practices Act 1974. Furthermore, the Australian Consumer and Competition Commission (ACCC) was given the power to scrutinize the conduct of code participants and to monitor prices where necessary through the Prices Surveillance Act 1983(Cth). In 1995 the states and the ACT enacted a series of co-operative acts termed the National Electricity Law and National Electricity Regulations. The participating states then created The National Electricity Code.
Administrator (NECA) Limited and the National Electricity Market Management Company Limited (NEMMCO) under the Australian Corporations Legislation. Further supporting legislation was enacted by the states to give legal status to operating and regulatory entities within their own jurisdictions.

As the result of a review of national energy policy, legislation was submitted to the Federal Parliament in June 2004 to amend the Trade Practices Act 1974(Cth) to provide:

♦ an Australian Energy Market Commission (AEMC) the body responsible for rule making and energy market development at a national level, including the National Electricity Rules and the National Gas Code.

♦ an Australian Energy Regulator (AER) the body responsible for economic regulation and compliance with and administering the rules of the electricity and natural gas industries at a national level; with NEMMCO continuing to be responsible for the day-to-day operation and administration of both the power system and electricity wholesale spot market in the NEM.

The amendments to the Trade Practices Act 1974(Cth), Part IIIAA – ss. 44AB to 44AAK, confer on the Australian Energy Regulator (AER) and the Australian Energy Market Commission(AEMC) functions and powers for electricity and gas as law within the jurisdiction of the Commonwealth. Complementing legislation has been passed into law by state jurisdictions. The Australian Energy Regulator becomes a constituent part of the ACCC but as a separate legal entity. Table 2.2 is a listing of the principal regulating authorities and their responsibility as it affects the New South Wales jurisdiction. The National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005 which came into force in April 2005 incorporates the powers and administrative responsibilities of the Australian Energy Market Commission and Australian Energy Regulator. In addition, the National Electricity Code, the code of conduct which governed the market under s. 6(1) of the old (1996) National Electricity Law, as has now been superseded by the National Electricity Rules which came into force in March 2007. They are made under the National Electricity Law and may be amended from time to time in accordance with the law.

Table 2.2: Regulation Legislation Authorities
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Regulating Authority</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Electricity Law and Regulations as above</td>
<td>Australian Energy Market Commission(AEMC)</td>
<td>♦ Making of the National Electricity Rules. ♦ Policy and development of the market. ♦ Any other functions relating to the market</td>
</tr>
<tr>
<td>National Electricity Law and Regulations Trade Practices Act 1974 (Cth) under Part IIIAA</td>
<td>Australian Energy Regulator</td>
<td>♦ to monitor compliance by market registered participants and breaches of Regulations and the Rules ♦ to institute and conduct proceedings ) against relevant participants under NEL or under ♦ s, 44AAG of the Trade Practices Act 1974(Cth) ♦ economic regulatory functions.</td>
</tr>
<tr>
<td>National Electricity Law and Regulations</td>
<td>National Electricity Market Management Company Limited(NEMMCO)</td>
<td>♦ Administers the wholesale market ♦ Security of the grid system</td>
</tr>
<tr>
<td>Australian Energy Market Act 2004(Cth)</td>
<td>The AEMC and the AER; (1) have the functions and powers conferred on them under the National Electricity (Commonwealth) Law, Regulations and Rules. (2) delegation by the AEMC and the AER is taken to extend to, and have effect for the purposes of, the NEL, Regulations and Rules.</td>
<td>♦ Things situated in or outside Australia; ♦ acts, transactions and matters done, entered into or occurring in or outside Australia; ♦ things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would be governed or otherwise affected by the law of a State, a Territory or a foreign country.</td>
</tr>
</tbody>
</table>

♦ Network system pricing.
### Electricity Act 1995 (NSW)

- Independent Pricing and Regulatory Authority
  - Development & access under the NER.
  - Customer contracts and protection.
  - Monitoring of network performance.
  - Contestable works

| ♦ Electricity Supply Act 1995 (NSW) | ♦ Department of Energy, Utilities and Sustainability | ♦ Customer protection and Contracts through the Electricity and Water Ombudsman (EWON) |
| ♦ Electricity Safety Act 1995 (NSW) | ♦ | ♦ Network performance as part of the licensing scenario. |
| ♦ Fair Trading Act (NSW) | ♦ Office of Fair Trading | ♦ Network safety, security and reliability. |
| ♦ Electricity Consumer Safety Act 1995 (NSW) | ♦ | |
| ♦ Electricity Supply Act 1995 (NSW) | ♦ | |

| ♦ Occupational Health and Safety Act 2000 (NSW) | ♦ WorkCover (NSW) | ♦ Industrial safety |
| ♦ | ♦ | ♦ Workers compensation |

Chapter 11 (glossary of terms) of the National Electricity Rules sets out the applicable regulatory instruments in detail.

### 2.4.2 The Powers of the Australian Energy Regulator (AER)

Of particular significance is the powers vested in the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) in respect of rule making and the governance of the market. Transmission and Distribution service providers being infrastructure businesses, are subject to an economic regulatory regime which determines the prices they charge for network services and hence the revenue to support their services. The governance is related to capital and operational expenditures as agreed to by the Regulator based on a compliance formulation weighed against system security, reliability and the conditions of the providers licence to operate in the market. Revenue determinations take place every five years between which there are regulatory determinations which allows for an annual transition of prices to match the revenue the Regulator has determined, although subject to revenue capping. This raises the question as what happens, or what is the procedure when a network service provider is in dispute with the Regulator and it cannot be resolved by consultation?
The National Electricity Law (NEL) provides for a judicial review under s.70 of Division 3 of the law. However, it is restricted to appeals in respect of decisions and rulings of the AEMC and NEMMCO, not the AER. That associated with AER is left to the provisions and procedures of the Administrative Decisions (Judicial Review) Act 1977 (Commonwealth). As to what such an appeal would achieve in the context of its political implications is open to question.

The following sets out the sections of the NEL relevant to the powers of the AER as follows.

**Section 15:**
(a) to monitor compliance by Registered participants and other persons with the National Electricity Law (NEL), the Regulations and the Rules; and

(b) to investigate breaches or possible breaches of provisions of the NEL the Regulations or the Rules that are not offence provisions; and

(c) to institute and conduct proceedings-
   (i) against relevant participants under section 61 of the NEL or section 44AAG of the Trade Practices Act 1974 of the Commonwealth; or
   (ii) in respect of Registered participants under section 63 of the NEL; or
   (iii) against persons under section 68 of the NEL; and

(d) to institute and conduct appeals from decisions in proceedings referred to in paragraph (c); and

(e) to exempt persons proposing to engage, or engaged, in the activity of owning, controlling or operating a transmission system or distribution system forming part of the interconnected transmission and distribution system from being registered as Registered participants; and

(f) any other functions and powers conferred on it under the NEL and the Rule

**Section 16 8:** the AER in performing or exercising its economic regulatory function or power-
(a) performs or exercises that function or power in a manner that will or is likely to contribute to the achievement of the national electricity market objective; and

(b) if the function or power performed or exercised by the AER relates to the making of a transmission determination, ensure that the regulated system operator to whom the determination will apply, and any affected Registered participant, are, in accordance with the Rules-
   (i) informed of material issues under consideration by the AER; and
   (ii) given a reasonable opportunity to make submissions in respect of that determination before it is made.

(2) Without limiting subsection (1)(a), the AER, in making a transmission determination, must in accordance with the Rules-

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7 A price-based formulation tied to the price index and making provisions for efficiency savings- CPI – X is employed as the principal device for ensuring that utilities do not exploit their monopoly pricing power while providing and incentive for productive efficiency.

8 This section refers to transmission. Regulation of distribution service providers occurred on 1 January 2007.
(a) provide a reasonable opportunity for the regulated transmission system operator to recover the efficient costs of complying with a regulatory obligation; and

(b) provide effective incentives to the regulated transmission system operator to promote economic efficiency in the provision by it of services that are the subject of the transmission determination, including-

(i) the making of efficient investments in the transmission system owned, controlled or operated by it and used to provide services that are the subject of the transmission determination; and

(ii) the efficient provision by it of services that are the subject of the transmission determination; and

(c) make allowance for the value of assets forming part of the transmission system owned, controlled or operated by the regulated transmission system operator, and the value of proposed new assets to form part of that transmission system, that are, or are to be, used to provide services that are the subject of the transmission determination; and

(d) have regard to any valuation of assets forming part of the transmission system owned, controlled or operated by the regulated transmission system operator applied in any relevant determination or decision.

(3) In this section-

affected Registered participant means a Registered participant (other than the regulated transmission system operator to whom the determination will apply) whose interests are affected by the transmission determination, relevant determination or decision means-

(a) any previous transmission determination; or

(b) a determination or decision under the National Electricity Code or jurisdictional electricity legislation regulating the revenue earned, or prices charged, by the regulated transmission system operator in respect of services provided by it that were regulated under the Code or that legislation.

The AER may investigate breaches or possible breaches, and may enforce the law, the regulations and the rules. The National Electricity (South Australia) Variation Regulations 2005 set out the provisions of the National Electricity Rules that are civil penalty provisions. The compliance and investigative powers of the AER are set out in Table 2.3

The National Electricity Law, s.59 gives the Regulator sole responsibility for initiating proceedings in relation to an alleged breach of the Law, Regulations or Rules. Criminal offences exist for various breaches of the Law. The prosecution of criminal offences occurs under the general prosecution regimes of the Commonwealth, states and territories. The civil penalty imposed by the court may be up to $20,000 for a natural person or up to $100,000 for a body corporate, for breaching a civil penalty provision which is not a civil penalty provision. The civil penalty provision applies in cases where scheduled generators or market participants breach clause 3.8.22A of the Rules, by not

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9 This applies to all State participants.
making dispatch offers, bids or rebids in good faith. In those cases the Regulator may seek penalties of up to $11000,000 (and $50,000 per day).

Table 2.3: Division 2 - Investigative Powers of the AER

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>Definitions.</td>
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<tr>
<td>20</td>
<td>Authorised Person.</td>
</tr>
<tr>
<td>21</td>
<td>Search Warrant.</td>
</tr>
<tr>
<td>22</td>
<td>Announcement before entry.</td>
</tr>
<tr>
<td>23</td>
<td>Details of warrant to be given to occupier.</td>
</tr>
<tr>
<td>24</td>
<td>Copies of seized documents.</td>
</tr>
<tr>
<td>25</td>
<td>Copies of seized documents.</td>
</tr>
<tr>
<td>26</td>
<td>Period for retention of documents or things seized may be extended.</td>
</tr>
<tr>
<td>27</td>
<td>Obstruction of persons authorised to enter.</td>
</tr>
<tr>
<td>28</td>
<td>Power to obtain information and documents in relation to performance and exercise of functions and powers.</td>
</tr>
</tbody>
</table>

The AER is able to seek remedies in the state or territory supreme court of the relevant market jurisdiction, or the Federal Court. The Regulator may apply to the court for an injunction where a person has engaged in, is engaging in or is proposing to engage in conduct in breach of the *National Electricity Law*, the *Regulations*, or the *Rules*. Under ss. 61 to 63 of the Law the courts may make a range of orders including a direction that a participant's load be disconnected, and that the participant be suspended from purchasing or supplying electricity through the wholesale exchange. The Federal Court's powers to make orders on application are contained in s. 44MG of the *Trade Practices Act 1974*(Cth) and include orders requiring the person to do one or more of the following:

♦ cease the activity that is in breach;

♦ take action to remedy the breach; and

♦ implement a specified program for compliance with the law.

The Regulator has an additional power under s.74 to issue an infringement notice in relation to any civil penalty provision (other than a rebidding civil penalty provision). An infringement notice can be served on a registered participant and any other person prescribed by the regulations as a "relevant participant", where the Regulator has reason to believe they have breached a civil penalty provision, that is not a civil penalty provision. A person who receives a notice may either pay the infringement penalty, or
defend, in court any formal proceedings in respect of the breach. The infringement penalty is $4000.00 for a person and $20000.00 for a corporate entity.

**Summary.** In the regulatory environment essential service providers are in essence commercial entities as defined by the Corporations legislation, yet subject to economic restraints in a manner which parallels that of a public authority. For the corporate network service provider operating as a market licensee in a regulatory constrained environment there is no option but to provide a reasonable service or forfeit its licence. The service provider could find itself supplying a service with resources which are inadequate due to regulatory economic constraints. Yet to argue limited resources is not generally regarded as relevant when assessing whether reasonable care has been taken when applied to a commercial enterprise as it would be if it were a state instrumentality. This issue will be taken up again in Chapters 5 and 6 when discussing liability and economic harm.

### 2.4.3 The National Electricity Rules and Compliance Requirements

The flow chart of Figure 2.4 illustrates the legislation involved in the making, administration and application of the National Electricity Rules.

The National Electricity Code adopted by New South Wales, Queensland, Victoria, South Australia and the ACT was lodged with the ACCC as an Industry Code for the purpose of market access undertakings by proposed market participants by the National Electricity Code Administrator (NECA) in September 1998 under section 44ZZAA of the *Trade Practices Act 1974* (Cth). The Code governed the functions and conduct of market participants by providing for regulation of a single electricity market in the States and Territory. With the establishment of the Australian Energy Market Commission (AEMC) and the Regulator (AER) by the *National Electricity (South Australia) (New National Electricity Law) (Amendment) Act 2005* (NEL), the Code became the Rules. The most recent Rules (Version 13) are of 936 pages set out in eleven chapters. They are available on request of NEMMCO, a code participant, and can be downloaded from the respective sites of the AEMC and AER. The transitional provisions in the new NEL under Schedule 3, clauses 7 to 9 provide that any reference to a document, however described, to the previous National Electricity Code, or to a
code participant (other than NEMMCO) is to be read as reference to the National Electricity Rules. For the avoidance of doubt, the *Australian Energy Market Regulations 2005 (Cth)* apply these provisions to access undertakings given in accordance with the old Code. Thus the original access undertakings continue in effect, subject to these modifications.

**Figure 2.4: The Trade Practices Act 1974 and the National Electricity Law**

Under Part 3 of the National Electricity Law the responsibility for the administration and governance of the Rules falls to the Australian Energy Regulator (AER). The powers of the AER are vested under Part IIIAA, Division 3, s 44AH, of the *Trade Practices Act 1974 (Cth)* in addition to Part 3 of the Law. Enforcing the Rules resides in the powers vested in the AER. The AER being a servant of the crown has crown immunity. Part 4 of the Law and s. 5 of the *AEMC Establishment Act (SA) 2004* confers on the Australian Energy Market Commission (AEMC) the function of making and amending the Rules as approved by the Australian Ministerial Council on Energy. The AEMC is also defined in s.4 of the *Trade Practices Act 1974*. Under s.121 of the
National Electricity Law no personal liability attaches to an AEMC official for an act or omission in good faith in the performance or exercise, or purported performance or exercise of a function or power under the Law.

Each market participant is required to provide the Australian Consumer and Competition Commission (ACCC) with an access undertaking which includes agreeing to abide by the Rules. Section 44ZZAA of the *Trade Practices Act 1974 (Cth)*

♦ enables the ACCC to accept access undertakings from any entity which seeks access to a market and to utilise the assets of a third party;

♦ sets out the terms and conditions on which the ACCC will accept such undertakings, but the ACCC can only do so if the service to which the undertaking relates has not already been declared by the Minister for access purposes;

♦ permits the ACCC to accept access undertakings from prescribed industry bodies, however, such bodies may be prescribed by regulation.

In assessing a proposed access arrangement and to approve it or not, the role of the ACCC is to determine whether or not the arrangement proposed meets the requirements of the Act. The ACCC cannot decline to accept an access arrangement because it prefers something it thinks to be better.

In summary:

(i) The National Electricity Rules are initially derived from the Schedule to the *National Electricity (South Australia) Act 1996* and complementary legislation in participating states. This legislation operates in conjunction with the *Trade Practices Act 1974* as Commonwealth law to vest power in the ACCC in respect of market access undertakings and to the standard set by the Rules; and, the AER in administering and enforcing the Rules. The remaining legislation is limited to the market participating jurisdictions and the AEMC including the Commonwealth only where extra-territorial circumstances are involved. It is in the powers vested in the AER by the *Trade Practices Act 1974 (Cth)* where recognition is given to the *National Electricity Law* under s. 44AK. The State/Territory law cannot impose a duty on the AER without Commonwealth consent.
(ii) Other than in s.44ZZAA there is no indication that there is recognition under Part IVB – “Industry Codes” Section 51ACA of the Trade Practices Act 1974(Cth) which recognises the Rules as either a mandatory or a voluntary Industry Code.

2.5 National Law Immunities for Electricity Suppliers

2.5.1 Immunity Provisions

The intention of this section is to examine the import of the exclusion from liability provisions contained in the National Electricity Law relative to NEMMCO and the transmission and distribution network service providers, including their employees. As will be discussed in Chapter 3, the exclusion clauses have a direct bearing on liability under the Trades Practices Act 1974(Cth) and the application of immunities contained in small end user deemed contracts examined in Chapter 4.

The basic issues which arise are considered to be the following.

1. Whether the immunity provisions protect a service provider if a system disturbance occurs and causes damage if the damage is due to negligence.
2. The deprivation of immunity where there is bad faith or through negligence? Liability for negligence and consequential economic loss is dealt with in detail in Chapters 5 and 6.
3. Do the immunity clauses protect against strict liability under the Trades Practices Act 1974? The arguments as to strict liability under the Trade Practices Act are set out in Chapter 3.

This Chapter looks at the underlying concepts associated with (1) and (2).

Figure 2.5 indicates the structural relationship of the National Electricity Law in respect of the immunity provisions under Sections 116, 119 and 120 of the law and the penal provisions of Clause 14 of the National Electricity Regulations. The National Electricity laws and regulations are enacted under uniform state legislation in each of the participating states, New South Wales, Victoria, South Australia, Queensland, Tasmania, and the Australian Capital Territory. Immunities provided under state legislation may be overridden by inconsistent Commonwealth legislation such as the

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10 These clauses are replicated in the National Electricity (Victoria) Act 1997 and the Electricity Industry (Victoria) Act 2000; Electricity National Scheme (ACT) 1997; National Electricity (NSW) Act 1997; Electricity National Scheme (Queensland) Act 1997; Electricity National Scheme (Tasmania) Act 1999. The South Australia legislation is the original enabling Act.

Reuben Stillman LLM (Hons) Thesis
Trade Practices Act 1974(Cth). The National Electricity Laws have been adapted as Commonwealth Law for Off shore areas and where proscribed under the Australian Energy Market Act 2004 and Regulations 2005 (Cth) by the Commonwealth. This discussed more fully in the Chapter 3.

Figure 2.5: The Immunity Clauses of the National Electricity Law

Section 116 is concerned with the responsibility which NEMMCO has for the security and safety of the interconnected power system and the market. As such it is designed to allow NEMMCO as the market manager to operate the power system as it sees fit in circumstances such as a severe or abnormal system disturbance and to do so without notice and be free of a suit in tort. For example, it would be protected against liability for system operations if it directed a transmission network service provider to disconnect power supplies involving a large number of customers even if it resulted in severe economic harm to end users. It also allows NEMMCO to call upon a registered participant to carry out localised operations without notice which may affect relatively small groups of customers, eg. taking a distributed generating system (wind, or solar
Section 116 provides:

National Electricity Law – Part 8: Safety and Security of National Electricity System

Clause 116. – Actions that may be taken to ensure safety and security of national electricity system

(1) NEMMCO may, if it considers that it is necessary—

(a) to maintain power system security; or

(b) for reasons of public safety direct a Registered participant or authorise a person to direct a
Registered participant, or subject to subsection (2), authorise a person, to take one or more relevant
actions in accordance with the Rules.

(2) A person authorised under subsection (1) must not take any relevant action unless the person has
directed the Registered participant to take the action and the Registered participant has failed to take
the action within a reasonable period.

(3) NEMMCO does not incur any civil monetary liability for any relevant action taken by a Registered
participant in accordance with a direction given by it under this section unless the direction is given in
bad faith.

(4) A person who directs a Registered participant to take a relevant action, or who takes a relevant
action in accordance with an authorisation under subsection (1), does not incur any civil monetary
liability for the action taken by the Registered participant or by the person unless the person gives the
direction, or takes the relevant action, in bad faith.

(5) A Registered participant does not incur any civil monetary liability for a relevant action taken in
accordance with a direction given to it under this section unless that action is taken in bad faith.

(6) In this section—

♦ civil monetary liability means liability to pay damages or compensation or any other amount ordered
in a civil proceeding, but does not include liability to pay a civil penalty under this Law, an
infringement penalty under Division 5 of Part 6 or the costs of a proceeding.

♦ relevant action means— (a) to switch off, or re-route, a generator; (b) to call equipment into service;
(c) to take equipment out of service; (d) to commence operation or maintain, increase or reduce
active or reactive power output; (e) to shut down or vary operation; (f) to, in accordance with the
Rules and any procedures made in accordance with the Rules in relation to load shedding, shed or
restore load; (g) to do any other act or thing necessary to be done to maintain power system security
or for reasons of public safety.

A registered participant is a person or entity registered as such by NEMMCO under the
Law in accordance with the National Electricity Rules. The different categories of
registered participants have different obligations under the National Electricity Rules as
set out in Part 2, Clauses 2.2 to 2.7 of the Rules. Participants include: generators, first and
second tier customers, network system operators and traders. In addition there are
market participants such as scheduled and non-scheduled generators and retailers who
on sell at spot prices to end users or end users who purchase from the market at spot
prices.

A customer is a person who engages in the activity of purchasing electricity supplied
through a transmission or distribution system to a connection point. This will include a
market customer who purchases electricity direct from the grid. The small end customer is a person who is supplied with electricity which is purchased at a connection point directly from a local retailer. That electrical load is classified as a first-tier load and as such the small end customer is a first tier customer. The local retailer is a separate entity divorced from the local network service provider. The customer will have a separate contractual arrangement with the network service provider. If electricity is purchased by a person at a connection point other than directly from the local retailer or the spot market, the electricity purchased by that person is classified as a second-tier load, eg where a shopping complex is the first tier customer and the shops which purchase from the complex are second-tier customers. Thus under the contractual arrangements which exist between a retailer and a customer, actions taken by NEMMCO to secure the safety of the power system can interfere with the contractual rights of both first-tier and second tier customers.

A retailer may also be registered as a retailer of last resort in relation to a jurisdiction. This means a retailer of last resort assumes the obligations under the Rules in that jurisdiction to pay trading amounts and other amounts of a market customer who has defaulted in the performance of their obligations. For example, customer X lives an area serviced by network service provider A, but buys power from retailer BB. If the latter defaults, the former would undertake to be the retailer of last resort. The protection against “civil monetary liability” except where a direction is given in “bad faith” is discussed below in 2.5.2.

**National Electricity Law : Part 9 – Clause 119: Immunity of NEMMCO and network service providers**

1. NEMMCO or an officer or employee of NEMMCO does not incur any monetary liability for an act or omission in the performance or exercise, or purported performance or exercise, of a function or power of NEMMCO under this Law or the Rules unless the act or omission is done or made in **bad faith or through negligence**;

2. A network service provider or an officer or employee of a network service provider does not incur any civil monetary liability for an act or omission in the performance or exercise, or purported performance or exercise, of a system operations function or power unless the act or omission is done or made in **bad faith or through negligence**;

3. Civil monetary liability for an act or omission of a kind referred to in paragraph (1) or (2) done or made through negligence may not exceed the prescribed maximum amount .

4. The Regulations may, for the purposes of subsection (3), without limitation-

   (a) prescribe a maximum amount that is limited in its application to persons, events, circumstances, losses or periods specified in the regulations;
(b) prescribe maximum amounts that vary in their application according to the persons to whom or the events, circumstances, losses or periods to which they are expressed to apply;

(c) prescribe the manner in which a maximum amount is to be divided amongst claimants.

(5) NEMMCO or a network service provider may enter into an agreement with a person varying or excluding the operation of a provision of this section and, to the extent of that agreement, that provision does not apply.

(6) This section does not apply to any liability of an officer of a body corporate to the body corporate.

(7) In this section-

❖ **Network service provider** means a person who is registered as a network service provider under the Chapter 2 of the Rules.

❖ **Officer** is a person who is an officer within the meaning of section 82A of the Corporations Act 2001 of the Commonwealth.

❖ **System operations function or power** means a function or power prescribed as a system operations function or power.

❖ **Civil monetary liability** means liability to pay damages or compensation or any other amount ordered in a civil proceeding, but does not include liability to pay a civil penalty under this Law or the costs of a proceeding. Clause 14 (1) of the N E L Regulations stipulates the following.

❖ **relevant action** means— (a) to switch off, or re-route, a generator; (b) to call equipment into service; (c) to take equipment out of service; (d) to commence operation or maintain, increase or reduce active or reactive power output; (e) to shut down or vary operation; (f) to, in accordance with the Rules and any procedures made in accordance with the Rules in relation to load shedding, shed or restore load; (g) to do any other act or thing necessary to be done to maintain power system security or for reasons of public safety.

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**Regulation 14 – National Electricity Law Regulations**

**Maximum civil monetary liabilities of NEMMCO or network service providers**

1. For the purposes of section 77A(4)(c) of the old National Electricity Law and section 119(3) of the new National Electricity Law, maximum amounts are prescribed as follows:

(a) the maximum amount of NEMMCO’s civil monetary liability to each person who suffers loss as a result of a relevant event is, in respect of that event, $2 million;

(b) however, if the amount of NEMMCO’s civil monetary liability to the person in respect of that event (as affected, if at all, by paragraph (a)) exceeds the prescribed amount in respect of the relevant event, the maximum amount of NEMMCO’s civil monetary liability to that person in respect of that event is that prescribed amount;

(c) the maximum amount of each network service provider’s civil monetary liability to each person who suffers loss as a result of a relevant event is, in respect of that event, $2 million;

(d) however, if the amount of the network service provider’s civil monetary liability to the person in respect of that event (as affected, if at all, by paragraph (c)) exceeds the prescribed amount in respect of the relevant event, the maximum amount of the network service provider’s civil monetary liability to that person in respect of that event is that prescribed amount;

paragraphs (a), (b), (c) and (d) do not apply in relation to civil monetary liability for death or bodily injury;

2. The maximum amount of the civil monetary liability of each officer or employee of NEMMCO or a network service provider to each person who suffers loss as a result of a relevant event is, in respect of that event, $1.

3. NEMMCO and each network service provider must ensure that the following provisions are complied with in relation to claims against NEMMCO or the network service provider alleging civil monetary liabilities in respect of relevant events:

(a) the claims must be dealt with in an orderly manner, without bad faith and with reasonable dispatch;
(b) a register must be maintained containing the following in relation to each claim lodged with it: a unique identifier assigned to the claim and linked to each entry in the register relating to the claim;
(c) the date on which the claim was lodged;
(d) the amount of the claim (if stated by the claimant);
(e) the date or dates on which the relevant event to which the claim relates is alleged to have occurred;
(f) the date of payment of the claim;
(g) the amount paid on the claim;
(h) separate running totals must be kept in the register of—
   (i) the amounts of the claims (as stated by the claimants) in relation to relevant events alleged to have occurred during the same prescribed 12 month period; and
   (ii) the amounts paid on the claims in relation to relevant events alleged to have occurred during the same prescribed 12 month period;
(iii) The running totals kept in the register must be made available for inspection by the public, during ordinary business hours and at no fee, in each participating jurisdiction in which NEMMCO or the network service provider carries on business;
(iv) a person appointed by NECA, or, after the commencement date of the new National Electricity Law, by the AER, must be allowed, at any time during ordinary business hours, to conduct inspections of the register and other records of NEMMCO or the network service provider, and to question officers and employees of NEMMCO or the network service provider, for the sole purpose of checking the accuracy of the register.

(4) In this regulation— prescribed amount in respect of a relevant event means—
(i) in relation to NEMMCO—the amount obtained by deducting from $100 million the aggregate of the amounts already paid by NEMMCO in discharge of NEMMCO's civil monetary liabilities to persons suffering losses as a result of relevant events occurring during the same prescribed 12 month period as that in which the relevant event occurred;
(ii) in relation to a network service provider—the amount obtained by deducting from $100 million the aggregate of the amounts already paid by the network service provider in discharge of the network service provider's civil monetary liabilities to persons suffering losses as a result of relevant events occurring during the same prescribed 12 month period as that in which the relevant event occurred;

prescribed day means 13 November 1999; prescribed 12 month period means—the period of 12 months from the prescribed day; or
   the period of 12 months from the end of the period referred to in paragraph (a); or
   the period of 12 months from the end of the period referred to in paragraph (b); or
   the period of 12 months from the end of the period referred to in paragraph (c); or
   the period of 12 months from the end of the period referred to in paragraph (d); or
   the period of 12 months from the end of the period referred to in paragraph (e); or
   the period of 12 months from the end of the period referred to in paragraph (f); or
   the period of 12 months from the end of the period referred to in paragraph (g);

♦ relevant event means—
(i) in relation to NEMMCO—a negligent act or omission, or a series of connected negligent acts or omissions, in the performance or exercise, or purported performance or exercise, of a function or power of NEMMCO under the old National Electricity Law or the Code or the new National Electricity Law or the Rules, done or made during the period of 8 years from the prescribed day;
(ii) in relation to a network service provider—a negligent act or omission, or a series of connected negligent acts or omissions, in the performance or exercise, or purported performance or exercise, of a system operations function or power, done or made during the period of 8 years from the prescribed day;
(iii) in relation to an officer or employee of NEMMCO—a negligent act or omission, or a series of connected negligent acts or omissions, in the performance or exercise, or purported performance or exercise, of a function or power of NEMMCO under the old National Electricity Law or the Code or the new National Electricity Law or the Rules;
(iv) in relation to an officer or employee of a network service provider—a negligent act or omission, or a series of connected negligent acts or omissions, in the performance or exercise, or purported performance or exercise, of a system operations function or power.
2. National Electricity Law: Section 120: Immunity in Relation to Failure to Supply Electricity

(1) A market participant or an officer or employee of a market participant does not incur any civil monetary liability for any partial or total failure to supply electricity unless the failure is due to an act or omission done or made by the Code participant or officer or employee in bad faith or through negligence.

(2) A registered participant or NEMMCO may enter into an agreement with a person varying or excluding the operation of subsection (1) and, to the extent of that agreement, that subsection does not apply.

♦ Market participant” means-
(a) a person who is registered at the person’s request by NEMMCO in accordance with the Code as a Code participant within the meaning of the Code; or
(b) NEMMCO;

(3) This section does not apply-
(a) to NEMMCO or an officer or employee of NEMMCO in relation to an act or omission in the performance or exercise, or purported performance or exercise, of a function or power of NEMMCO under this Law or the Rules; or

(b) to a network service provider or an officer or employee of a network service provider in relation to an act or omission in the performance or exercise, or purported performance or exercise, of a system operations function or power; or

(c) to any liability of an officer of a body corporate to the body corporate.

(4) In this section-
♦ Civil monetary liability, “network service provider”, “officer” and “system operations function or power” have the same meanings as in section 119.

♦ relevant action means— (a) to switch off, or re-route, a generator; (b) to call equipment into service; (c) to take equipment out of service; (d) to commence operation or maintain, increase or reduce active or reactive power output; (e) to shut down or vary operation; (f) to, in accordance with the Rules and any procedures made in accordance with the Rules in relation to load shedding, shed or restore load; (g) to do any other act or thing necessary to be done to maintain power system security or for reasons of public safety.

The immunity given in Section 119 applies specifically to the marketing company NEMMCO, the transmission network service providers, such as Transgrid (NSW), PowerLink (Queensland) and network service providers, eg, Energy Australia, Integral Electricity, AGL etc. is intended to enable them to carrying out operational responsibilities as detailed in section 116. Typical functions are given by “relevant action” (see above)11. Whatever constraints there are is circumscribed by clauses (1) and (2) with the phrase “unless the act(ion) or omission is done or made in bad faith or through negligence”. Where it can be shown that the performance of an operational act has been made in bad faith or through negligence, Section 119 provides for

11 There may be other relevant actions to secure the system.
penalties under Clause 14 of the Regulations as set out above and (subject to limits) damages or compensation in a civil action.

S.119 (5) provides that NEMMCO or a network service provider can enter into a contractual arrangement with market participants varying the application of s.119. Such a contract would be expected to contain an exclusion clause covering abnormal operational states. Arguably if it is expressly, excluded there may be no liability under s.119 even if the conduct was in bad faith or negligent. Hence, the bad faith or negligence criteria would be a matter for the contracting parties.

Section 120 set out above, provides immunity for registered market participants other than NEMMCO and the network service providers relieving them of liability should they be affected by or have to participate in an action by NEMMCO or the network service providers which directly affects the supply of electricity to end users.

Registered market participants can be any body registered and licensed to participate in the market as defined by Chapter 2 of the National Electricity Rules. They operate as scheduled and non-scheduled generators, eg wind power of less than 30 mega Watts, as traders and as market customers who on sell as retailers. Other than the generators, market customers and traders fulfil a secondary role, they are in essence “go betweens”. Their immunity is forfeited if the act or omission is done in bad faith or through negligence. The State Owned Corporations Act (NSW) 1989, s. 9, 20F provides that state owned corporations are not agents of the Crown and therefore unlike the pre 1995 electricity trading undertakings established under the old Local Government Act 1919 have no crown immunities.

2.5.2 Limits of Immunity Clauses

The protection available under ss.119 and 120 does not apply if there is negligence or bad faith. How far can they protect against liability for non-negligent conduct? If the decision of the High Court in Puntoriero & Anor v Water Administration Ministerial Corporation 12, which found in favour of the plaintiffs is any guide, immunity clauses have their limitations 13.

13 Refer also to the discussion in Chapter 5 at 5.3
In 1992, Mr and Mrs Puntoriero drew water from irrigation waters supplied by the Water Administration Ministerial Corporation to irrigate a potato crop on their farm. The crop was damaged by chemically polluted water supplied by the Corporation. The appellants brought an action seeking damages for negligence. They alleged that the Corporation failed to:

- test the water for chemicals likely to damage crops;
- to warn them that the water was contaminated;
- to clear the water of contaminants; and
- had permitted the contaminants to remain in the water by failing to drain the irrigation channel from which the Corporation supplied the appellants.

The Water Corporation, was a commercial enterprise within the meaning Corporations Act 2001 (Cth). It relied upon s 19(1) of the Water Administration Act 1986 (NSW) detailed below, as an entitlement to exclusion of the liability.

s 19(1) Exclusion of liability:

(1) Except to the extent that an Act conferring or imposing functions on the [Corporation] otherwise provides, an action does not lie against the [Corporation] with respect to loss or damage suffered as a consequence of the exercise of a function of the [Corporation], including the exercise of a power:

(a) to use works to impound or control water, or
(b) to release water from any such works.

(2) Sub-section (1) does not limit any other exclusion of liability to which the [Corporation] is entitled.

(3) No matter or thing done by the [Corporation] or any person acting under the direction of the [Corporation] shall, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject the Minister or a person so acting personally to any action, liability, claim or demand."

In the first instance, damages were determined in favour of Puntoriero. On appeal by the Corporation, the New South Wales Court of Appeal set aside the verdict and substituted a verdict for the Corporation. The Court of Appeal did so on the ground that the Corporation was protected from the liability by the immunity conferred by s.19(1) Water Administration Act. Subsequently, Mr and Mrs Puntoriero appealed to the High Court which reversed the decision and held that the statutory immunity contained in the Act did not protect the Corporation. Gleeson CJ and Gummow J at [16] stated that:

Conduct which, it transpires, amounts to breach of contract, partnership or trust may inflict loss or damage on others which, in the literal sense of s 19(1), is suffered as a consequence of the exercise of a function of the Corporation. Such conduct would not be stigmatised as ultra vires the Corporation.
However, to confer an immunity in respect of such loss or damage, which would not have been suffered if the engagement had been performed in accordance with its terms, would be to stultify the objects of the Act. To read s 19(1) in that fashion would create a significant deterrent to the entry by others into commercial relations with the Corporation.

and at [18]:

These considerations support a jealous construction of s 19(1) to limit what otherwise would be the rights of plaintiffs and to immunise the Corporation from action only in respect of those positive acts in the exercise of functions "which of their nature will involve interference's with persons or property". The supply of water by the Corporation to the appellants was not the exercise of a function which of its nature involved such an interference. Further, the gist of the complaint by the appellants was inactivity by the Corporation in failing to take certain steps anterior to the supply of the water to them.

The Water Corporation was empowered as a state corporation to enter into commercial contracts as well as providing and managing water supplies. As such, despite finding for Mr and Mrs Puntoriero, the Court held that not all acts carried out by the Corporation came within the immunity. If immunity applied in respect of loss or damage arising out of the Corporation’s commercial activities the objects of the Act would be made ineffective. So that the contractual supply of water to the Puntorieros did not involve the exercise of a statutory function and was not protected.

The arguments in the Puntoriero case were directed towards the failure of the Corporation to take certain steps before supplying the Puntorieros with water. The failure of the Corporation to warn of the danger which it knew or should have known did not prevent the claim; if the Corporation had discharged its duty of care the damage would have been avoided. While the terms of conferring immunity, read literally, covered any action against the Corporation, the principles of statutory construction required that section 19(1) be read down so that they did not apply to ordinary functions performed by the Corporation and which were done by agreement with private citizens.

McHugh and Callinan JJ, in their summary stated the following at [115]:

If s 19(1) were to be given the breadth for which the respondent contends, then it might be successfully invoked to defeat a claim by a joint venturer, a beneficiary of a trust or a partner with whom the respondent had entered into arrangements pursuant to s 12A of the Water Administration Act. If s 19(1) were to operate in that way then the respondent would represent to any joint venturer or partner an extremely undesirable, indeed dangerous legal personality with whom to do business, or to join in any activity in which money or property might change hands.

Subsequently at [121]:

"Perhaps there may be two respectable ways of looking at s 19(1). But the one which pays due regard to the statutory expectation that the respondent is to act commercially, and is given some limited express immunities only in its commercial dealings, as well as extraordinary powers which would be denied to any ordinary person or corporation, invites the rejection of the untrammeled operation of the section that the respondent urged upon the Court. The fact that the statutes under consideration are not by any means perfectly drawn or unambiguous as the overlapping of several of their provisions indicates, requires that recourse be had to the objects and purposes of them, including the commercial objects and arrangements for which they make provision, for their construction and application”.

In summary - because ss.119 and 120 do not protect where there has been negligence, the relevance of the decision is that immunity must be read in the light of statutory purposes. Immunity will not be read more widely than statutory purposes require. For example, it might be argued that maintenance of the market by withholding supply would not be protected under the immunity clauses. As such s.119 nor s.120 would necessarily protect NEMMCO and the service providers against liability despite the fact that an act comes within the sphere of risk associated with a relevant action.

2.5.3 The “Bad Faith or Through Negligence” Limitation

Subsection (1) and (2) of Section 119 of The National Electricity Law provides NEMMCO and service providers with wide discretion as to how they act in securing the safety of the market system. The commercial structure of the National Electricity Market is such that it could be supposed that an act done in bad faith can arise in certain circumstances. For example, market manipulation of the wholesale market to increase the wholesale price artificially as happened in the California electricity market and collusion of generators in the United Kingdom. However, what is required of an end user to make out a case should they be subject to physical or economic harm resulting from an act done in “bad faith or negligence” would be to show that NEMMCO, the service provider, and or their employees were recreant to their duty by wilfully and deliberately carrying through an action contrary to their operational duty of care. In *SBAP v Refugee Review Tribunal*, it was said:

Good faith or the absence of bad faith, is not a term of art. In the context of administrative decision making bad faith is a serious matter going beyond involving personal fault on the part of the decision maker going beyond the errors of fact or law which are inevitable in any such process. as such, it is an allegation not to be lightly made and must be clearly alleged and proved. ..... The ways that bad faith can occur are infinite and no comprehensive definition is possible....

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18 [2002] FCA 590 at [49].
In other words to prove “bad faith” involves a very heavy burden of proof.19

Bad faith is in essence a state of mind that engenders an act which is contrary to community expectations, particularly where there is a close relationship between parties, such as in contract. It is normally associated with bad motives, fraud and improper purpose which will make invalid or ineffectual the exercise of an action. Bad motives have not established a separate legal niche in themselves, largely because no separate treatment is needed in light of the bad faith or improper purpose grounds.20

There are many cases which use the term, “bad faith” but in contexts in which dishonesty, fraud, malevolence, spite or other personal motivation are alleged, as such bad faith does not appear to have an independent existence as a distinct ground for invalidity. Some decisions have suggested that the term "bad faith" be confined to cases of personal wrongdoing. In Eastman v The Hon Jeffery Miles & Ors, 21 an administrative law case, “bad faith” was defined in the following terms:

If a power is exercised in bad faith, it will vitiate that exercise of power. A decision made in bad faith will be a nullity (Anisminic v Foreign Compensation Commission [1969] 2 AC 147 at 171 per Lord Reid). There are obvious conceptual difficulties in the non-exercise of a power on this basis. Those difficulties flow from the question of what arises where there is said to be an omission but where there is no duty to exercise the power. That circumstance may require a state of knowledge and intention to harm, or foreseeable risk of harm akin to establishing the tort of misfeasance in public office (Northern Territory & Ors v Mengel & Ors (1994-1995) 185 CLR 307 at 347-348) before it can be said that the decision-maker acted in bad faith. Even what might constitute bad faith in the exercise of a statutory power is uncertain. In Smith v East Elloe Rural District Council & Ors [1956] AC 736 at 770, Lord Somervell of Harrow observed - Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud or corruption.

Gyles J in NAKF v Minister for & Immigration and Multicultural and Indigenous Affairs said that22, bad faith cannot be constituted by recklessness in the sense of negligence, no matter how gross the negligence. A tribunal member cannot blunder into bad faith, no matter how stupid and careless the tribunal member is, any more than a person can blunder into deceit...

The case of Douglas and Ors v Bogan Shire Council and Water Resources Ministerial Corporation 23 was argued on the basis of lack of good faith, or as suggested, the absence of bad faith. It was a case where Bogan Shire acted on the advice of the Water

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19 National Tertiary Education Industry Union v Commonwealth (2002) 117 CLR 114 at 145. “Whilst the civil standard of proof is technically constant, it has long been recognised that the “balance of probabilities” standard is extremely difficult to satisfy in the case of fraud or bad faith allegations.”


22 (2003) 199 ALR 412 where an appellate decision maker was guilty of rubber stamping the first instance decision, this being equivalent to bad faith.
Resources Corporation. Such would be the case where NEMMCO directs a registered market participant or a service provider in respect of system operations.

The residents of the town of Nyngan suffered extensive damage due to the severe flooding of the Bogan River in April 1990. Flood prevention measures in the form of a permanent levee bank had been constructed by Bogan Shire Council in 1981 based on floods of approximately equal height that were experienced in 1955 and 1976 at Nyngan. Records indicated that the 1976 flood was the highest known flood, and as such, the levee bank constructed in 1981 was designed to protect the town of Nyngan from the recurrence of such a flood. The 1976 flood had a river gauge height of approximately 4.2 metres. The 1990 flood reached a height of around 5.2 metres. All residents suffered damage to their real and personal property. In total direct and indirect damage was estimated at $47.7 million. Some 700 residents and property owners of Nyngan sued the Bogan Shire Council (the Council) and the Water Administration Ministerial Corporation (WRC) in negligence. The resident's claimed that if the Council (and the WRC, which approved the plans for and construction of the permanent levees in 1981), had constructed the levee with a height of 0.4 metres above the 1976 flood height, less damage would have been suffered. While the 1990 flood would still have overtopped those levee banks, the residents could have successfully defended the town against the 1990 flood. The Council and WRC denied negligence and relied by way of defence upon s.582A(1) Local Government Act 1919 as amended, which provided for the following:

(1) A Council shall not incur any liability in respect of (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

(2) Without limiting the generality of subs(1) ... that sub section applies to: (e) the carrying out of flood mitigation works; (f) any other thing done or omitted to be done in the exercise of a Council’s powers, authorities, duties or functions under this or any other act.

(3) This section applies to and in respect of: (a) the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any act ... (d) a person acting under the direction of a Council or of the Crown or any such body or authority, in the same way as it applies to and in respect of a Council.

(4) This section applies to and in respect of any advice furnished or thing being done or omitted to be done before the commencement of this section, as well as to and in respect of any advice furnished or thing done or omitted to be done after the commencement of this section.” By s7(2)(e) Water Administration Act 1986, the Water Administration Ministerial Corporation, the second defendant, is, for the purposes of any act, a statutory body representing the Crown.


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Cole J, found for the defendant. His honour said that the provisions of s.582A were designed to strike a balance between:

- the interests of the authority (WRC) which is funded by public not private funds and which pursuant to statute, provides information, and
- the interests of the recipient (Shire Council) of the information and others reasonably acting upon it where, in the ordinary course, those persons may be expected to incur substantial liability on the faith of what is disclosed by the authority.

Cole J, based his judgement on a number of cases but in particular the Federal Court in *Mid City Developments Pty Ltd v Rockdale Municipal Council* 24. In this case the court held that a statutory requirement of “good faith” requires more than “honest ineptitude”. Consequently the conscious failure to consult records before issuing a certificate would not be in “good faith”. It was considered that the Shire Council had not acted in bad faith in deciding to design and construct the levees to accord with the criteria given to it by Water Resources Corporation (WRC). The WRC was a body experienced in flood mitigation structures and had the statutory responsibility for the distribution of public funds for the purpose of flood mitigation works provided such works were constructed in accordance with its requirements. Thus the Council had met the good faith defence.

The WRC accepted that it was regarded as appropriate between 1979 and 1981 to permit construction of a flood prevention levee with a freeboard of 0.4 metres above record flood level. The body of engineering evidence tendered before the court accorded with proper engineering principle and practice as understood in 1981. As such it defeated any claim that the party acted in bad faith or was negligent. The conclusions drawn were.

1. The flood mitigation works merely provided a level of protection. As such the Council was not under any duty of care to provide a greater level of protection than that for which the levee banks were designed, namely, the prior record flood.

2. The levee banks were designed and constructed in accordance with proper engineering standards applicable between 1979 and 1981.

3. The damage caused to the Plaintiffs was not caused by any act or omission of the Council or WRC.

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4. The damage suffered by the Plaintiffs was the result of an unforeseen occurrence, namely, a record flood. The levee banks were never designed to or intended to defeat such an unforeseen flood.

5. Both the Council and WRC acted in good faith in the design and construction of the levee. In that circumstance, no liability attaches for any consequences of such flood mitigation works to either the Council or WRC.

But it should be noted that the phrases “in good faith” and “in bad faith” do not necessarily bear the same meaning. For example, it may be possible to argue in a particular statutory context that carelessness would not suffice for “bad faith”.

Summary: It is apparent from the above discussion that the phrases contained in Clause 116 “in bad faith” and “bad faith or through negligence” in Clause 119 and Clause 120 of the National Electricity Law are open to a wide interpretation by the marketing company (NEMMCO), service providers and the licensees operating in the market. The immunities conferred appear to be a substitute for the crown immunities previously conferred on government trading undertakings, such as Electricity County Councils created under Local Government Statutes. In essence, an end user or customer as plaintiff if subject to harm would in order to litigate require sufficient knowledge of the particular operation which the caused harm to show that there was bad faith, or to establish negligence. Such a task would place a very heavy burden of proof on a plaintiff with limited resources.

It is argued that the High Court decisions in the Puntoriero25 and Water Corporation26 cases, that neither clauses 119 nor 120 would necessarily protect NEMMCO, service providers and market licensees against liability despite the fact that an act on the face of it came within their statutory powers. The immunities are considered to be limited in their scope in respect of the untrammelled operation of the power system network. Where damage can be avoided, there is an obligation to exercise the powers in a reasonable manner otherwise negligence could be found.

2.6 Regulation in State Jurisdictions: The New South Wales Model

The NSW model is in essence mirrored in the other state jurisdictions. Victoria and South Australia differ only in respect of ownership of the utilities and in the titles of the respective legislation. However, as it is part of a co-operative scheme, it is designed to marry with the powers conferred by each of the States and the Commonwealth in order to achieve a unity of purpose in governing the national electricity market.

Prior to the creation of the national electricity market the power supply industry in each state was a state owned vertically integrated monopoly. This took the form of complete integration of generation, transmission and distribution as was the case with the Electricity Trust of South Australia and the State Electricity Commission of Victoria, or as in New South Wales and Queensland, an Electricity Commission having generation and transmission and County Councils (NSW) or Boards (Queensland) with franchise distribution areas. As a consequence, in the creation of the market structure, each jurisdiction determined how it was to proceed in unbundling its utilities and apply a regulatory regime and at what pace they would introduce full retail competition (FRC) for all customers. Full retail competition was completed by 2004 except in Queensland where it came into force July 1, 2007. Although Western Australia and the Northern Territory are not participating members of the national market in that their transmission systems are not physically part of the interconnected transmission system, they have followed the national pattern of unbundling their respective power and gas systems. The legislative framework for state owned corporations in New South Wales is illustrated by the diagram of Figure 2.5.

The state regulatory provisions as they impact on the rights of small end customer are as follows.

♦ The State Owned Corporations Act (NSW) 1989 provides for the establishment and operation of government enterprises (SOC) of any type generally within the meaning of the Corporations Act 2001 (Cth). Section 9, 20F of the Act indicates that state owned corporations have no crown immunities.

♦ The Energy Service Corporations Act (NSW) 1995 is specific to the creation of power generation, transmission system and distribution system service and retailing corporations within the New South Wales jurisdiction.
Figure 2.6: NSW Statutory Regime

- The *Electricity Supply Act 1995* sets out the regulatory process as to:

  (i) who may be licensed as network service providers and who may be licensed to be a retailer of electricity;

  (iii) delineates the powers of a network service operator in management of a network;

  (iv) as it affects customer access, choice and rights in respect of connection and delivery of electricity and the basic conditions associated with standard form and negotiated contracts (see Chapter 4);

  (v) establishing an internal mechanism for dispute and claims resolution of small end customers; and

  (vi) a procedure to review unresolved disputes and or claims under the industry ombudsman scheme as it affects small end customers and users (Chapter 7);

  (vii) regulation of tariffs and pricing through an Independent Pricing and Regulatory Tribunal.
The Electricity Supply (General) Regulations (NSW) 2001 sets out conditions of endorsement of standard retail suppliers who are required to provide electricity to small retail customers and other customers located in their supply districts involving:

(i) the rights conferred on small retail customers in respect the disconnection of customers from the distribution system;

(ii) the establishment of customer consultative groups by distribution network service providers and standard retail suppliers.

(iii) exercise of functions by the electricity industry ombudsman.

(iv) detailing arrangements relating to electricity suppliers in the event of a default by another supplier and the terms and conditions that are to apply.

The Electricity Supply (Safety and Network Management) Regulations (NSW) 2002 is concerned with the management of safety and security of the local transmission and distribution system networks and their management, inclusive of policing industrial, commercial and domestic customer installations.

With the 2004/5 changes to the NEL and the creation of the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) the regulatory powers of the participating states has been significantly diminished. In essence they are left with little more than to police licensing and ensure access and rights of the end users.

2.7 General Conclusions

1. This Chapter outlined the legal framework of the National Electricity Market and the nature of the relationships that exist between the various code participants. While the National Electricity laws create the market and ensure that the market operator can function on a national scale, there is a deal of interrelated state legislation which police the various state registered participants in the context of licensing. Despite a degree of uniformity between state jurisdictions each State tends to impose
their own idiosyncratic legal structures which can generate differences in laws between federal and state jurisdictions.

2. The 2005 changes to the regulatory regime as described in section 2.4.2 suggest more not less regulation and a further retreat from the original objective of so-called light handed market regulation\(^{27}\). In essence the powers vested in the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) in respect of rule making and the governance of the market appears to involve a regulatory dictatorship, if somewhat benign, with power over capital and operational expenditures and so revenue, or management by regulation, leaving the commercial risk to the network service provider. In essence network service providers are hybrid entities, constitutional and commercial in operation, but economically constrained in a manner parallel to that of the old franchise state monopoly. This raises the interesting question as to what constitutes reasonable care within such an economically constrained environment. To determine reasonable care which may impinge on the functions of a Regulator is fraught with difficulty as courts are disinclined to intervene in the exercise of the discretionary functions of the regulating authority and to second guess decisions of the Regulator where competing political and social policy values are concerned\(^{28}\).

3. The primary aim of the exclusion clauses as set out in ss.116, 119 and 120 of the National Electricity Law is to ensure that code participants can carry out system operations without being subject to legal suit other than where bad faith (s.116) or bad faith or through negligence can be shown. Clauses (1) and (2) of Section 119 of the National Electricity Law provides NEMMCO and service providers with wide discretion as to how they act in securing the safety of the market system. From the legal perspective it is difficult to determine as to what operational reasons can give rise to a claim of bad faith or through negligence. Bad faith is a term which denotes a deliberate act, such as fraud, an improper action, or something against community interests. In contrast, negligence is invariably an inadvertent act of carelessness in the performance of a function. Hence, an end user or customer as plaintiff if subject to harm, would have to show that either there was an intention akin to bad faith, or establish that there was a foreseeable risk of harm, inadvertent as it might be. If the

\(^{27}\) The original National Electricity Code, Chapter 1: Objectives - s.4(b)(1).
decisions in *Puntoriero & Anor v Water Administration Ministerial Corporation*\(^{29}\) and *Douglas and Ors v Bogan Shire Council and Water Resources Ministerial Corporation*\(^{30}\) are any guide, then clauses 119 and 120 have a limited scope as to the immunity they may confer on NEMMCO and the service providers.

4. From the limited case histories available, a very heavy burden of proof would fall upon a plaintiff, such as a small end user to produce evidence to successfully challenge the claim that an operational action by a utility such as NEMMCO, or a network service provider was not genuine or negligent. End users are in a particularly weak position when it comes to deciphering or determining what is and what is not a genuine operational reason for an action and to attempt to do so would to be beyond most small end user’s resources if not their capabilities.

5. Sections 119(5) and 120(2) allow contractual variation so that a wider (or narrower) protection may be bargained for under contract. For example, an industrial customer under a negotiated contract may have a tariff provision which allows for load shedding at specific times of the day or under emergencies. However, only that party to the contract will be bound by the variations. As such, it would be unreal to believe that a small end domestic customer or small shop user could negotiate a variable price contract.

The next Chapter 3 examines the strict liability argument and how it might be imposed on a provider under the *Trade Practices Act 1974* (Cth). Liability for negligence and consequential economic loss is dealt with in Chapters 5 and 6.

\(^{29}\) (1999) 199 CLR 575.

\(^{30}\) (1994) 55053 of 1993, Supreme Court of New South Wales Common Law Division.
Chapter 3: THE TRADE PRACTICES ACT 1974 AND ELECTRICITY CONTRACTS

3.1. Introduction

The previous chapter considered the National Electricity Law Immunities applying to the supply of electricity. It was noted that the small end customer would be able to sue for defective supply where there was supposedly “bad faith or negligence”. This Chapter considers the potential for strict liability to a small end customer under the Trade Practices Act 1974 (Cth) (TPA) based on liability under: (1) Section 71; (2) Section 74; (3) Part VA. In Chapter 2 at 2.5 it was indicated that the National Electricity Law and regulations are enacted under state uniform legislation. Immunities provided under state legislation may be overridden by Commonwealth legislation such as the Trade Practices Act 1974 (TPA).

The first part of the chapter examines the notion of electricity as “goods” as in Trade Practices Act 1974 s. 4. This is a key concept and important in discussing liability under ss 71, 74 and Part VA. It also examines electricity as goods under TPA Part VA and “supply time” as in s 75AK(2) as it relates to the supply of defective goods. The second part details the Electricity Supply Association of Australia v Australian Competition and Consumer Commission \(^1\) case with emphasis on the circumstance in which strict liability can apply as it affects electricity network service providers under section 71 utilising a case study.


The Trade Practices Act introduces two key concepts in dealing with liability relating to electricity supply. First it commodifies electricity defining it as “goods” in s 4. This is relevant to s.71 liability and Part VA. Secondly for the purpose of Part VA (liability for defective goods) it adopts as a basis for defining defective goods as a point in time when goods are required to be defective, “supply time”. It will be argued that the latter is misconceived and that the definitions are inappropriate for the electricity supply industry.

\(^1\) Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission, [2001] FCA 1296 (12 September 2001).
Essentially the electricity supply industry is a multi-product industry supplying outputs distinguished by the time at which they are produced and by location.

Electrical energy is generated using power stations which are typically of different vintages and of different technologies, e.g. steam generation, hydro-electric, gas turbines, wind power and solar power. There is an order of merit among the power stations depending on the cost of generation. The order in which stations are brought into service is a function of the time of day, of increasing system demand and of the generator short run marginal cost. Power is transmitted over long distances, distributed at different voltage levels and in real time, resistive and reactive power flows can take different transmission and distribution paths. Resistive power (real power) and the accompanying losses may in fact be flowing in an opposite direction to that of reactive power and reactive losses (non useful power). For example, a current problem besetting the supply industry is the ever increasing use of domestic air conditioners giving rise to inductive or reactive power flow. Thus, technically the dynamics of power system operation and management is a complicated process. Consequently, it is difficult to envisage electricity in the conventional and statutory sense of goods and chattels passing from seller to buyer.

Figure 3.1, is a simplified single line diagram of the Queensland Power System. It shows the transmission line distances between the various bulk supply substations and power stations connected to the 275000 volt transmission system. The numbering of the power stations is indicative of their marginal cost and merit order. Utilizing the methodology of operational research it can be shown to be econometrically rational to express electricity in the form of a multi-faceted product compatible with the TPA statutory definition of “goods”. This involves modelling a power system as a transportation minimization problem utilizing linear programming and multi-regression analysis to determine the marginal cost of delivering three categories of goods: domestic, commercial, and industrial to bulk supply points from which it is delivered to randomly located end users over a widespread area\(^2\). In such

terms, electric power can be treated as a commodity or ordinarily goods acquired for consumption which are sold on demand by time of day and location.

In other words: power passes from generator (manufacturer) to a distribution network service provider (bulk receiver) sold to an end user or customer under contract, at a price, at whatever time the customer desires by a retailer. As electricity is experience goods, that is it’s quality is unknown until used, it is logical to argue that the end user would expect that it would be delivered fit to be utilized for his or her particular purpose.

In summary, utilizing a linear programming minimization model, electricity which cannot be stored, can be treated as a multi-faceted product in which three classes of goods, domestic, commercial and industrial, are transported from a manufactured source (power stations) and delivered to a bulk terminal from which they are sent to randomly located end users by time of day on demand, by tariff, under contract.

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3 Comco Constructions Pty Ltd v Westminster Properties Pty Ltd (1990) 1 WAR 335.
4 Sale of Goods Act 1923 (NSW), s.19; Grant v Australian Knitting Mills Ltd [1936] AC 85 at 99.
these terms it is feasible to reconcile electricity as a physical phenomenon with the statutory definition that goods includes electricity. In contrast s 4, of the New South Wales Fair Trading Act 1987, defines both “goods” and “services” as including electricity. Section 4 of the Trade Practices Act 1974 (Cth) defines electricity exclusively as “goods” and not services.

In relation to a liability action against a manufacturer for defective goods, s 75 AK of the Trade Practices Act 1974 provides a defence if it can be established that:

♦ at the time of supply of the goods they were not subject to defect;

♦ the goods only had the defect because they were complying with a mandatory standard;

♦ the state of scientific or technical knowledge when the goods were supplied by the actual manufacturer was not such that the defect could be discovered; or

♦ the defect is a component to other goods.

The interpretation of the clause in terms of electricity is that “supply time” means at the time it was generated being a time before it was transmitted or distributed – TPA s 75 AK(2). It is argued that to express supply time in terms of generation of electricity does not make sense when it comes to defining the source of a defect in a power supply system. The reasoning is set out below in the context of Figure 3.1. The operation of the power system is defined by system power demand by time of day and location. For example, in the early hours of the morning at light system load, only the large least cost base load power stations would be on line, whereas at peak demand, all power stations may be in service. While it may be feasible to proscribe a defaulting power station under varying load conditions as that which triggered a disturbing system event, the electricity delivered to the end user is in real time a combination of all that is produced by the on line power stations at supply time including distributed generation if online. Hence, it would be difficult to differentiate between cause and effect.

The extent and physical configuration of an electricity system is such that supply and quality of power delivered can become affected after it is generated. A major system disturbance, such as a substation failure, a transmission line structure failure, or a
distribution line component failure, can occur at any point, at any time on the transmission system or the distribution network, which may give rise to blackouts, power surges, distorted voltage levels and abnormal power system frequency.

A recommended change to s 75AK(2) of the Trade Practices Act 1974 is that it read:

♦ “Supply time” means: the time at which it is delivered to the end user, being a time after it was generated. Also, “generator” should be replaced by the “network service provider” where the term electricity is used in the clause.

The network service provider has a contract with the market operator (NEMMCO) or a distributed generator for the supply of electricity in bulk. Thus the electricity service provider, has the knowledge, the resources and the contractual obligation to monitor the state of the distribution network prior to and at the point of the delivery of electricity to the end user. It follows therefore, that if the Trade Practices Act 1974 is intended to protect consumers against defective supply, the network service provider should accept responsibility.

If the definition of “supply time” were to be amended as suggested, this could, (if the distributor qualified as a “manufacturer”) impose strict liability for defective goods which caused personal injury or damage to the claimant’s goods or property. Liability under Part VA applies if a corporation in trade and commerce supplies goods manufactured by it; those goods are defective; that defect causes personal injury or damage to goods or property acquired for personal, domestic or household use which in turn results in loss to a claimant. Apart from a limited exception relating to personal injuries, no claims are available under Part VA for economic losses unrelated to physical or property damage. The term “manufactured” is defined in s.75AA to include “produced, processed and assembled”. A mere distributor of goods is not regarded as a manufacturer. But if the distributor alters the “goods” thereby changing some of the characteristics of the “goods”, it is arguable that the distributor could then be regarded as a “manufacturer”. Goods are

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5 Trade Practices Act 1974, ss75AD,AF,AG.
6 Trade Practices Act 1974, s.75AE. The section was intended to allow persons such as family members to recover costs of nursing etc.
defective if “their safety is not such as persons generally are entitled to expect”, s.75AC. Consequently, it is arguable that if the hurdle of manufacture can be overcome, electricity as “goods” would be defective if there was power surges and voltage variations outside what might be considered the normal anticipated variations. The recommended amendment would provide the domestic consumer with a ready remedy for defective supply without the need to show fault. It would have the advantage that, unlike the implied warranties provisions, a claimant need not show a contractual relationship with the provider. Consequently, partners, children and others who did not have a contract with the provider could claim under Part VA.

Where there is a contractual relationship, the consumer can rely on the implied warranties under the Trade Practices Act and related state Fair Trading legislation, to which we now turn.

3.3 Trade Practices Act 1974 Part V : Division 2 - Conditions and Warranties

3.3.1 Electricity Supply Association of Australia (ESAA) v Australian Competition and Consumer Commission (ACCC) Case

This first section is concerned with the conditions imposed by the implied undertaking as to quality or fitness of electricity under TPA s 71. It examines arguments presented in the Federal Court case of Electricity Supply Association of Australia v Australian Competition and Consumer Commission (ACCC). Separate consideration will be given to the supply of services under TPA s 74(1) and s 74(2) and the implied warranty that the services will be rendered with due care and skill. It should be noted that ss71,74 protect “consumers”. A person is taken to have acquired goods as a consumer under s.4B if the price of the goods did not exceed the prescribed amount ($40,000) or where the goods exceed the prescribed amount, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption. Consequently, these provisions would protect domestic consumers and
small businesses up to $40,000. In relation to the latter, exclusion clauses can apply unless it is not fair or reasonable for the corporation to rely on the contract, s.68A(2).

In *Electricity Supply Association of Australia v Australian Competition and Consumer Commission* the parties had been engaged for some years in argument over the implied conditions and warranties contained in Part V, Division 2 in respect of standard form electricity supply and electricity connection contracts, particularly section 71 set out below:

(1) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business, there is an implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except that there is no such condition by virtue only of this section:

(a) as regards defects specifically drawn to the consumer’s attention before the contract is made; or

(b) if the consumer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(2) Where a corporation supplies (otherwise than by way of sale by auction) goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation or, to the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being acquired, there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is the purpose for which such goods are commonly supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person.

(3) Subsections (1) and (2) apply to a contract for the supply of goods made by a person who in the course of a business is acting as agent for a corporation as they apply to a contract for the supply of goods made by a corporation in the course of a business, except when at corporation is no supplying in the course of a business and either the consumer knows that fact or reasonable steps are taken to bring it to the notice of the consumer before the contract is made.

The Australian Competition and Consumer Commission argued that electricity as “goods” (TPA s. 4) are required to be reasonably fit for the purpose which it was known to be acquired, and that the breach of the implied conditions and warranties under s.71 does not require proof of fault by the supplier. The issue of the proceedings was the interpretation attributed to TPA s. 71 by the Australian Competition and Consumer Commission (ACCC) in its public statements. The view expressed by ACCC was as follows:

An action for damages under Division 2 does not appear to require the consumer to establish that the supplier was negligent in supplying or manufacturing the goods. Rather, the question is whether, at the time of supply, the goods were of merchantable quality and fit for the purpose. Apart from considering the question of “all other relevant circumstances” in seeking to determine the merchantable quality of the electricity, the question of whether the electricity was fit for the purpose appears to be a question of fact. The liability is not qualified as in the case of “merchantable quality”.

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Therefore, it is considered that it would be wrong to assert that the distribution companies are only liable for damage caused by power surges if the company itself is negligent. It rests on the distribution company to take precautions against uncontrollable events which may cause power surges, or perhaps to insure against them. The distribution companies are contractually bound to supply electricity of merchantable quality and in a state which is fit for the purpose. How it does so is not the consumer's concern.

This was in response to a request by the Victorian Electricity Industry Ombudsman (EIOV) to the Australian Competition and Consumer Commission for its views. The response presupposed the applicability of TPA s 71 to electricity supply contracts with consumers and indicated a concern that electricity companies might misrepresent, among other things, the effect of the implied conditions in Division 2.

In this context and in light of legal opinions provided to the Australian Competition and Consumer Commission, the Electricity Industry Ombudsman Victoria adopted strict liability for claims lodged with it in respect of voltage conditions. Eastern Energy, a service and retail supplier, in marketing insurance for damage caused by power surges denied its liability for power surges "caused by lightning strikes, trees, possums or birds contacting overhead wires, or by motor vehicle accidents". Subsequent communications with that company induced the Australian Competition and Consumer Commission to seek legal advice in respect of Division 2 of the *Trades Practices Act 1974*.  

In contrast to the view expressed by the ACCC, the peak national industry body for the suppliers of electricity at that time, the Electricity Supply Association of Australia (ESAA), contended that the implied conditions do not apply to electricity supply contracts. However, even if they do, they would not render a supplier liable for damage resulting from an abnormal system disturbance, such as a power surge, brown-out, actions of third parties that are “beyond the reasonable control” of the supplier. Informing the contending views of the parties was an array of opinions by ten QCs and Senior Counsel. Despite the arguments which were marshalled on either side, the opinions did little to resolve the controversy and as a consequence, the

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10 See s. 68 (application of division to contract not to be excluded or modified) and s.74K(warranties in relation to the supply of services). Also, *Miller v Fiona's Clothes Horse of Centrepoint Pty Ltd* (1989) ATPR 40-963; *Trade Practices Commission v Radioworld Pty Ltd* (1989) ATPR 40-973; *Commissioner for Consumer Affairs v Spadtan Pty Ltd* (1995) ATPR 41-416; *ACCC v Nationwide News Pty* (1996) ATPR 41-519.
Electricity Supply Association of Australia sought orders to by way of declarations, injunctions and an order of review:

(i) to have the Australian Competition and Consumer Commission prevented from publicising and acting upon a view or views of s 71 of the Trade Practices Act 1974 that are said to be erroneous; and

(ii) of vindicating the right of Electricity Supply Association of Australia and its members both to publish their own views concerning Trade Practice Act 1974 s. 71 and to expose the error of the Australian Competition and Consumer Commission’s views.

The application was dismissed on the technical grounds that the questions raised relate to contractual rights and obligations of consumers and electricity suppliers. But neither a consumer nor a supplier was seeking or opposing the declaratory relief sought, and no actual consumer contract was at issue in the proceedings. In this context the court considered that it was not competent to bring down an authoritative decision.

Thus, the question of electricity as “goods” (s 4) retains its statutory meaning and as far as can be ascertained the Australian Competition and Consumer Commission remains fixed to their original view as to the liability of the network service provider should a fault on the system cause damage to a end user’s equipment and as a consequence the ACCC continues to publish their views on their web site: “ACCC Consumer Express” (February 2004). However, no court actions have been launched to test the matter.

The case is best summed up by the conclusions of Finn J [at 143] as follows 11:

‘The lack of success leaves unresolved the debate over Division 2 of Part V of the Act that this proceeding was designed to bring to a head. It is regrettable that an issue of such general importance to users of electricity in the country cannot secure an effective resolution’.

What follows are the various opinions expressed by senior counsel in relation to the issue.

1. The Strict Liability Argument of Mr Archibald QC.

(a) Given the *Trade Practices Act* definition of "goods" and the character of the supplier and customer relationship, the delivery of electricity to customers must be regarded as the supply of goods for the purposes of s 71.

(b) Given that even the most diligent distributor is unable to ensure that at all times electricity will be supplied in a condition fit for the purpose for which it is required by the consumer, it does not of itself relieve the distributor of the contractual obligation to supply electricity of a quality which enables the electricity to be used for the purpose for which it is supplied, at least in circumstances in which exemption clauses are negated by operation of statutory provisions.

(c) While such circumstances may be "relevant" for the purposes of s 66(2) of the *Trade Practices Act*, it is not regarded as a factor which justifies the supply with impunity of electricity in a form that is calculated, because of the abnormal disturbance, to cause harm to the customer's property, if not the customer's person. 12

(d) Therefore on balance, electricity distribution companies which are subject to the operation of the *Trade Practices Act 1974* are likely to be held liable for damage sustained by consumers in consequence of power surges notwithstanding that the power surges are not referable to fault on the part of the distributors. Such a consequence follows under TPA s 71(1) because the excessive voltage associated with power surges has the effect that electricity is not fit for the purpose for which such electricity is commonly acquired as it is reasonable to expect having regard to all relevant circumstances. It may also follow under TPA s 71(2) under implied undertakings as to quality and fitness. Such a conclusion can, however, be no more than a view as to the general result that may be expected to occur. The outcome in any particular instance in which a consumer suffers damage by reason of a power surge will depend upon the particular circumstances of the case.

Copies of the Archibald advice were provided to the supply companies, to the Electricity Supply Association of Australia and to regulatory bodies. The Australian Competition and Consumer Commission informed electricity suppliers that

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12 s 66(2) : Goods of any kind are of merchantable quality within the meaning of Division 2 if they are as fit for purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.
statements made by industry companies claiming that they were not liable unless there had been negligence on their part and offering insurance to consumers on this basis, that the Australian Competition and Consumer Commission was of the view that electricity companies that represent to consumers that they have no, or only limited, liability for power surges are likely to contravene TPA s. 52 (misleading conduct), s.53(g) (false representation) and s.55 (misleading conduct involving industrial property) of the *Trade Practices Act 1974*.13

2. The Alternative Arguments

(a) If it is assumed that s 71(1) and (2) did apply to electricity contracts with consumers and there was no liability for breach of an implied condition of merchantable quality, or reasonable fitness for purpose when a power surge caused damage; a supplier could still be liable to a customer where its own negligence caused a power surge.14 (see Chapter 4 at Section 4.3 on customer standard form contract immunities).

(b) Section 68 of the *Trade Practices Act 1974* declares void any attempt by parties to render the warranties implied into contracts by Division 2 inoperative or to modify those warranties15 and section 71(1) and s 71(2) implies into a contract that the goods are of merchantable quality fit for purpose16. If section 71(1) did apply to electricity, then it can be argued that the provider is not liable for power surges because the “goods” are still of merchantable quality. In this context it would be necessary to look at the relevant circumstances that could be encompassed by section 66(2)17 which provides that goods of any kind are of merchantable quality within the

13 s 52: misleading or deceptive conduct; s 53(g): false representation; s 55: misleading conduct to which industrial property convention applies. s 55 is enacted by the Commonwealth in reliance on its external affairs power and gives effect to the provisions of the Convention for the Protection of Industrial Property.

14 Advice tendered to United Energy Ltd by Alex Chernov QC and James Peters.

15 Aravco Ltd v Qantas Airways Ltd (1996) 185 CLR 43 (in which an indemnity clause in a contract with the appellant was found not to be valid under TPA s 68); Wallis v Downward-Pickford(North Qld) Pty Ltd (1994) 179 CLR 388 (in which the provisions of the *Carriage of Goods by Land Act* which purported to limit liability in a case where transported goods had been damaged was found to be in conflict with TPA s 68 and so the appeal was upheld); Dillion v Baltic Shipping Co. (1989) 92 ALR 331(s 74 extends to the carriage of personal luggage and s 68 applies to render inoperative any conditions in the passengers ticket which would have rendered the shipping company not liable for a breach of s 74).


17 s 66(2): Goods of any kind are of merchantable quality within the meaning of Division 2 if they are as fit for purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.
meaning of the Division if they are fit for the purpose for which goods of that kind are commonly bought. In relation to section 71(2), electricity that is subject only to surges that conform to what is to be expected from overhead supply may well be held to be "reasonably" fit, but not absolutely fit but meeting a standard of fitness that is reasonable in the circumstances. However, the advice acknowledged that, while a supplier would probably not be in breach of section 71 because of a power surge, it would depend on the circumstances.  

3.3.2 Exploring Standards and Circumstances a Case Study

It is apparent from the arguments which were presented in the ESSA v ACCC case discussed above, that there is a wide disparity of interpretation as to what is meant by electricity as “goods” and to what standard and circumstances would a supplier be in breach of s.71. What follows is an exploration of “standards” and “circumstances” utilising the case of Lasermax Engineering Pty Ltd v QBE Insurance (Aust) Ltd.  

The ACCC argument is based on a strict reading of electricity in its commoditified context, that is, electricity as physical goods. Consequently, then it is required that those goods should be delivered to the end user fit for the purpose they were intended. If not, then the supplier is in breach of that part of s. 71(2) as repeated below:

\[\ldots \text{there is an implied condition that the goods supplied under the contract for the supply of the goods are reasonably fit for that purpose, whether or not that is the purpose for which such goods are commonly supplied...}\]

In contrast the ESAA argument was that there is a "contrary intention". However, it reasoned that if the implied conditions did apply to electricity as goods, the supplier would not be liable for damage resulting from an abnormal system disturbance, such as a power surge, brown-out, or actions of third parties if it was “beyond the reasonable control” of the supplier. In effect, is this saying that it is still “reasonably fit” for purpose? That is reliance is placed on s. 71(2):

\[\ldots \text{except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgment of the corporation or of that person".}\]

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18 Advice tendered to Eastern Energy Ltd by J D. Heydon QC.
19 50052/03, 2004 NSWSC 483m unreported judgment.
20 What contrary intention means, other than an opposite effect, was not explained, or if it was it was not in the transcript of the case.
Consequently it is argued that the issue then reduces as to what standards and what circumstances constitute an event which prevents the service provider delivering to the end user electricity reasonably fit for the purpose for which it is intended?

Events which can lead to a power surge, brown-out, blackout or actions of third parties can be treated as events which are superimposed on a power system from:
(a) external sources, eg storms (lightning, wind causing clashing of conductors), a car or truck striking a power pole, a digger cutting a power cable;
(b) internal sources, eg magnetic inrush currents in switching large pieces of equipment, surges generated from the failure of equipment.

These conditions have been categorised by service providers as *force majeure* exclusions. 21 However, it can be shown that force majeure arguments are not always accepted. 22 That in fact the service provider may be in a position to control such events depending on the condition and operational management of the network supplying end users who may be subject to harm. *Lasermax Engineering Pty Ltd v QBE Insurance*, 23 though concerned with an insurance claim, is used to illustrate different scenarios in respect of standards of care and circumstance in which a power surge occurred when high voltage conductors fell on to low voltage conductors because of a pole fire.

**Scenario 1**: that the incident was beyond the reasonable control of the service provider; or
**Scenario 2**: that the incident was within the control service provider.

**Background**: A laser machine used by Lasermax Pty Ltd (“Lasermax”) for the purpose of welding, cutting and treating materials was damaged due to a power surge. The laser machine was installed in an engineering workshop supplied from a three phase 415/240 volt service connected to an over head low voltage line carried on wood poles. The head configuration of each pole consisted of high and low voltage conductors supported on wood cross arms having a vertical separation of

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21 See Chapter 4 Section 4.3 on exclusion clauses in standard form contracts.
22 Commissioner of Railways (WA) v Stewart (1936) 56 CLR 520 concerning the collapse of a railway embankment and flooding of houses.
23 NSW Unreported Judgments, 50052/03, 2004 NSWSC 483.
approximately 1.2 metres. A fire occurred on the upper cross arm carrying high voltage conductors of a pole located in the vicinity of the Lasermax workshop. As a result the high voltage conductors fell onto the low voltage conductors which induced a power surge having a peak value of around 9000 volts into the low voltage mains serving the laser machine. As a consequence, the machine was severely damaged. The cause of the fire was said to be the electrical breakdown of a high voltage insulator.

The mechanism of wood pole fires is described in more detail in a case study set out in Chapter 5. Sufficient for the purpose of this examination is to indicate that insulator failure leading to a fire on a wood pole results from leakage current of a relatively small magnitude heating the dry areas under and surrounding the steel fittings of the insulator. Charring and a subsequent fire of the surrounding wood is dependent on local weather and its affect over time. The two main sources of insulator failure are over voltage stressing and puncturing of the insulator as the result of an induced lightning strike to or in the vicinity of the line, or atmospheric pollution of the insulators. 24

**Scenario 1: circumstances beyond the reasonable control of the service provider.** It is assumed that the overhead line was at sometime in the past subject to an induced or direct lightning strike. As a result the insulator is punctured although it appeared to be mechanically sound. In due course moisture has infiltrated the puncture giving rise to an insidious leakage current and has induced heating and charring where the wood of the crossarm makes contact with the steel assembly supporting the insulator. The result was a cross arm fire and the fall of the high voltage conductors on to the low voltage line.

**Argument.** The fact that a network has tens of thousands of insulators on its system makes it very difficult and extremely costly to monitor each and every circumstance

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24 R.H.Stillman, “The Application of Lightning Research to Wood Pole Lines”, Masters Thesis, University of Queensland, Chapters 3 and 4, 1978. Charring occurs due to a temperature differential between wet and dry areas of the steel wood contact area and the movement of air in the vicinity, eg wind. The peak transient over voltage generated by a lightning strike near or on a power line which damages the insulator is a product of the short circuit current of the stroke at the point of contact or induction and the surge impedance of the line conductors. The magnitude of the over voltage surge wave depends on the number of line reflecting nodal points encountered prior to grounding and the time and the volume of wood in the wood/porcelain combination.
involving a lightning strike to, or in the vicinity of a power line. There is no standard or test which can be used. It is feasible, however, to apply circumferential bonding of the insulator support steelwork in order to mitigate the effects of the leakage current. Consequently, an argument could be sustained that in the circumstances described and within acceptable industry standards of network maintenance, the power surge which damaged the laser machine was not within the control of the network service provider. Therefore it is arguable that it was unreasonable to rely on fitness for purpose. But it must be remembered that strict liability applies under s.71. Why should “events beyond reasonable control” be excepted when in other cases, strict liability is applied to unknown defects which caused harm? 25

Scenario 2: circumstances within the reasonable control of the service provider.
The Lasermax workshop is located within an industrial complex close to a salt water environment. Thus, it could be assumed that the insulation properties of the insulator which caused the fire had been degraded by industrial and salt spray contaminants. Pollution contamination of the insulator can be caused by a variety of agents (coal, cement and road dust, salt spray, fertilisers, etc) which when moistened reduce its power frequency insulation voltage properties. Pollution as such, causes a non-uniform distribution of the operating voltage of the outer porcelain housing of the insulator, resulting in leakage current surges which can induce a fire in a supporting wood cross arm. 26

Argument. There is a sustainable case that in the particular industrial environment in which the power line was located and operated, the insulation properties of the insulator carrying the high voltage power line involved in the Lasermax incident would have been subject to pollution in which leakage currents of sufficient magnitude would over time cause the crossarm to ignite. It would have been possible to mitigate the effects of insulator pollution by:

♦ regular washing of the local system line insulators; or
♦ installing insulators having a outer housing with a longer leakage path.

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25 Laverick v Lease Auto Pty Ltd (2002) 192 ALR 290. The applicant was injured when the wheel of a hired car which he was driving came off. He recovered damages for breach of the undertaking as to fitness implied in his hire agreement.
Consequently, it could be argued that the network service provider failed in the reasonable care and maintenance of the power line.

**Strict Liability.** It is doubtful that a network service provider operating a widespread system of exposed overhead power lines would or could be expected to ensure that the system will deliver electricity to an end user in a condition reasonably fit for the purpose under extreme weather conditions. However, overhead systems are designed and maintained to a standard which meets most external and internal conditions which could undermine the delivery and quality of an electricity supply. It is considered that whether the network service provider was at fault or not, the fact that in the particular circumstances, the power surge which damaged the laser machine breached s. 71 of the *Trade Practices Act 1974* in so far that the electricity delivered was not fit for the purpose it was intended. In other words, the network service provider would be strictly liable under the Act.

### 3.4 Trade Practices Act 1974: Section 74: Supply of Services

#### 3.4.1 A Direct Relationship

A consumer connected to the power supply enters into two contracts, a retail supply contract with a retailer and a connection to the network contract with the network service provider. The term consumer under section 4B of the *Trade Practices Act 1974* is of importance in relation to Division 2 of Part V in respect of conditions and warranties in consumer transactions rendered under s. 74 of the Act as follows:

74. **Warranties in Relation to the Supply of Services**

(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services and any materials supplied in connection with those services will be reasonably fit for purpose or are of such a nature and quality that they might be reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.

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27 The transcript of *Lasermax v QBE Insurance* indicates that proceedings are pending for an action in negligence.
Section 74(1) of the Act implies into all contracts for the supply of services to a consumer a warranty that all the services will be rendered with due care, and any materials supplied in connection with those services will be reasonably fit for the purpose for which they were supplied. Section 74(2) gives rise to a specific warranty when the end user makes known, either expressly or by implication to the service provider either the specific purpose for which the services are required, or, the end result as to what the services are suppose to achieve. The implied warranty in these circumstances is that the services supplied are reasonably fit for purpose, or, of such a nature or quality that they might be reasonably be expected to achieve that result.

The warranty also covers any materials supplied in connection with the supply of the service. The warranty does not apply where the end user does not, in fact, rely on a provider’s skill or judgment; or it is unreasonable for the end user to rely on the network provider’s skill or judgment. The reason why statutory warranties cannot be excluded is because the Trade Practices Act ensures that a contract term that excludes, restricts or modifies the statutory warranty is void. It can be excluded however, if:

(a) the services are not of a kind ordinarily acquired for personal, household or domestic use; and

(b) the contractual term limits liability to either re-supplying the services; or paying the costs of re-supplying the services; or

(c) it is fair and reasonable for the service provider seeking to limit liability to rely on that contractual term.

In determining whether the contractor’s reliance is fair and reasonable, the court looks at:

♦ the relative strengths of the bargaining positions between the parties;

♦ whether the customer received inducements in agreeing to the term, eg discounts;

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28 See Chapter 4: “Consumer Connection and Supply Contracts” for a detailed discussion.
29 Trade Practices Act 1974 (Cth), s.68.
30 Trade Practices Act, s.68(1).
31 Trade Practices Act s.68A(1)(b)
32 Trade Practices Act, s.68A(2)
33 Trade Practices Act, s.68A(3)(a).
34 Trade Practices Act s.68A(3)(b)
whether the customer had an opportunity to acquire the services (or their equivalent) from any source of supply under a contract which did not contain the limit on the liability clause,\textsuperscript{35} for example, another retail provider; and,

- whether the buyer knew, or ought reasonably have known of the exclusion.\textsuperscript{36}

The warranties cannot be excluded or limited in relation to a domestic consumer. TPA Section 68A(1) makes it quite clear that a term of a contract excluding liability relating to the supply of goods and services other than those acquired from domestic or household use is not void under s.68. Hence, a small business could be subject to any limitations of liability included in the negotiated contract unless it could show that it was not fair and reasonable for the provider to rely on the exclusion clause.

The \textit{Trade Practices Act} does not directly create a new cause of action arising from a breach of warranty. Rather, where a breach of warranty occurs, the action lies in contract and not in tort. As Wilcox J, explained in relation to the statutory warranties:\textsuperscript{37}

\emph{The Trade Practices Act... does its work, not by prescribing unacceptable practices but by imposing, by force of statute and regardless of the wishes of the parties, additional contractual terms. These terms each improve the position of the weaker party; typically, but not necessarily, a consumer. But they do so by force of contract law; not by conferring a right of action for breach of a statutory prohibition. The circumstances which attract the operation of each section include the prior existence of a contract.}

This means that where a statutory warranty has been breached, damages will be assessed in accordance with contractual principles and not tortious principles, and damages for lost profits could be more readily available.\textsuperscript{38} Consequently, on the supposition that there is a direct contractual relationship between the consumer and the network service provider, the consumer can sue for breach of contract in respect of the implied warranty under s 74 of the \textit{Trade Practices Act} in that the materials supplied in connection with the service were not fit for the purpose for which they were supplied.

\textbf{Case Study:} The plaintiff leased a factory unit in an industrial terrace complex for the purpose of sand blasting and plating steel products. The plating process was

\textsuperscript{35} \textit{Trade Practices Act}, s.68A(3)(b)

\textsuperscript{36} \textit{Trade Practices Act}, s.68A(3)(c).

\textsuperscript{37} E v Australian Red Cross Society (1991) 27 FCR 310 at 352.
carried out by means of water cooled electric vat. As the result of an apparent fault on the incoming three phase power mains supply, the pump supplying the water coolant to the vat was disconnected and as a consequence the furnace overheated and was severely damaged. The vat had been installed 12 months prior to the incident during that time there had been two other incidents involving the disconnection of either the pump or the mains supply. The cause of the problem was the lack of discrimination between the circuit breaker servicing the incoming mains and a circuit breaker associated with the pump motor. As a consequence when the vat was fully loaded, it was a question as to which protective fuses would operate first.

The original installation work was carried out by the electrical contracting division of the local network service provider as contestable works. It involved the installation of new service mains, installation of the circuit breakers and their setting, and the electrical wiring associated with the blasting and plating equipment. The plaintiff could have brought an action against the contractor indicating that there was a failure to take care and exercise skill in the provision of a service under s.74(2) of the Trade Practices Act arguing contractual breach of warranty and negligence in that the contractor in rendering the service failed to take due care and skill as to the setting of the circuit breakers. It could be argued that that customer relied on the service provider’s skill in the setting of the circuit breakers. The conditions and warranties implied in Section 74(1) and (2) arise when the customer makes it known, either expressly or by implication to the provider of the service either the specific purpose for which the services are required, or, the result that the service is suppose to achieve. The warranty does not apply where the end user does not, in fact, rely on the network provider’s skill or judgment.

3.4.2 Indirect Third Party Relationship

Another scenario is that where parties rent or lease premises for the purpose of carrying out commercial or industrial activities and obtain their electricity supply from a retail onseller such as the owner of complex. As such they are not parties to the connection contract, the latter being entered into by the property owner.

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38 TPA s.68A(3)
39 Contestable Works: competitive tendering work between the customers premises and the power network.
Consequently, the end user who may suffer damage as the result of a system disturbance is a third party to the contract. The only claim is against the owner of the complex or the on seller.

Based on the proposition that the warranties in the *Trade Practices Act 1974*, ss. 71 and 74 override any contractual immunities contained in a service contract, the ACCC contend that when a retail reseller of electricity enters the market a situation can occur where the retail reseller is unable to exclude liability in its contracts with its retail clients, whereas the network service provider will be able to exclude liability to the reseller. Consequently, the reseller becomes the responsible party for damage arising from a system disturbance. However, the customer might be able in tort to sue the network provider. In this particular case it could very well be argued that the mains supplying the units of the complex were the responsibility of the owner of the complex and therefore the owner was liable for the loss. A more detailed examination of liability for economic loss is given in Chapter 6.

### 3.4.3 Summary

The object here has been to illustrate the legal complications which can arise in the present market environment between a customer, a network service provider and a retailer. Under the *Trade Practices Act 1974* it is necessary to differentiate between electricity as goods, their quality or fitness as implied by s. 71 and the warranties implied in a contract for services that the service will be performed with due care and skill as required by s.74. Issues of responsibility and liability arising from a system disturbance become complicated and invariably beyond the comprehension of small end users where (a) the end user of electricity has a negotiated connection contract with a network provider but (b) buys electricity under a negotiated retail contract from a retailer. For example, an Airport installation includes a number of leased workshops. The Airport installation is connected to the network owned by provider “A”. However, the airport owner “B” buys electricity from a market retailer “C” for his or her own use and also on sells electricity to the leased premises. Thus there is a chain of contracts:

- between the Airport and the network provider;
- between the Airport and the retailer; and
- between the Airport and the leased workshops.
If a disturbance occurs on the network which causes harm to any of the contracting parties there are non excludable warranties as to fitness implied in the contracts under the TPA which continue to be available to the small end user.

3.5 Quality and Fitness and the Sale of Goods Act 1923 (NSW)

At the State level the Sale of Goods legislation may also be relevant. Section 19(1) of the Sale of Goods Act 1923 (NSW) sets out the following requirement:

1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description which it is in the course of the seller’s business to supply (whether the seller be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

and section 19(2) that:

2) Where goods are bought by description from a seller who deals in goods of that description, whether the seller be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality. Provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.

Section 4 includes “electricity and gas” in the definition of “goods”. Section 19(1) and s 19(2) of the Sale of Goods Act 1923 (NSW) are somewhat similar in that goods bought by description means that they must be sold by description and as such shall be of merchantable quality. However, there is a provision that if the buyer examined the goods prior to the contract being made there is no implied condition as regards defects which such an examination ought to have revealed. Obviously this is not possible in respect of electricity. However, it does not prevent a breach being established in relation to latent defects in the goods, that is, a defect which was not discoverable by an examination of the goods. In respect of electricity the defect is only apparent when it manifests itself at the time of usage. Subsequently section 64(3) of the Act states:

(3) Without limiting the meaning of the expression merchantable quality, goods of any kind which are the subject of a contract for a consumer sale are not of merchantable quality if they are not as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to their price, to any description applied to them by the seller and to all other circumstances.

Sale of Goods Acts in the state and territories: ACT: s19(2); NT: s 19(a); Qld: s 17(1); SA: s 14(1); Tas: s 19(a); Vic: s 19(a); WA: s 14(1).
The case of *Grant v Australian Knitting Mills Ltd* 41 is an example of s.64(3). The plaintiff, Dr Grant, purchased woollen underwear from a retailer, David Jones Pty Ltd and contracted dermatitis because of the presence of sulphides left as a residue of the bleaching of the cotton material used in the garments. Thus the implied condition was established, and a breach proved, on the basis of experience as the defect in the goods could not have been discovered by any examination by either the buyer or the retailer. Moreover, liability was established without any proof by the buyer that the retailer had failed to exercise reasonable care. The Privy Council concluded that:42

"Whatever else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination. . ." 

Section 66(2) of the *Trade Practices Act 1974* provides a similar definition:

(2) Goods of any kind are merchantable quality within the meaning of the Division if they are fit for the purpose for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price, if relevant, and any other relevant circumstances.

Unlike the *Sale of Goods Act 1923*, the definition given of merchantable quality in section 66(2) requires the goods to be reasonably fit for purpose for which the goods of that type are commonly purchased. This contrasts with the concept that it is sufficient for the goods to be fit for one of the purposes for which those goods are commonly bought as required by the *Sale of Goods Act 1923 (NSW)*. For example, in *Henry Kendall & Sons v William Lillico & Sons Ltd*43 the goods were Brazil ground nuts which were suitable for feeding cattle but not poultry. They were held to be of *merchantable quality* even though the vendor knew the purchaser was going to use the nuts for poultry feed. If the statutory definition in the TPA had applied, the decision would have been different as the goods would not have been reasonably fit for all the purposes for which such goods were commonly bought. This distinction becomes irrelevant if the goods are commonly bought for only one purpose as was the case in *Grant v Australian Knitting Mills*, mentioned above.44 The general conclusion drawn is that if merchantable quality and fitness are compared, it is apparent that they tend to overlap to a considerable degree. They are not however, coextensive. Goods which are not fit for a special or unusual purpose may well be of

41 [1936] AC 85.
42 At pp99 –100.
merchantable quality, yet a buyer may succeed under conditions as to fitness if he or she has made their purpose known to the provider. Despite the fact that electricity can be used in many ways the purpose is defined by the class of end user or consumer being supplied at the time of delivery, such as, domestic, commercial or industrial. The Trade Practices Act 1974 being an Act of the Commonwealth it would prevail in an action involving State sale of goods legislation.\textsuperscript{45}

3.6 Summary
The central question has been whether liability exists in cases in which a system failure occurs without fault on the part of the network provider. The Australian Consumer and Competition Commission has taken the position that under Division 2, Part V of the Trade Practices Act 1974, an electricity supplier is responsible for damage to customer's equipment in conditions of a system disturbance regardless of negligence. The Commission reasons that the sale of electricity includes the statutory warranties of merchantability and fitness for purpose, pursuant to section 71 which cannot be excluded in a consumer contract\textsuperscript{46} and that system disturbances resulting in a degraded electricity supply or failure violate the implied warranties of the Trade Practices Act 1974, s.71. The industry in disputing this claim, argues that electricity is of merchantable quality if in the circumstances in which it is delivered, it meets reasonable expectations based on the fact that a power system can never be free of fault. That is, a widespread exposed power network is such that it is not reasonable to expect that there will not be circumstances when power supplies are not affected by abnormal circumstances. The problem which arises is in differentiating between electricity as a commodified product and its delivery. In contract, the standard for a breach of the implied warranty in the delivery of services is a negligence standard, that is, under section 74(1) services must only "be rendered with due care and skill."

\textsuperscript{44} [1936] A.C 85,101.
\textsuperscript{45} If state law modifies the impact of the implied warranty, the State law does not apply: Trade Practices Act 1974 (Cth) s.67 otherwise the concurrent operation of state law continues, see s.75.\textsuperscript{46} TPA Section 68A allows a retailer in a contract for goods or services "other than (those) ordinarily acquired for personal, domestic or household use or consumption" to limit liability (1) for goods: to replacement, repair of goods or the cost or repair or replacement; (2) for services: to supplying the service again or the cost of resupply. But this does not apply if it is not fair or reasonable for the corporation to rely on the contract, s.68A(2).

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While the electricity supply case was centred on the uncertainty about the standard for a breach of implied warranties applying to goods, there is no such ambiguity when it comes to network service providers who provide a connection service. The fact that the customer has separate contracts, one for the supply of electricity and another to service electricity defines a relationship of supply and delivery. At the manufacturing or bulk supplier end of the chain, the goods are expected to be produced in good order on dispatch but are degraded during the course of delivery to the end user, there is an arguable case for strict liability. Which then is preferred, strict liability or no liability for defects where there is no negligence? Should the small end user be protected? The answer is in the affirmative, as the small end user has very limited means by which to challenge the contentions of a network service provider as to whether the electricity supply is fit for purpose despite the fact that it may have caused harm on delivery. It is observed that the implied warranty under the Trade Practices Act, s.71 concerns goods which have been delivered to the consumer which are not fit for the purpose. Consequently, the implied warranty, it is argued, does not cover situations where there has been no supply at all - a total failure of supply. Unless the contract between the provider and the customer guarantees supply (see chapter 4) or a tort claim is available for failure of supply (see ch 6), the customer will not have a remedy where there is a blackout.

The Chapter which follows will examine the contractual relationships affecting small end consumers and the attempts by providers to contractually limit their liability.

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47 See the section 3.3.2 as to the different interpretations that can be placed on the cause of the power surge detailed in Lasermax v QBE Insurance NSW unreported 50052/03, 2004 NSWSC 483.

48 In some states there may be modest payments where there has been continuing disruptions to supply, for example, in Victoria, $300 is payable for unplanned interruptions of more than one minute for more than 60 hours in a calendar year: Vic Essential Services Commission, Electricity: Your entitlement to a reliable supply.
Chapter 4: CUSTOMER CONNECTION AND SUPPLY CONTRACTS

4.1 Introduction
A small end user of electricity is provided with electricity through two mechanisms.
♦ First the premises are connected to a point on the network giving rise to a connection contract with the distribution network service provider.
♦ Second, through a separate contract electricity is purchased from a local retailer who is a separate entity from the network service provider.

Chapter 2 examined the immunity clauses contained in the National Electricity Law and Chapter 3, the implications of the Trade Practices Act 1974. This Chapter is concerned with distribution system connection and supply contracts. It will examine the potential for liability towards the small end user and exclusion clauses in standard form contracts. Figure 4.1 shows the statutory relationships.

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1 Electricity Supply Act (NSW) 1995 No.94: Division 2 and Division 3.
2 See Chapter 2 at 2.6.1 for the definition of a customer under the National Electricity Rules.
The standard form customer connection contract applies to all small end user customers connected to a network. The standard form contract contains guaranteed customer service standards\(^3\) which include timely provision of services, notice before discontinuing supply or arranging disconnection, notice after disconnection and the provision of other services. Where a contract is negotiated between parties, it will be constructed to contain terms as the provider and the customer agree and that the contract is enforceable accordingly. For the majority of customers, this is not the case in respect of the standard form connection contract. The contract is one of default or deemed\(^4\) to have existed, or have been negotiated between the service provider and the small end customer when the service provider came into existence at the time the electricity supply industry was restructured in the various state jurisdictions, eg New South Wales first in 1995 and subsequently in 2001 having acquired the customers as part of the franchise\(^5\). Copies of the contract are available on request, or by downloading on-line, or on display at a provider’s local office (if such exists).

Furthermore, changes can be made to the deemed contract without necessarily informing the customer\(^6\). It is considered that this unilateral right to vary a contract deprives the consumer of what would be considered normal contractual rights. It is relevant also to the previous discussion of s 68 in at 3.4 in Chapter 3 as to the Trade Practices Act 1974 and small customer electricity contracts.

The first part of the Chapter looks at the requirements of the standard form contract in an environment of full retail competition and the provisions required of such contracts by the New South Wales legislation. This is followed by an examination of the principles and issues raised by the use of exclusion clauses in deemed standard form connection contracts with case studies.

\(^3\) NSW Electricity Supply (General) Regulations 2001: Schedule 2. Electricity Association of New South Wales “Code of Practice - Electricity Service Standards” and “Service Provider Customer Service Standards for Connection Customers”.

\(^4\) Deemed – used to create a legal or statutory fiction – Muller v Dalgety & Co Ltd (1909) 9 CLR 693.

\(^5\) In New South Wales and Queensland industry restructuring has taken place twice. Initially in 1995-96 and subsequently in 2001. For example, in NSW the 1995 transfer of customers from the franchised distributor operating as a trading undertaking under the Local Government Act 1919 and a second transfer as a result of the 2001 restructuring (NSW Electricity Supply (Country Energy) Regulation 2001).

\(^6\) Electricity Supply Act 1995 No.94, at Section 22 (Connection Contracts) and at Section 42 (Supply Contracts) and Electricity Supply (General) Regulations 2001 Part 4.
4.2 Full Retail Competition and Standard Form Connection and Supply Contracts

Full retail competition (FRC) in the electricity supply market between retail providers as it effects small end users has been in operation in New South Wales and Victoria since January 2002, in South Australia since January 2003 and introduced into Queensland in 2007. In this context a retailer is at liberty to compete for customers in any State providing the retailer is licensed to operate in the national electricity market. In New South Wales for instance, for a small end user to receive an electricity supply there must be in place a connection to the network contract and a retail supply contract as a condition of licensing under the *New South Wales Electricity Supply Act* 1995 No.94, namely:

- a customers standard form customer connection contract: Division 2 of the Act;
- A standard form customer supply (retail) contract: Division 3 of the Act.

Prior to the re-structuring of the electricity supply industry customers were within franchised supply areas in which they would have entered into customer connection agreements with a state owned trading network and retail provider, eg a County Council (NSW), Area Board (Queensland) or the Electricity Commission (Victoria), Electricity Trust (South Australia). In each case the agreement would include both connection, servicing and the supply of electricity. To date, in the re-structured industry, the majority of small customers appear to have remained with the successor to their original supplier and have not changed to another retailer with the introduction of full retail competition. In electing to stay with the original supplier the customer is party to a deemed, or default standard form type contract.

Utilising the New South Wales legislation as an illustration for study, the *Electricity Supply Act* 1995, No 94 (NSW) provides for different forms of customer connection or supply contracts for different classes of customer. It is a condition of the providers licence that they must notify any relevant customer consultative group, and must

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7 See s 2.4 in Chapter 2.
8 See Monash University, Centre for the Study of Privatisation and Public Accountability, Report *Protecting Utility Consumers from Market Failure* at p 23. As of January 2004 switching rates involving market contracts was in the order of 17% (Victoria) and 16% New South Wales. No figures are available for the ACT although it is estimated to be close to that of NSW, or for South Australia.

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have due regard to the group’s comments before completing its preparation. However, a provider is at liberty to amend a deemed standard form contract, to vary the conditions on which it will provide a connection and or a supply contract as indicated earlier.9

The Electricity Supply (General) Regulations 2001 (NSW) s 13 (2) and 42 stipulate that information given to or provided to customers requires the provider to furnish the customer with a document that informs him or her as how to obtain copies of their contract. It does not require that the customer should actually receive a copy of the standard form contract unless the customer so requests. It is possible to download a copy on line or view one at a local office of the service provider. Few local offices now exist and if they do they may be some great distance from where a customer resides. Some energy suppliers provide an outline summary of the contract and or its obligations on line. A requirement of the Electricity Supply (General) Regulation 2001 (NSW) 10 is that in respect of a connection contract, a provider must have a “Customer Service Standards” document. Such a document sets out minimum standards of services to be provided to customers, eg levels of supply availability, and power quality standards; indicates the normal characteristics of the electricity supplied; informs customers of the electrical environment in which their equipment operates, and draws their attention to factors which can alter the characteristics of their electricity supply including being disconnected from supply by the customer’s retailer.

The following is indicative of the essential elements of the Electricity Supply Act 1995 No.94 (NSW) in respect of a standard form connection contract and a standard form supply contract.

s 20: Matters For Which Standard Form Customer Connection Contracts Must Provide

(1) A standard form customer connection contract must make provision for the following matters:

(a) the basis on which charges for its customer connection services are to be calculated,
(b) any security to be provided by customers for payment of any such charges,
(c) the standard of service to be provided to customers by the network service provider.

9 Electricity Supply Act (NSW) 1995 at s.22 and 42.
10 In accordance with the Electricity Association of New South Wales “Code of Practice - Electricity Service Standards” and the Electricity Supply Act 1995 (NSW) (including the Regulations made under the Act – particularly the Electricity Supply (General) Regulation 2001 Schedule 1 Clause 5).
(d) the requirements to be complied with by customers under Division 4 (customer connection services),
(e) the circumstances under which premises may be disconnected from the distribution network service provider’s distribution system,
(f) the procedures established by the distribution network service provider for handling enquiries and complaints made by customers, and resolving disputes with customers, in relation to matters arising under the contract,
(g) such other matters as may be prescribed by the regulations.

(2) A standard form customer connection contract:
   (a) must indicate that this Act and the regulations confer powers, duties, rights and obligations on the distribution network service provider and the customer, and
   (b) must briefly describe the nature of those powers, duties, rights and obligations, but is not unenforceable merely because of a failure to do so.

(3) A standard form customer connection contract must comply with:
   (a) any conditions imposed on the distribution network service provider by its distribution network service provider licence, and
   (b) any relevant determination of the Independent Pricing and Regulatory Tribunal but is not unenforceable merely because of any failure to do so.

(4) A standard form customer connection contract must not be inconsistent with the provisions of this Act or the regulations, and is unenforceable to the extent of any such inconsistency.

s 40: Matters For Which Standard Form Customer Supply Contracts Must Provide

(1) A standard form customer supply contract must make provision for the following matters:
   (a) the basis on which charges for or in relation to the supply of electricity to customers are to be calculated or imposed,
   (b) any security to be provided by customers for payment of any such charges, the standard of service to be provided by the retail supplier, the circumstances under which the supply of electricity to customers may be discontinued,
   (c) the procedures established by the retail supplier for handling enquiries and complaints made by customers, and resolving disputes with customers, in relation to matters arising under the contract,
   (d) the estimation of electricity supplied otherwise than through an electricity meter or in circumstances in which an electricity meter fails to operate or fails to operate correctly,
   (e) the rate at which electricity is taken to have been supplied between consecutive meter readings,
   (h) such other matters as may be prescribed by the regulations.

(2) A standard form customer supply contract:
   (a) must indicate that this Act and the regulations confer powers, duties, rights and obligations on the retail supplier and the customer, and
   (b) must briefly describe the nature of those powers, duties, rights and obligations, but is not unenforceable merely because of any failure to do so.

(3) A standard form customer supply contract must comply with:
   (a) any conditions imposed on the retail supplier by its retail supplier’s licence, and
   (b) any relevant determination of the Tribunal in force under Division 5, but is not unenforceable merely because of any failure to do so.

(4) A standard form customer supply contract must not be inconsistent with the provisions of this Act or the regulations, and is unenforceable to the extent of any such inconsistency, except as provided by subsections (2) and (3).
The use of the word “must” in the clauses as to what information the provider has to provide to the customer appears to be used as a term of insistence or obligation that something shall be done. In this context there seems to be apparent conflict where the phrase “but is not unenforceable merely because of any failure to do so” is used in the clause. This raises the interesting question does the provider have to bring to the attention of the customer (where a deemed or default standard form contract is in place) those clauses of the contract which may undermine or negate the customers rights under the contract in certain circumstances? Fairness would suggest that it should.

Retail suppliers and the distribution network service providers are only required to make copies of their approved standard form contracts available to customers on request as per Part 4 Division 1 Electricity Supply (General) Regulations 2001 (NSW). The detail is set out in Part 4.3 of this Chapter. How this is done is significant when the issue of liability under an exclusion clause of the contract is in contention. At common law, the customer must be given notice that a document is contractual and that it contains terms that govern his or her dealings with the provider. This rule seems to be abrogated by the legislation. The deemed standard form connection contract and retail supply contract is a bargain only in a very narrow sense as it is a contract drafted by the provider who is in the superior bargaining position and who invariably imposes the terms on which the provider is prepared to deal, and so there is no opportunity, and hence no real freedom, to negotiate by the customer. Consequently, the customer has no choice but to accept the terms or go without. In this sense, if a small end user wants to obtain a supply of electricity for their house or shop, they have to enter into a contract on terms laid down by the provider. By their very nature the terms are liable to be far more favourable to the provider than to the individual receiving them. The provider in this respect has the advantage over the individual in that it usually can call upon large resources and the best legal advice as to litigation without having to worry unduly about the cost, and knowing that the individual, troubled as they might be, cannot really do without the providers services. This raises the issue of those clauses in the standard form contract which seek to exclude or limit a party’s liability, eg electricity connection provider, or retailer, which they would have borne had it not been for the clause.
Domestic consumers are further disadvantaged not just by exclusion of liability clauses but also indemnity clauses. The distribution network service provider connection contract and the retail supply contract also includes terms requiring the customer to indemnify the service provider for the customer’s use of electricity in circumstances where the use of electricity on the customer’s side of the customer’s premises causes loss or harm to the distribution network service provider. That is, a fault on the customer installation transfers to the network side and or involves harm to a third party. This constitutes a breach of the contract and as such the customer is liable to pay damages. Consequently are these fair contracts in the context of contract law? It is argued that they are not.

4.3 Limiting Terms and Exclusion Clauses in the Standard Form Connection Contract

4.3.1 Commentary on Exclusion Clauses

The object of this section is to examine the exclusion clauses contained in standard form connection and retail contracts. Set out below are the exclusion clauses extracted from the standard form connection and retail contracts of a New South Wales distribution service provider. There are of course other distribution providers who have clauses in their contracts which are similar in their general thrust to limit the conditions of liability if not exactly in the wording. A basic problem in respect of these immunity clauses is that they form part of a default contract which many consumers probably have not seen. In this context, the contracts clearly favour the provider.

1(Connection). Conditions and warranties implied by law

Nothing in this contract is to be taken to exclude, restrict or modify any condition or warranty that we are prohibited by law from excluding, restricting or modifying. All other conditions and warranties, whether or not implied by law, are excluded.

1(Retail). Conditions and warranties implied by law

Nothing in this contract is to be taken to exclude, restrict or modify any condition or warranty that we are prohibited by law from excluding, restricting or modifying. All other conditions and warranties, whether or not implied by law, are excluded.

Comment. The clause does not deal with common law negligence except in so far as a contract for services would normally have an implied term that services would be

performed with reasonable care. As a contractual term it would not bind a person not party to the contract. A contract which in any way attempts to restrict or modify a statutory requirement is void from the beginning as it cannot give rise to contractual rights or liabilities. Hence, the clause states an obvious contract rule. It is apparent from the clause following that these provisions are intended to have a wider effect than the non-excludable Trade Practices Act 1974 (Cth) warranties.

2. (Connection) Limitation of any liability under the Trade Practices Act 1974 (Cth)

The Trade Practices Act 1974 (Cth) implies conditions and warranties for the benefit of "consumers" into contracts for "goods" and "services" (within the meaning of that Act). If any condition or warranty is implied into this contract by the Trade Practices Act 1974 (Cth), then our liability (if any) for breach of that condition or warranty in connection with any goods or services we supply under this contract that are not of a kind ordinarily acquired for personal, domestic or household consumption is limited, as far as the law permits and at our option, to resupplying the goods or services or paying for their resupply.

2. (Retail) Limitation of any liability under the Trade Practices Act 1974 (Cth)

The Trade Practices Act 1974 (Cth) implies conditions and warranties for the benefit of "consumers" into contracts for "goods" and "services" (within the meaning of that Act). If any condition or warranty is implied into this contract by the Trade Practices Act 1974 (Cth), then our liability (if any) for breach of that condition or warranty in connection with any goods or services we supply under this contract (that are not of a kind ordinarily acquired for personal, domestic or household consumption) is limited, as far as the law permits and at our option, to resupplying the goods or services or paying for their resupply.

Comment. The clause does not indicate the relevant sections of the Trade Practices Act 1974 (Cth). However, since the reference is to "goods" and "services", it could be argued that it applies in particular to Part V of the Act. It has been argued in the previous chapter that the Trade Practices Act 1974, ss.71, 74 imply warranties in relation to services (reasonable care and skill) and in respect of the quality or the fitness of goods (electricity) supplied. Where breach of these warranties causes damage to business customers the price exceeding $40,000, the provider can restrict its liability to resupply of the goods or services, repair of the goods, payments to replace goods or resupply services, s.68A. The provider cannot rely on this limitation if the customer can show that it is not fair or reasonable to do so, s.68A(2).

Section 74 of the Trades Practices Act 1974 gives rise to a non-excludable warranty, in relation to the supply of services and that the services will be rendered with due care and skill. As such s.74 imports contractual conditions into the connection and
retail contracts. The remedy for a breach of s 74 is to sue for breach of contract.13 The s.74 implied warranties are replicated in the Fair Trading Act 1987 (NSW) s.40S (warranties in relation to supply of services).14 Consequently, based on the previous discussion of implied warranties under the Trade Practices Act 1974 as discussed in Chapter 3 at 3.4, the domestic consumer’s right to recover for breach of warranties is not affected.

3 (Connection). Exclusion of liability for supply interruptions, distortions or fluctuations
Subject to the above, and as far as the law permits we are not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by us) arising from:

(a) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer’s retail supplier) of electricity to the customer’s premises or from any such supply not being or remaining continuous;

(b) the customer’s retail supplier discontinuing supply of electricity to the customer; or

(c) Our interrupting the supply of electricity by the customer’s retail supplier to the customer’s premises.

3(Retail) Limitation of liability for supply failures
Subject to the above, and as far as the law permits we are not liable (under contract, tort or any other basis) for any loss or damage the customer may suffer:

(a) from any fluctuation or distortion (in voltage, wave or frequency) or interruption to the customer’s electricity supply or failure to provide continuous electricity due to anything beyond our reasonable control;

(b) arising from our discontinuing supply of electricity under the terms of this contract;

(c) arising from the network provider interrupting the supply of electricity to the customer’s premises under a customer connection contract; or

(d) arising from anything beyond our reasonable control.

Comment. These clauses attempt to absolve the network service supplier and or the electricity retailer for liability in respect of external and internal system disturbances such as a power blackout, a power surge, voltage and frequency distortion etc., which can seriously affect the delivery of a power supply. Under the Electricity Supply (General) Regulation 2001 (NSW) 15 a “Customer Service Standards” document is required which sets out the minimum standards of services to be provided by way of

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12 See Chapter 3: Section 3.4.3 in respect of s.68 and s.68A of the Trades Practices Act 1974.
14 See also section 19 of the Sale of Goods Act 1923 (NSW).
15 In accordance with the Electricity Association of New South Wales “Code of Practice - Electricity Service Standards” and the Electricity Supply Act 1995 (NSW) (including the Regulations made under the Act – particularly the Electricity Supply (General) Regulation 2001 Schedule 1 Clause 5).
supply voltage levels, interruptions to supply etc. Such a service standard document cannot negate the implied warranties required by ss 71 and 74 of the *Trade Practices Act 1974*. In this context reference is be made to the strict liability arguments set out in sections 3.3 and 3.4 of Chapter 3 dealing with the *Trade Practices Act 1974* and electricity contracts.

Clauses 116, 119 and 120 of the *National Electricity Law* gives protection to network service providers and retail providers where at the direction of NEMMCO they carry out an operational function which affects power supplies and results in economic loss or physical damage to a customer (Chapter 2 at 2.5). This protection is not available under these clauses if there is “bad faith or negligence” (s.119 and 120). However, these sections, ss119,120, do permit variation or exclusion of the immunities where contracts are actually negotiated between parties. Do these clauses operate as a variation or exclusion of liability where there is “bad faith” or “negligence”? Clause 6 of the standard form contract (set out below) deals specifically with s.119 of the *National Electricity Law*. What is not clear is whether the clause above applies to exclude or vary liability under the *National Electricity Law* s.120. It could be argued that since specific reference is made to s.119 in the clause below, it is not intended to vary responsibility under s.120 in other sections of the contract.

4(Connection). General limitation on liability

To the extent that we have any liability to the customer despite the effect of paragraph 3, liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:

(a) We are not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and
(b) Our liability for all other losses suffered by the customer is limited to the lesser of:

(i) the total amount billed to the customer's retail supplier (or to the customer under the liability for network charges clause) for network charges relating to the use of the distribution system for the supply of electricity by the customer's retail supplier to the customer's premises during the year that breach, act or omission (which gives rise to the claim) occurred, or
(ii) $5,000 (GST inclusive, if any), for all claims the customer makes in any one calendar year.

This part of a default contract will bind only those in a contractual relationship with the network service provider. This provision will not exclude mandatory statutory warranties under the *Trade Practices Act 1974* as discussed in Chapter 3, as the
federal statute (s.67) will override a deemed contract under state statute to the extent it is inconsistent.

The question which arises is - would this clause protect against physical injury as well? With reference to paragraph (a), the word “loss” normally refers to economic loss. “Damage” usually means damage to goods or property. “Injury” would normally refer to personal injury. Under paragraph (b), the description “all other losses” is wider. Nevertheless, “loss” is not the usual descriptor for physical injury or damage. On the principle that exclusion clauses are interpreted narrowly, it is argued that Clause 4 does not cover physical injury or property damage.

4.(Retail) General limitation on liability

Subject to paragraph 3 and as far as the law permits, our liability (under contract, tort or any other basis) for loss or damage caused by a breach of this contract, or by any other act or omission by us (including any negligent or deliberate act or omission) is limited as follows:

(a) Liability for any indirect, economic, special or consequential losses or damages of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and

(b) Our liability for all other losses suffered by the customer is limited to the lesser of:
   
   (i) the total amount billed to the customer for the component of the single rate(s) relating to the cost of electricity (or if you have unbundled rates, the total amount billed to the customer for electricity) during the year that our breach, act or omission occurred which gives rise to the claim, or

   (ii) $5,000 (GST inclusive, if any), for all claims the customer makes in any one calendar year.

Comment. The previous comments relating to the connection contract apply. These clauses are slightly different in respect of the assessment of compensation. The first is concerned only with liability in respect of the connection to the provider’s network and the other if the utility is a supplier of electricity as a retailer. The issue of economic loss is dealt with in Chapter 6: Liability For Negligence: Pure Economic Loss. In essence the clause appears to limit the amount payable to a end user suffering loss (economic) or physical harm to $5000 or the equivalent of a billed amount equated to the loss of supply which ever is the lesser.

5 (Connection). Exclusion of liability and indemnity for customer’s use of electricity

We are not responsible for, and the customer accepts all risks in respect of, the control and use of electricity on the customer’s side of the customer’s premises. The customer indemnifies us against (and therefore must pay us for) loss or damage suffered by us arising in connection with the control and use of electricity on the customer’s side of the customer’s premises.
5. Exclusion of liability and indemnity for customer's use of electricity

We are not responsible for, and the customer accepts all risks in respect of, the control and use of electricity on the customer's side of the customer's premises. The customer indemnifies us against and therefore must pay us for loss or damage arising in connection with the control and use of electricity on the customer's side of the customer's premises.

♦ Comment. This clause appears to cover a circumstance where a faulty customer installation translates into a network fault which may cause harm to others, eg, the failure of a customer’s motor protection system to sense a fault on a motor results in the operation of the less discriminating supply system protection to affect other customers connected to the local system. The implication of the clause is to attempt to apply strict liability to the customer for the network fault. How a customer becomes aware of such a situation and in hindsight what precautions should the customer have taken given the circumstances?

♦ That a provider has the expertise it would have been incumbent on the provider to have advised the end user of his or her obligations and to indicate what should be done to avoid the problem.

♦ It is argued in respect of this clause that under common law principles of contract it is loaded in favour of the provider. The provision attempts to negative liability towards the small end customer in a contractual relationship with the network provider. This would not be effective to prevent tort liability to a person not in a contractual relationship.

♦ Accepted practice of the pre 1995 regime of state owned franchised trading monopolies was that overhead service lines to a customer’s installation was that the provider supplied the first 20m (60 feet) of overhead service. Under the new corporate regime, their ownership has transferred to the customer as part of the customer installation. Consequently, the repair and maintenance falls to the customer as does their liability for harm done.

6. Limitation of liability for system operations functions

So far as the law allows, we are not liable for any losses the customer may suffer as a consequence of or in connection with any act or omission by us in relation to the performance or exercise, or purported performance or exercise, of a system operations function.

This clause 6 operates as an agreement under section 119(6) of the National Electricity Law between us and the customer to exclude liability under section 119 of the National Electricity Law.

♦ Comment. This provision incorporates the statutory immunities of the National Electricity Law and Regulations under s119. It is intended to give immunity
where a network provider is directed by NEMMCO or carries out a system operating function designed to secure system stability and safety.  

7(Connection). Force Majeure
Our obligations under this contract are suspended while we cannot perform them due to a force majeure event.

7.(Retail) Force Majeure
Our obligations under this contract are suspended while we cannot perform them due to a force majeure event.

♦ Comment. This clause covers circumstances purported to be beyond the control of the network provider. A force majeure clause is intended to exclude a party from liability for failure to perform the contract where the failure was due to forces, either natural or human, beyond a party’s control. Common examples are natural disasters, war, strikes which involve a complete dislocation of business. It does not however exclude liability where it has been negligent. “Beyond control” normally does not include negligence, or exclude strict liability under the Trade Practices Act 1974(Cth).

♦ A utility is expected to anticipate the foreseeable range of disturbing events within their regions. Most often the issue of liability will turn on whether the utility has taken steps as a prudent utility would take having regard to a potential risk, eg. the issue of negligence.

4.3.2 Discussion: Are Exclusion Clauses Effective to Limit the Liability of the Network Service Provider?
Where the exclusion clauses rely on the immunity clauses ss. 116, 119 and 120 contained in the National Electricity Laws, these give some protection against liability. This protection is lost under s 116 if the act or omission is in bad faith, or under ss 119 and 120, if in bad faith or through negligence. Liability under ss 119 and 120 may be modified by contract but this only affects contracting parties. To the extent that the contractual exclusion clauses attempt to protect against “bad faith”

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16 See Chapter 2 section 2.6.
17 Birch v Central West County District Council (1969) 119 CLR 652.
18 Harrison v Sydney Municipal Council (1931) 10 LGR 116 (District Court of New South Wales). In which failure to warn of the danger of fallen conductors caused the death of a farm horse by electrocution. Commissioner of Railways (WA) v Stewart (1936) 56 CLR 520 concerning the collapse of a railway embankment and flooding of houses.
19 See Section 2.5 of Chapter 2.
and “negligence”, they could operate as a contractual variation to the immunity clauses in s.119 and s.120 of the National Electricity Law.

Courts will strictly construe exclusion clauses which attempt to exclude liability for the breach that had occurred. 20 In Butcher v Lachlan Elder Realty Pty Ltd which concerned the purchase of waterfront property and a disclaimer clause, Kirby J made the following comment: 21

Such a presentation of the disclaimers can be likened to the minuscule notes, published in obscure places in official reports, which, examined with a magnifying glass, typically disclose insignificant information, such as the identity of the government printer, the designer or some other data immaterial to the majority of readers. To suggest that such subscriptions constitute communication of meaningful information is to defy common experience and half a century of legal efforts to discourage such ploys by denying them legal effectiveness. 22

The fact that the deemed standard form connection contract is unsigned and unseen by the small end customer unless specifically requested is explored through the arguments set out the 2004 case Toll (FGCT) Pty Limited v Alphapharm Pty Ltd. 23 This case related to a contract for the transportation of goods in which the carrier (Toll - Finemores) relied upon exclusion clauses providing for an indemnity. Each of the four parties to the case was a substantial commercial organisation. The genesis of the argument between the parties was that a party who signs a contractual document is not bound by its terms because its representative did not read the document. In this context the key question was whether the clauses formed part of the contract.

The initial question which the court examined was that of objectivity, drawing upon their decision in Pacific Carriers Ltd v BNP Paribas 24, where they had examined the principles by which the rights and liabilities of the parties to a contract are determined. The court stated that it was not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. This requires consideration not only of the text, but also of the surrounding circumstances known to the parties,

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22 Butcher v Lachlan Elder Realty Pty (2004) 218 CLR 592
and the purpose and object of the transaction. Consistent with this objective approach to the determination of the rights and liabilities of contracting parties is the significance which the law, in this case, attached to the signature of a contractual document. To this end the court drew on the significant distinction made by Lord Justice Mellish in *Parker v South Eastern Railway Company* between the signed and unsigned agreement.

"In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it."

Consequently, a person who signs a contractual document without reading it is bound by its terms. But if it is unsigned, it is binding only if the other party has done what is reasonably sufficient to give notice of the terms. The court said that origin of this proposition is in the principles that apply to cases, such as ticket cases, in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document. Furthermore, it was said that in *L'Estrange v Graucob,* the problem was different from

"the railway passenger and cloak-room ticket cases, such as Richardson, Spence & Co v Rowntree, where there is no signature to the contractual document, the document being simply handed by the one party to the other."

It is therefore argued that in cases in which the contract is contained in an unsigned document, such as a deemed standard form contract, on ordinary common law principles, it would be necessary for the network service provider to show that an end user was aware, or ought to have been aware, of its terms and conditions. A document will be “contractual in nature” if generally regarded by the customer who receives it knows that it is either contractual or that it contains terms that govern their dealings with the service provider. However, the provider seeking to rely upon the exclusion clause must show that they did all that was reasonable, in the

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26 (1877) 2 CPD 416 at 421.
27 Balmain New Ferry Co Ltd v Robertson (1906) 4 CLR 379; Causer v Browne [1952] VLR 1; Parker v South Eastern Railway Co (1897) 2 CPD 416.
28 [1934] 2 KB 394 at 402-403.
29 [1894] AC 217.
circumstances to bring the exclusion clause to the attention of the customer.\textsuperscript{31} Consequently, a customer who actually becomes aware of the existence and contents of the clause or clauses yet perseveres with the contract will be bound and will not be able to recover for any wrongs that the clauses cover. However, if in fact a small end user has not sighted the connection contract, it be said that he or she has actually assented to the contract? Or can it be argued that the deemed contract provisions have the effect that it is not required.

The problem which arises is what steps the provider has taken in meeting the requirements of the \textit{Electricity Supply (General) Regulation 2001\textsuperscript{(NSW)}} set out below.

13. **Information given to applicants for standard form contracts**

(1) As soon as practicable after receiving an application from any person who is or may be a small retail \textit{customer} for the provision of connection services or supply of electricity under a standard form \textit{customer} contract, a licence holder must furnish the \textit{customer} with a document:

(a) that sets out any relevant guaranteed \textit{customer} service standards, and
(b) that indicates that those standards form part of the relevant \textit{customer} contract, and
(c) that contains a statement of the \textit{customer}’s rights in relation to disputes and resolution of disputes with the licence holder, including particulars of any applicable approved electricity industry ombudsman scheme and the procedures for referring complaints and disputes to the electricity industry ombudsman under that scheme, and
(d) that sets out particulars of any rebate or relief available under any Government funded rebate or relief scheme under which a \textit{customer} may obtain a rebate or relief from charges, and
(e) that indicates how copies of the licence holder’s \textit{customer} contracts may be obtained.

(1A) The document is to contain, in community languages (including Arabic, Cantonese, Vietnamese, Italian, Greek and Spanish, and any other language approved by the supplier after consultation with any relevant \textit{customer} consultative group), information about the availability of interpreter services for the languages concerned and telephone numbers for the services.

(2) It is a condition of a licence holder’s licence that the licence holder comply with this clause.

**Comment:** Consequently, if there are guaranteed service standards\textsuperscript{32} given a statutory force this would suggests that they cannot be excluded by contract. The \textit{Electricity Supply Regulations} goes on to provide at reg.43 the following.

43 **Availability of contract documents**

(1) It is a condition of a licence holder’s licence that the licence holder make the following documents available for inspection, free of charge, at its offices during office hours:

\footnote{\textit{Henry Kendall \& Sons v William Lillico \& Sons Ltd} [1969] 1 AC 31.}
\footnote{\textit{Pondcil Pty Ltd v Tropical Reef Shipyard Pty Ltd} (1994) ATPR 46–134.}
\footnote{see section 4.2 on contracts and section 4.3 on exclusion clauses.
(a) if the licence holder is a standard retail supplier, copies of its standard form customer supply contracts and the document referred to in clause 13,
(b) if the licence holder is a supplier, copies of any standard form customer connection contracts used by service providers providing connection services to customers of the supplier,
(c) if the licence holder is a service provider, copies of its standard form customer connection contracts,
(d) a copy of any document incorporated by reference in a contract referred to in this clause and any document referred to in any such contract that is not incorporated in the contract.

(2) It is a condition of a standard supplier’s licence that the supplier make the following documents available through the internet:
   (a) a copy of its standard form customer supply contract and any documents incorporated by reference in the contract,
   (b) a copy of any document referred to in the contract that is not incorporated in the contract,
   (c) a copy of the Act and this Regulation.

If all that is required is that copies of the standard form contract be available, this would suggest that the contract laws covering incorporation of the exclusion rules do not apply.

4.4 The Application of an Exclusion Clause in the Connection Contract

The following are a selection of case histories of customer claims against service providers which were adjudicated under the statutory requirements of section 96 of the Electricity Supply Act 1995 (NSW) by the Electricity Industry Ombudsman. The powers and duties of the ombudsman are set out in Chapter 7. Under the legislation the Ombudsman has the responsibility for the resolution of disputes and complaints in accordance with relevant legal principles, customer connection contracts, customer supply contracts, any other disputes and complaints whether or not under contract involving a small end customer. In this context, the small end customer has recourse to a review process where the service provider has on face value made an arbitrary decision rejecting a claim. In the cases cited for example, denial was based on “for reasons beyond the providers control”. It is important to appreciate the fact that most small end users of energy services have little or no comprehension of the underlying causes of a power system disturbance which results in harm to their property. In this regard the small end user is disadvantaged when pursuing a claim unless they are able to call upon expert opinion as to a possible cause. In this respect dispute resolution is weighted in favour of the service provider without some form of intervening independent adjudication.

In the case studies detailed below the underlying issues are:
1. Could the event which caused the damage be considered an act which was preventable and was it negligence?
2. How have force majeure clauses been construed where there is negligence?
3. Could the provisions of the *Trade Practices Act 1974 (Cth)* apply?
4. Do the immunity clauses of the National Electricity Laws apply where there has been a system disturbance?

It should be noted that service providers will pay a minor amount of automatic compensation for loss of power supplies where it can be shown that they are at fault (see section 4.3). However, this does not apply in circumstances of a storm involving large numbers of customers. The purpose appears to be to provide some nominal compensation for loss of supply. This may be a good public relations exercise as well as forestalling a myriad of small claims.

In each case the object is to place the event into the context of a particular provider contract exclusion clause. It is assumed that all claimants are in fact contractual customers, although in fact this is not always the case. A simplified technical explanation is set out for each case.

**Case A : Failure of Provider’s Equipment Causing a Severe System Disturbance**

A 11000 volt lightning arrester installed on the outgoing feeder of a main substation failed. The substation protection system sensed the fault and as a result the controlling circuit breaker opened automatically to clear the fault. However, a second attempt was made manually to reclose the circuit breaker on to the failed arrester, resulting in a severe local system disturbance. Coincident with the disturbance a plasma wide screen television and video system was damaged and as a result the owner of the television system sought compensation from the network service provider.

**Comment.** First was it negligence. A contractual exclusion clause provided a set out below.

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33 See the model power system – Distribution- Section 2.2, Chapter 2 (page 13).
34 See Section 4.3.1 of this Chapter "Commentary on Exclusion Clauses ".

Reuben Stillman LLM (Hons) Thesis
(a) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer’s retail supplier) of electricity to the customer’s premises or from any such supply not being or remaining continuous ......

It would cover the circumstances relevant to a contracting party. But, as has been argued earlier, it would not be effective to exclude liability under the *Trade Practices Act 1974* (Cth).

Could the service provider have exercised control over the local substation system as to have prevented the surge occurring? The network service provider in this instance had adopted a policy of replacement on failure of lightning arresters rather than replacement at some pre-ordained time before failure. As a consequence, lightning arrester failures of this type are inevitable. In addition, for reasons unknown an attempt was made to reclose the circuit breaker by manual means on to the faulty arrester. This resulted in a severe local system disturbance which no doubt generated a power surge large enough to damage the television and video screen. At issue is the manual attempt to reclose the circuit breaker. Was it in fact necessary in the circumstances? It could be argued that it was operationally questionable, particularly in an urban system where surge currents of substantial magnitude can be generated. It is argued that this is negligence in the circumstances.

As was indicated Chapter 3 the service provider would have been held responsible for the damage under the Australian Consumer and Competition Commission strict liability argument in the context of TPA Part V. Although there was error on the part of the service provider, it is arguable that the claimant was contributory negligent. This is on the basis that a reasonably prudent home owner takes steps to protect valuable assets from power surges. Contributory negligence is a defence to a contractual claim where there is co-extensive and concurrent duty in tort. But it is not a defence to a strict liability claim based on contract. Power systems will inevitably be subject to fault, consequently a degree of responsibility falls on the end user to protect valuable equipment from a system disturbance such as a power surge. Consequently -

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35 see Chapter 3 at 3.3.2 “Exploring Standards and Circumstances a Case Study”.
37 *Asterly v Austrust* (1999) 197 CLR 1. The provisions of the TPA s.82 do not apply claims based on contract.
♦ It is considered that the event which caused the damage was preventable and that the provider was negligent.

♦ In the circumstances where there was negligence it could not be argued that force majeure could be applied in this case.

♦ Strict liability under the Trade Practices Act 1974 could be applied.

♦ the immunity clauses of the National Electricity Laws would not apply in this instance.

Case B: System Blackout and Failure of Customer to Provide for an Emergency

In this case a blackout occurred which had its origins in a major transmission system disturbance causing the loss of power supplies on the distribution system operated and controlled by the service provider. A claim for compensation for pure economic loss was made by a telephone call company on the network service provider as the result of the interruption of power supplies to the communication system. The network service provider invoked the following limitation of liability clause of the supply contract.

4 General limitation on liability

To the extent that we have any liability to the customer despite the effect of paragraph 3, liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:

(a) We are not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and

(b) Our liability for all other losses suffered by the customer is limited to the lesser of:

(i) the total amount billed to the customer's retail supplier (or to the customer under the liability for network charges clause) for network charges relating to the use of the distribution system for the supply of electricity by the customer's retail supplier to the customer's premises) during the year that breach, act or omission (which gives rise to the claim) occurred, or

(ii) $5,000 (GST inclusive, if any), for all claims the customer makes in any one calendar year.

Comment. It is unlikely that a duty of care would be owed in the tort of negligence for the losses. The loss of supply was due to a transmission system disturbance. Under the National Electricity Law immunities, the claimant would have to argue under s. 119 and s. 120 that the disturbance was the result of an act(ion) or omission done or made in bad faith or through negligence” by NEMMCO or the transmission

38 See Chapter 6: Liability For Negligence: Pure Economic Loss.
or distribution Service provider (Section 2.5 of Chapter 2). In this particular circumstance, the loss of supply resided in the actions of the transmission service provider. Consequently, for the distribution network supplier to be held at fault, it would be necessary to show that distribution service provider could have done something to mitigate the effects of the blackout.  

If there is actionable negligence and the exclusion clause does not apply, again the issue of contributory negligence arises as discussed in Case A. Considering the importance of the communication system to the business, there would have been an expectation that some form of un-interruptible power supply would have been installed by the customer or a stand by generator to maintain the operation of the communications system in the event of a emergency including a loss of power within the customers own installation. The claim amounts to an expectation that the service provider is a guarantor of supply and the insurer of last resort? Consequently,

♦ Could the event which caused the damage be considered an act which was preventable by the provider and was it negligence, the answer is in the negative.
♦ If there is no supply of electricity (goods) then s 71 of the TPA does not apply.
♦ Do the immunity clauses of the National Electricity Laws apply where there has been a system disturbance? The claimant would have a difficult task in proving that NEMMCO and the transmission or the network service provider acted in bad faith or with negligence. These protections in connection with the exclusion clauses would protect against liability.

Case C: Interruption to Power Supplies by a Third Party.
As the result to an interruption to supply caused by the failure two 33kV cables which had been damaged by a contractor employed by the network service provider seven claims for compensation were made, four were for so-called business loss (economic loss) and three involved equipment damage. The contractor was under the network service provider’s supervision but was not an employee. The network service provider denied liability invoking the following immunity clause of the supply contract.

5. Limitation of Our Liability

39 Citipower Pty Ltd v Victorian Industry Ombudsman Ltd (1999) VSC 275
Despite any other provision of this Contract, to the fullest extent permitted by law, we and our employees, agents and contractors are not liable in negligence, in tort, in contract or otherwise to you for:

1. any direct losses or damages of any kind suffered by you as a result of any act, omission or breach by us or any of our employees, agents or contractors;

2. any consequential, indirect or special losses or damages of any kind (including, without limitation, loss of profit, loss or corruption of data, business interruption or indirect costs) suffered by you as a result of any act, omission or breach by us or any of our employees, agents or contractors;

3. any of our employees, agents or contractors;

4. any failure or defect in the supply of electricity caused by machinery and equipment breakdown or causes beyond our control;

5. any delay in connecting your premises to the distribution network;
   any deficiency or defect in the service equipment or any part of the electricity supply system;

6. any characteristic of the supplied electricity (such as the voltage or frequency of electricity) which makes it unsuitable for use; or

7. an interruption to supply in accordance with this Contract.

5.(Retail) Limitation Of Our Liability

Despite any other provision of this Contract, to the fullest extent permitted by our employees, agents and contractors are not liable in negligence, in tort, in otherwise to you for:

1. any direct losses or damages of any kind suffered by you as a result omission or breach by us or any of our employees, agents or contractors;

2. any consequential, indirect or special losses or damages of any without limitation, loss of profit, loss or corruption of data, business indirect costs) suffered by you as a result of any act, omission or any of our employees, agents or contractors;

3. any failure or defect in the supply of electricity caused by machinery breakdown or causes beyond our control;

4. any delay in connecting your premises to the distribution network;

5. any deficiency or defect in the service equipment or any part of the electricity supply system;

6. any characteristic of the supplied electricity (such as the voltage or frequency of electricity) which makes it unsuitable for use; or

7. an interruption to supply in accordance with this Contract.

Could the event which caused the damage be considered an act which was preventable and was it negligence?

The issue of economic loss in discussed in detail in Chapter 6, suffice to indicate that it is doubtful if the business losses could be recovered in tort based on existing law even if negligence could be shown; damage to equipment would on the other hand could be compensable. In tort, generally a person is not liable for the negligence of an independent contractor. Exceptions exist in special circumstances where the provider has control over the environment and the safety of vulnerable groups such
as employees, school students and patients are involved. In situations of special
danger, an occupier of premises may be liable to vulnerable claimants for the
conduct of an independent contractor over whom there is sufficient control. In
special situations, the network provider could be held liable for the contractor’s
negligence. In contract, liability can be strict and economic losses can be recovered
provided they are not too remote.

4.5 Discussion and Conclusions
Despite the introduction of full retail competition in 2002/3, some 80% of small
customers in the various state jurisdictions remain with the equivalent of their pre
1995 service provider. This raises the issue as to how many of these small end
customers under the present arrangement of standard form connection and supply
contracts actually possess a copy of such contracts, or have even read or perused
such contracts? A network service provider is obligated by statute to provide
customers with information in respect of their rights under the respective standard
form connection contracts, but is only required to provide a copy of the respective
contract upon request. This appears to be a contradiction in terms. Further
compounding the issue is that the unseen contract is also an unsigned contract. It is
argued that this is legally significant when the issue of liability under an exclusion
clause of the contract is in contention. The High Court in Toll (FGCT) Pty Limited v
Alphapharm Pty Ltd made it quite clear that the party to the contract must be given
notice of the contract and that it contains an exclusion clause which affects their
rights under the contract. Complicating the issue is the fact that the terms of the
connection and retail contracts include a clause which requires the party to the
contract to indemnify the network service provider from and against all liability,
inclusive of consequential loss, which the provider could suffer as the result of the
customers use of electricity on the customer’s side of the installation. Consequently,
if the end user has neither seen nor signed the contract and as it can only be obtained
upon request, this is unjustifiably unfair and contrary to what the common law would
require. It is arguable, however, that the statutory deeming of contracts under the

41 Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520. Note also Stevens v Brodribb
42 Hadley v Baxendale (1854) 9 Ex.341.
NSW regulations effectively dispenses with the common law rules relating to notice of contractual exclusion clauses.

Exclusion clauses attempt to restrict liability of service providers against liability for both contract and tortious liability to the contracting party. Exclusion clauses in the contract may also rely on the immunities contained in the National Energy Laws to limit responsibility. In relation to a small domestic end user, the Trade Practices Act 1974 prevents suppliers from excluding warranties under ss.71,74. It is argued that outside the protection available under the Trade Practices Act 1974, contractual exclusion clauses are unfairly weighted against small end customers. It will be argued that it is not fair and reasonable\textsuperscript{44} that the service provider should be able to avoid liability to a small end consumer at least in situations where it has been negligent. It will also be argued in the context of the Electricity Ombudsman (chapter 7) that it should be able to order compensation despite the existence of these exclusion clauses at least in those cases where property damage occurs to the small retail customer. It will also be argued for adoption of the Victorian guideline of strict liability to a prescribed amount for unauthorized voltage variation.\textsuperscript{45}

The Chapter which follows deals with a service provider’s liability for negligence.

\textsuperscript{44} Note the Victorian Electricity Industry Guideline No 5, Connection and Use of System Agreements Issue No 1, 14/11/06 Part 4: Fair and Reasonable.
\textsuperscript{45} Electricity Industry Guideline No. 11 Voltage Variation Compensation, April 2001.
Chapter 5: SERVICE PROVIDER’S LIABILITY FOR NEGLIGENCE

5.1 Introduction

Previous Chapters have examined contractual liability and liability of power system service providers under the Trade Practices Act 1974 (Cth). The National Electricity Laws and the immunities conferred by Clauses 116, 119 and 120 have also been examined. These immunities set out to protect the National Electricity Marketing Company (NEMCO), transmission and distribution service providers, and other registered market participants against liability in circumstances where the security and safety of the transmission system is involved and to limit liability for negligence where end users may be affected. In Chapter 4, the effect of contractual exclusion clauses was examined. Under the civil liability legislation, these contractual exclusions limit liability to the contractual consumer.\(^1\) To the extent that liability is not excluded by contract, the service provider may be liable for negligence. In this regard the small end user does not necessarily have a contract with a service provider protected by the exclusion clause and consequently would not be bound by exclusion or limitation of liability clauses.

In relation to negligence claims, since 2002 there has been significant legislative intervention through statute in the form of civil liability legislation in most states affecting tort claims.\(^2\) The objective of this Chapter is to use the New South Wales Civil Liability Act 2002 to examine liability for negligence and the contributory negligence of a claimant as a defence as it impacts on connection and retail supply providers. The legislation may have an impact as it affects a claim for failure to take reasonable care where:

- Claims are not protected by immunity clauses 116, 119 and 120 of the National Electricity Law; it could involve a claim for negligence where a electricity market

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\(^1\) Civil Liability Act 2002 (NSW), s.3A(2)(3); Part 2 (personal injury damages) is excepted.

participant sheds load in order to ensure the security of the power system and so harm an end user.³

♦ Claims by third parties not affected by contractual exclusion clauses or in relation to claims not covered by exclusion clauses contained in standard form electricity connection and retail contracts which provide immunities and indemnities to connection and retail service providers.

This Chapter will examine the liability of service providers for negligence. After considering the duty of care issue, it will give detailed consideration to three areas in which a detailed analysis is particularly pertinent to the electricity supply industry. These areas are: (1) breach of duty and economic analysis; (2) fault tree analysis in causation; and, (3) the defences, particularly contributory negligence.

In the context of breach of duty the Chapter examines the economic theory underlying the notion of the marginal utility of safety as raised in the judgment of Kirby P in Cekan v Haines ⁴ and the practical difficulties of applying such analysis. Tort law and economics are based on the proposition that negligence has a price-system rationale as formulated by Learned Hand J, in the appeal case of United States v Carroll Towing Company ⁵ and subsequently by various legal workers of whom Justice Richard Posner is a leading exponent.⁶

The issue of causation is limited to the general principles of factual causation as expressed by section 5D of the Civil Liability Act 2002 (NSW). It is postulated that an accident can be characterized by a sequence of conditional states governed by the laws of probability utilizing event or decision tree risk diagrams. The technique is applied to case studies of power system accidents.⁷ Such diagrams are conceived as a tool to aid in assessing as to whether there is a reasonable connection between the risk

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³ See Thesis Chapter 2: Regulation and the Electricity Market
⁵ (1947) 159 F. 2d 169
of harm and negligent conduct where quantitative analysis is difficult to apply and conceptual errors can arise.

5.2 The Duty Issue

General issues concerning a duty to take care are discussed in this section. The nature of a duty to avoid economic loss is dealt with separately in Chapter 6. The formal question applying to the issue of duty is one of what could have been reasonably foreseen in the circumstances of the event causing harm? Couched in the terms of Lord Aitkin’s statement in the seminal case of *Donoghue v Stevenson* 8 it may be expressed as:

*The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.* 9

Professor JG Fleming defined duty as an obligation, recognised in law, to avoid conduct fraught with unreasonable risk of danger.10 In effect the duty to take care arises in any circumstance where the defendant’s activity involves a risk of injury to others. This can be expressed in terms of a sphere of risk around every kind of activity. At the outer limit of the sphere the risk of injury ceases to be reasonably foreseeable.

In *Chapman v Hearse*,11 which involved a chain of circumstances leading to injury, it was stated that in order to establish the existence of a duty of care to a plaintiff, there was no need to show the precise manner in which the injuries were sustained, providing the general elements of the concatenation are foreseeable. Chapman, negligently drove his car into the rear of another car and was thrown onto the roadway. Shortly after Dr Cherry, who was driving past, stopped to render Chapman medical assistance. It was a dark wet night and there was no one available to warn of oncoming traffic. While rendering assistance Dr Cherry was hit and killed by a car driven by Hearse. Chapman argued that he owed no duty on the facts to Dr Cherry on the ground that the events were not reasonably foreseeable. The High Court dismissed

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8 [1932] AC 562, 612.
9 The full statement is at [1932] AC 562, 599.
the argument indicating that while the combination of events was unusual, each event in itself was foreseeable and as a result the plaintiff did not need to show precisely how his injuries were sustained.\textsuperscript{12} This rule in combination with the rule that even slight risks may be reasonably foreseeable gives rise to the question, would a rational person actually have in mind the various combinations of risk which could occur when directing his or her mind to the activity being conducted? The relevant test is whether the reasonable person would accept that events of this sort were not altogether an unlikely consequence of the act in question, if asked about it at the time of the act. In essence, the test is said to be one of hindsight rather than foresight in respect of the unusual risk.

At the breach of duty stage, the inquiry revolves around the degree of foreseeable risk rather than the risk itself. The higher the degree of risk the less reasonable it would be not to respond to the risk by taking reasonable steps to prevent its occurrence. What a reasonable defendant would do, is based on a variety of criteria, such as, the defendant’s knowledge, the cost and the burden imposed on the defendant to ameliorate the risk and public and social policy. The leading case is that of Wyong Shire Council v Shirt\textsuperscript{13} in which Mason J, said at 47-8:

\textit{A risk of injury which is quite unlikely to occur...may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable...[A] risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable.}

Thus the plaintiff does not have to show the precise harm, nor the precise chain of events leading to the harm. All that is necessary is to prove that the defendant created a reasonably foreseeable risk of injury of some kind to someone such as the plaintiff. Thus if a risk of injury is not 'far-fetched and fanciful', a reasonable person takes \textit{reasonable} precautions against reasonably foreseeable risks or, as Mason J, said:

\textit{In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the}

\textsuperscript{11} (1961) 106 CLR 112.
\textsuperscript{12} Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ at 120-22.
\textsuperscript{13} (1986) 146 CLR 40.
magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man in the defendant's position.

Hence, a service provider would be expected to take reasonable precautions where there is a reasonably foreseeable risk of injury to persons who may be an end user or a member of the community. This is not just the duty owed to the able bodied person, it may be owed to a disabled pedestrian. In Calf v Sydney County Council a trench had been dug in a footpath in the laying of a cable without warnings being displayed. A pedestrian fell into the trench and subsequently claimed in negligence and nuisance and recovered damages.

Foreseeability of harm to the "neighbour" in the Donoghue formulation, must be a person who is "closely and directly affected" by an act which induces harm or injury. In the absence of special factors, where physical injuries have been caused by direct physical contact, a plaintiff need only demonstrate that the injuries are reasonably foreseeable (Jaensch v Coffey). However, it is generally recognised that not all negligence cases can be reduced to a simple test of foreseeability for the purpose of establishing a duty. In its effort to limit duty of care, or more particularly "reasonable foreseeability", the High Court had used a concept of proximity formulated by Deane J in Jaensch v Coffey in which Deane J stated that "proximity" in Donoghue v Stevenson did not indicate foreseeability alone. The notion of proximity entailed either physical proximity, circumstantial or causal proximity or combinations of these factors, each of which imposed different requirements to that of foreseeability, although both the requirement of foreseeability and of proximity would need to be satisfied in order to find a duty of care (Sutherland Shire Council v Heyman). The High Court has now rejected the test of proximity as a general criterion to determine a duty of care, although no clear principle has

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14 This issue is discussed in 5.2.3 below in the context of the Civil Liability Act 2002/(NSW).
16 (1972) 2 NSWLR 521.
replaced it as a determinant of duty of care. In *Sullivan v Moody* the Court stated at [578-9]: 20

*As Professor Fleming said, ‘no one has ever succeeded in capturing in any precise formula” a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. The formula is not ‘proximity. Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited’.*

In *Perre v Apand*, 21 which was a pure economic loss case, the Court enunciated a set of salient features which identified a means of determining the limiting circumstances in which a duty of care should be found to exist. In essence, the proximity criteria inter relates with the “*vulnerability of the plaintiff and control by the defendant*”. That is, the plaintiff’s dependence and sense of powerlessness, and that the defendant should be responsible for protecting the plaintiff, rather than proximity. 22

Section 5.10 is a case study based on a Corrimon Inquiry in which an undetected network failure caused a fatality. It demonstrates a set of foreseeable events which in combination gave rise to a somewhat extreme outcome. The intention is to illustrate the issues discussed above as to the duty owed by the service provider and whether the accident could have been foreseen and prevented.

### 5.3 Standard of Care.

In determining whether the duty has been breached, the court will measure the defendant’s conduct against a standard of care. If the conduct falls short of the standard, this may be negligence. Consequently, in the case of a service provider, to determine what such an entity would, or would not do in a particular situation, the court will imagine a reasonable entity whose conduct will be judged against an objective standard of a reasonable service provider taking into account as evidence codes or regulation. The court is not concerned with whether the service provider as

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22 Gleeson CJ at [10], Gaudron at [38 - 42], McHugh at [118,124, 125,126,129], Gummow at [216], Kirby at [296], Callinan at [395, 408, 416] JJ.
defendant has done its best to take care, it simply measures the conduct against a standard of care. In *Blyth v Birmingham Waterworks Co*\(^{23}\) it was stated that:

*Negligent conduct is the omission to do something which the reasonable person guided upon those considerations which ordinary regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do.....*

To the question whether it is enough for the service provider to show compliance with some professional\(^{24}\) or other generally prevailing community standard in order to discharge the standard of care, the answer as a generalisation is that such compliance is relevant evidence that they acted reasonably.\(^{25}\) As an example, where overhead lines are in areas that are considered to be the legitimate domain of light aircraft, such lines should be marked, but failure to adopt such a community standard is not necessarily negligent.\(^{26}\) However, a community standard, if originally acceptable, may become negligent in the course of time. For example, a ship repair company had acted in accordance with a common practice among employers in that they ignored the risk of hearing loss to employees caused by the noise of work in their shipyards. This was originally held to be no breach of the duty, but later in the light of greater medical knowledge of the risk, the greater availability of medical advice and warnings to employers, and changes in community expectations, it became so.\(^{27}\) It is a question of fact in each individual case.

Compliance with power industry practice or codes is not conclusive that a defendant has not been negligent, as that practice may in itself be negligent. For example, the electrocution of the farmer discussed in Section 5.10 of this Chapter raised the vexed question of re-energising a power line by reclosing the circuit breaker once protection equipment has sensed a power line is in fault.\(^{28}\) In this instance a line fault was detected some 3 months prior to the accident and had cleared on auto-reclosure. No subsequent inspection was made by utility personnel, it being assumed that no person

\(^{23}\) (1856) 11 Exch 781 at 784.
\(^{24}\) Section 5O of the *Civil Liability Act 2002* (NSW) provides for the standard of care for a person practising as a professional. It is discussed in Thesis Section 5.5.
\(^{26}\) *Brown v Rolls Royce Ltd* [1960] 1 WLR 210; also *Sheather v Country Energy* [2007] NSWCA 179.
\(^{27}\) *Thompson v Smith Ship Repairers Ltd*[1984] QB 405; *Hughes v Australian Telecom* [1997] ATR 82-428
\(^{28}\) Refer to comments made *Nationwide News Pty Ltd v Power and Water Authority* (PAWA) (2006) NTSC 32 discussed earlier.
was at risk. In *Kentucky Utilities Co v Moore* 29 it was held that if there was notice that reclosing a switch would put persons at risk then it would be negligence to reclose it.

In the absence of relevant statutory requirements or other evidence of negligence, liability will be determined by balancing inconvenience and cost on the one hand against the risk of harm on the other. Consequently, a service provider is entitled to take into account that a line located in a remote part of the network will be re-energised under fault conditions in circumstances where the fault cannot be located except by inspection. If the only means of avoiding the harm was for the service provider to investigate each and every occurrence before restoring supply the provider would be involved in costly and lengthy interruptions to power supplies with significant disruption to consumers. However, once the line had gone to lockout it is beholden on the service provider to carry out an inspection. In each case it is a question of fact to be determined having regard to the individual circumstances as to possible negligence.

Where once prescriptive construction and maintenance regulations defined design, construction and maintenance practice, in the Australian restructured energy supply industry, they have been replaced by performance criteria which are subject to the scrutiny of Regulators. As indicated in Chapter 2, of particular import in the operation of the National Electricity Market is the *National Electricity Law*, its *Regulations* and the *National Electricity Rules*, breaches of which are subject to sanctions and penalties. Breach of regulatory codes or standards incorporated into regulations or inferred, may be used as evidence of negligent conduct and may form the basis of a separate action for breach of statutory duty. Protocols, standards and codes may be given the same status as statutory requirements where they are stipulated to be part of the licensing conditions for a transmission or distribution network provider. Where there is non compliance with statutory or industry standards, codes or practices, it may not necessarily involve automatic liability for negligent conduct, although the ACCC

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29 *Kentucky Utilities Co v Moore* 57 ALR Ann.1054, concerned the death of a father and son and injury to a second son when a line was reclosed. The utility was originally found to be negligent. On appeal it was held that the utility is not an insurer of last resort; the duty is one of reasonable care having regard to the danger and that there was no negligent conduct in reclosing without determining if a person was in danger. However, if it could be shown that if there was knowledge of a risk to persons then reclosure would constitute a breach of the duty to take care.
has argued strict liability if it can be shown that the service provider violated the implied warranties of the *Trade Practices Act 1974 (Cth)*.\(^{30}\) Despite the absence of any relevant exclusion clauses, it would be rare if a breach of such codes or common practice did not result in liability.

Works designed and constructed under codes, manuals and standards which had statutory force prior to the restructuring of the energy industry remain valid in law in respect of works constructed at the time the codes were in force, but, any changes to the works must be in accordance with any new code or standards. Standards promulgated by industry bodies such as Standards Australia or the Energy Association of Australia are frequently incorporated into regulatory requirements. Where there is no Australian standard other standards such as British or of the United States, or those of the International Electro-Technical Commission (I.E.C.) are recognised and can be used. But compliance with codes and regulations does not necessarily mean that the defendant has not been negligent. Professor Fleming\(^ {31}\) indicates that:

*Failure to adopt a general industry practice is often the strongest indication of the want of care, as it suggests that the defendant did not do what others in the industry considered proper and feasible. Failure to take proper and recognised precautions followed by the very harm which those precautions were designed to prevent will shift the burden to the defendant to justify themselves.*

For example, failure of a network service provider to comply with common practice\(^ {32}\) to mark power lines in an area of known aircraft activity resulted in the loss of a helicopter and the death of the pilot and passenger.\(^ {33}\)

A plaintiff can seek to prove negligence by bringing evidence as to what a prudent service provider would have done under the circumstances. The *Electricity Supply (Safety and Network Management) Regulation 2002 (NSW)*\(^ {34}\) requires network operators under the *Electricity Supply Act 1995* to develop, submit and implement safety and operating plans in respect of their transmission and distribution systems to the Director-General of the Department of Energy concerning: (1) the transmission and distribution of energy to supply to customers; (2) the connection of a customer’s electrical installation to the distribution system; (3) the connection of embedded

\(^{30}\) Chapter 4 at 4.1.
\(^{32}\) Australian Standard 3891.1 and 2 – 1991: *Marking of Overhead Cables and their Supporting Structures*
\(^{34}\) Similar legislation exists in other State Jurisdictions.
generating units to the transmission and distribution system; (4) the transfer of electricity between systems; and (5) bushfire risk management. Evidence that a defendant service provider has complied with, or failed to comply with the submission made to and approved by the Director-General of the Department of Energy may be relevant in an action for negligence. Furthermore, information and recommendations contained in procedural and safety bulletins are also pertinent.

A critical issue of the standard of care owed is proper record keeping indicating what steps a service provider has taken to reduce or take precautions against the risk of harm. Such records involve pertinent maintenance and inspection data, complaints received, and work reports inclusive of written instructions and directives to staff, Fraser v Lismore City Council. 35

5.4 The Civil Liability Act 2002 (NSW): Division 2
5.4.1 General Principles

It is important to note that Part 1, section 3A (1) and (2) of the Civil Liability Act 2002 (NSW) allows statutory immunities to apply to claims as well as permitting the parties to a contract to exclude liability except for personal injury damages, Part 2. Consequently, contractual exclusions referred to in Chapter 4 can continue to apply to torts claims between contracting parties. Also any statutory claims between contracting parties continue to apply. This is relevant to the National Electricity Law immunities set out in Chapter 2. Division 2 of the Act sets out general principles of negligence as follows: 36

5B General Principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:
(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
(b) the risk was not insignificant, and
(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
(a) the probability that the harm would occur if care were not taken,
(b) the likely seriousness of the harm,
(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.

35 (1956) 1 LGRA 34.
Like any statutory definition these provisions are subject to judicial interpretation. However, the provisions generally follow accepted common law concepts of negligence. The general principles are directed largely to breach of duty issues, leaving the issue of when a duty of care is owed largely to the common law. That is, if a risk of harm is not insignificant, what precautions did the defendant take to avoid harm to a class of person within the sphere of the risk. In the context of a network service provider, reasonable care resides in the operation and management of the network and the risk of injury that can occur to those connected to the network or to the community at large, if care is not taken. All that a claimant must show is that he or she was one of a class of persons who would foreseeably be at risk of injury and that the risk of harm was not insignificant, if the service provider failed to take reasonable care.

The Civil Liability Act 2002 (NSW) recognises the criticism levelled at the test of reasonable foreseeability in terms of that which is not far fetched or fanciful as failing to act as any sort of limiting factor in determining liability for negligence. In Koehler v Cerebos(Australia) Ltd, Callinan J criticised Wyong Shire Council v Shirt arguing that the line between a risk that is foreseeable but extremely unlikely and one that is far fetched is very difficult to draw. With enough imagination and pessimism it is possible to foresee anything. The emphasis has now shifted to the means available for guarding against risk.

Section 5B does not impose an obligation to exercise reasonable care and skill. It simply sets out a number of specific conditions that need to be satisfied before a defendant can be held to be liable for the failure to exercise reasonable care. It provides that a person has not failed to exercise reasonable care and skill in failing to take reasonable precautions against a risk of harm unless:

- It was a risk of which the person knew or ought have known;
- the risk was not insignificant;
- the reasonable person in the circumstances could have taken precautions

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37 Nervous shock is an exception, Civil Liability Act 2002 (NSW).
The Negligence Review Panel\textsuperscript{41} recommended that there be a statutory provision encompassing -

- As to what harm would probably occur if the care were not taken.
- The seriousness of the harm.
- The social utility of the activity which creates the harm.

1. The probability of a risk of harm occurring is only one factor to be taken into consideration in determining what the actions of a reasonable person in response to the risk. For example a service provider may be required to take steps to avoid a risk even though it is unlikely if very serious harm may result.\textsuperscript{42}

2. The seriousness of the harm that could eventuate is a further factor which has to be taken into account. The more serious the harm, the more readily a court may find that a reasonable person in the provider’s position would have taken steps to avoid that harm. However, the fact that severe injury might result if steps are not taken is not determinative.\textsuperscript{43} Additional protections are given to public authorities in Part V of the \textit{Civil Liability Act 2002 (NSW)}. Public authorities, in particular local government authorities and roads authorities are often hampered in their ability to avoid risk because they have limited financial and other resources that must be given priority for use in carrying out other functions and responsibilities. A service provider is not a public authority for these purposes.\textsuperscript{44}

3. The social utility of the risk taking activity is another factor to be brought into the balance. In a bushfire situation the risk to property must be counterbalanced against the benefit of providing power supplies for pumping and other purposes. The appropriate standard of care in such circumstances takes account of the circumstances of the emergency, although the actor would be expected to exercise a greater care.

\textsuperscript{42} \textit{Overseas Tankship (UK) v Miller Steamship Co Pty} [1967] 1 AC 617
\textsuperscript{43} In \textit{Romeo v Conservation Commission of the Northern Territory} (1998) 192 CLR 431 even though the injuries suffered by the appellant were severe, the Commission was held not liable for failing to erect a fence.
\textsuperscript{44} s.9 of the \textit{State Owned Corporations Act (NSW)} s.20F Schedule 5 states unequivocally that state owned corporations are not agents of the crown and have no crown immunities or special protection under civil liability legislation.
The transmission and distribution of electricity is in a sense a risk taking activity and so the provider of such a service would be expected to operate with a deal of caution. The following Northern Territory case illustrates some of the issues involved in a negligence claim against statutory body having crown immunities.

**Case Study**: *Nationwide News Pty Ltd v Power and Water Authority* (PAWA)\(^{45}\) involved a claim for damages by the plaintiff against the defendant Power and Water Authority for negligence and a breach of statutory duty. The suit stemmed from a sequential series of power surges causing severe damage to the telecommunications equipment of the plaintiff. The plaintiff’s claim was dismissed and judgment entered for the Power and Water Authority. There were two key issues (1) statutory immunities; and (2) duty of care.

The plaintiff occupied premises located close to the central business district of Darwin. The premises were serviced by a ground type substation connected by cable to an 11000 volt overhead line feeder. In the early hours of the morning of the 26 July 1996 the line opened under fault. Evidence before the court indicated that disturbances of some severity occurred on the feeder as the result of manual reclosing of the source substation circuit breaker over a period of some eight minutes. Subsequently, on failing to restore supply, a line inspection was instituted.

The fault was attributed to a flying fox found hanging from the overhead line which apparently caused a flash over from the overhead conductor to the steel cross arm of a transformer cable support structure. The short circuit current generated at each attempt to reclose was thought to be of sufficient magnitude as to dislodge the tail end of the cable connection from an overhead line clamp, causing the cable tail to fall to ground. Based on the weight of expert opinion, the damage to News Ltd telecommunications equipment was considered to be due to circulating fault current flowing through the neutral and the various earth bonds associated the premises of News Ltd and those parts of the telecommunications equipment bonded to earth. The resultant rise in potential subjecting the telecommunications equipment to a severe over voltage.

\(^{45}\) (2006) NTSC 32.
The Power and Water Authority (PAWA) was established as a body corporate to generate, transmit and distribute electricity as defined under s. 14 of the *Power and Water Authority Act*(NT), 1987. In July 2002 the Act as repealed and the Authority transformed into a government owned Corporation. In its original form the Authority was subject to the directions of the Minister administering the Act (s.16), and as such was entitled to Crown immunities. In this context, the powers and functions of the Authority were comparable to roads authorities as defined by the High Court in *Brodie v Singleton Shire Council*.  

The Court found that the provisions of the *Power and Water Authority Act* and the Northern Territory *Electricity Act* did not give rise to an action for breach of statutory duty.

The express statutory immunities were contained in the *Electricity Act*(NT) s.32. In 2000 the *Electricity Act*(NT) was repealed in conformity with federal competition policy and as such, there is now no equivalent s.32 provision in place. However, as the damage to the plaintiff’s property occurred in 1996, it did not affect the entitlement of the plaintiff to rely on s.32 of the *Electricity Act*(NT), it being noted that the s.32 provisions are strictly construed if they derogate from private rights.

The court stated that PAWA having the power to remedy any risk or hazard affecting the power system is obliged to take reasonable steps within a reasonable time to address any known risk. If the risk is unknown or latent and only discoverable by inspection, then to discharge its duty of care PAWA would be obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist. In applying this principle, a great deal depends upon the facts and circumstances disclosed by evidence. The circumstances will include the practicality of any alternative and safer design or construction, if available, weighed

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46 Prospect County Council v Blue Mountains City Council (1992) 28 NSWLR 301; North Sydney Municipal Council v Housing Commission of NSW (1948) 48 SR (NSW) 281.
47 (2001) 206 CLR 512. The fact that the PAWA was subject to Ministerial direction, does not necessarily convert it to a body representing the crown.
48 Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397 at 405.
49 This equates to the *Electricity Supply Act* 1995 (NSW) and the repeal of s 53 dealing with immunities.
against the funds available to the authority. If a power line is in a dangerous condition, the authority will have discharged its duty of care by taking reasonable steps to minimise any danger or to prevent it arising. It was concluded that the duty of care owed and exercised by the PAW to the plaintiff was consistent with that expressed by the various authorities to electricity consumers.\footnote{Birch \textit{v} Central West County District Council (1969) 119 CLR 652; Schwartz \textit{v} RESI Corporation (2003) 85 SASR 357.}

The Court found that the Power and Water Authority did not breach its duty of care to the plaintiff. In assessing whether there was a breach of duty the court found that the operation and maintenance of the power system was conducted in a reasonable manner. That a power system is subject to fluctuations and disturbances is generally accepted. The law does not impose a standard of care that is impracticable or cannot be discharged and does not require the defendant to adopt measures which give rise to expense, difficulty or inconvenience which is disproportionate to the magnitude of the risk to be guarded against.\footnote{(1980) 146 CLR at 47.}

The case contained a great deal of argument concerning how the fault current penetrated to the earthing system and damaged the telecommunications system. Evidence cited by the Court described the initial fault as a “\textit{minor disturbance}”. It is presumed that the manual reclose of the substation circuit breaker was attempted for this reason. The circuit breaker held in for approximately eight minutes then tripped open. As a result a second attempt was made. It was the last attempt which it was said generated a severe short circuit condition of sufficient magnitude as to have dislodged the cable connection from its line clamp. It was not until this point in time that it was decided to determine the cause of the fault by inspecting the feeder.

Despite the findings of no negligence, it is argued here that the operational procedure adopted by the Power & Water Authority of manually reclosing after the first attempt failed was in error in that it breached standard utility operational practice. In this case, the location of the fault was adjacent to the Darwin CBD and as such would have placed persons and property in the area at risk. For urban feeders, where there is a high probability of placing persons at risk, the accepted practice is to design the

\begin{footnotesize}
\footnote{Birch \textit{v} Central West County District Council (1969) 119 CLR 652; Schwartz \textit{v} RESI Corporation (2003) 85 SASR 357.}
\footnote{(1980) 146 CLR at 47.}
\end{footnotesize}
protection system for one automatic reclose 5 seconds after the circuit breaker opens under fault. If the circuit breaker opens it is locked out. A subsequent reclose on the line should not be attempted until consideration has been given to:

♦ the geographic location of the fault;
♦ the need for patrol and inspection;
♦ the time delay between the outage and the try-back reclose; and
♦ assessment of the associated risks, including any extreme weather conditions, fire ban declarations, floods, etc.  

5.4.2 Other Principles

Section 5C provides for other factors to be taken into account in determining whether a person would have taken precautions against a risk of harm is the burden of taking those precautions as set out below.

5C Other principles

In proceedings relating to liability for negligence:
(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and
(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and
(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

The risk management chart of Figure 5.1 is indicative of issues which could arise under s. 5C in respect the avoidance of harm and asks what did the network service provider do in the circumstances?

In this context the cost of prevention becomes an important issue. For example in *Romeo v Conservation Commission* 54 (discussed later), the question arose as whether the Commission as the occupier of the reserve to which the public had access as of right should have undertaken the costly provision of a 8 km fence to protect the public against an obvious danger of a cliff which was a natural feature? In *Donoghue v Stevenson* it was stated that the prevention of harm varies according to the level of danger where the danger is great the standard of care may be such as to be so stringent as to amount practically to a guarantee of safety. 55 Consequently, where an activity is inherently dangerous, such as transmission and distribution of electric power, the defendants obligation may be greater to minimise the danger.

Section 5C(a) (set out above) of the *Civil Liability Act 2000 (NSW)* Act56 emphasises that a court must consider not only the burden of taking precautions to avoid the risk of harm which eventuated, but also the burden of taking precautions to avoid other, similar, risks of harm for which the defendant is also responsible. 57 For example, if a

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56 D.Villa, “Annotated Civil Liability Act 2002(NSW) at page page 39
plaintiff is injured as the result of climbing a pole mounted substation, a claim made against the network service provider for failure to erect a clear warning sign must consider not only the cost of erecting and maintaining such warning signs but must also consider the costs of erecting and maintaining signs at similar locations over which the network provider has control. The court may also consider not only risks from similar activities occurring at different locations within the electricity supply franchise, but also different risks arising from any particular location considered a risk normally associated with the use of electricity.  

The object of section 5C(b)(set out above) is to limit the relevance of “preventability” in determining the issue of breach. It makes it clear that if something had been done differently then the harm would not have eventuated. However, it does not in itself give rise to or affect liability for the way the thing was actually done. There is no rule which states what may be done. Often as not a defendant will consider various alternatives of avoiding the risk of harm. It is recognised that the process may involve a complex process of reasoning involving many variables, eg cost, method, advantages and disadvantages. The fact that one alternative over another has failed to prevent the harm that eventuated whilst the other would have done so does not logically require a finding that the defendant should have chosen the other. In essence, section 5C(b) makes it clear that such reasoning is impermissible.  

Section 5C(c) provides for the situation where a defendant subsequently takes action which would have avoided the harm which eventuated. Such action does not in itself affect liability in relation to the risk of harm, and does not constitute and admission of liability. For example, in Sheather mentioned earlier in thesis Section 5.3, the service provider fitted markers to the power lines after the accident has taken place. This subsequent action although relevant as evidence of the practicability of taking action does not admit to liability.

5.5 Civil Liability Act 2002 (NSW): Assumption of Risk and Obvious Risks

58 Waverley Council v Lodge (2001) 117 LGERA 447 at 459
59 In Tame v New South Wales (2002) 211 CLR 317 at 353, McHugh J indicated: “there is often a slide into a finding of liability once questions of foreseeability and preventability have been answered in favour of the plaintiff”.
60 D.Villa, “Annotated Civil Liability Act 2002(NSW) at p. 40
5.5.1 General

At common law “no wrong is done to one who is willing”. In relation to negligence claims, where the defendant has accepted the risk of harm, (volenti non fit injuria, volens), this is a complete defence to an action for negligence. Contributory negligence on the other hand requires the plaintiff to have failed to take due care of his or her own safety and will normally result in a reduction of damages rather than provide a complete defence.

At common law, in order to raise the defence of volenti or assumption of risk, a defendant must show not only that the plaintiff accepted a risk of some injury, but accepted that particular risk which caused the injury. This requires actual knowledge of the facts which gave rise to the risk as well as an appreciation of its nature and the extent of the risk involved. This has been modified by the Civil Liability legislation.

The Civil Liability Act deals with risk in the following ways:

♦ it creates a rebuttable presumption that a plaintiff was aware of the risk of harm if that risk is an “obvious risk”
♦ provides that there is no duty to warn of an obvious risk unless the plaintiff has requested information about the risk, a warning is required by a written law, or the warning relates to the risk of injury from the provision of a provider service by a professional
♦ excludes liability for the materialisation of an inherent risk other than a failure to warn of an inherent risk.

These provisions can affect issues relating to whether the duty owed includes a duty to warn of danger; whether the defendant was negligent where there was an obvious risk; whether the defendant is liable because the plaintiff had consented to the risk of harm, volens.

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63 Section 5G: - injured person presumed to be aware of the risk. Section 5H – no proactive duty to warn of the obvious risk. Section 5I – no liability for materialisation of the inherent risk.
64 Vairy v Wyong Shire Council (2005) 80 ALJR 1. But note Haynes J at [162] stating that concentrating on obviousness of the risk distracts from the proper approach to issues of breach of duty, see also Randwick City Council v Muzic [2006] NSWCA 66.
Division 4 extends to “harm” generally. It is therefore capable of application to an obvious risk of personal injury or damage to property, or economic loss.

5.5.2 Obvious Risk

Section 5F of the Civil Liability Act 2002 (NSW) sets out the meaning of the obvious risk as:

5F Meaning of “obvious risk”

(1) For the purposes of this Division, an “obvious risk” to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

5G Injured persons presumed to be aware of obvious risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

For the purpose of section 5F, an obvious risk is a risk that in the circumstances, would have been obvious to a reasonable person in the position of that person. A risk may be obvious even though there is a low probability of it occurring, s.5F(3). An obvious risk includes risks which are patent or matters of common knowledge.

The following two cases demonstrate the application of these provisions in relation to electrical accidents.

Sydney County Council v Dell’Oro 65 and Bus v Sydney County Council 66 although 10 years apart have some similarities. In each an electrical contractor was electrocuted while working in close proximity to a switchboard which had protruding “live” electrical terminals. Both were experienced tradesman and under the supervision of a Council supervising technician, but were left unattended for a short period. In Dell’Oro, the defendant service provider was found not to have been negligent. In the

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65 (1968) 89 WN pt 1 (NSW) 168.
later case of *Bus*, the Court found that there was negligence in allowing the contractor, who was an authorised licensed electrician to work unattended near live terminals, as it was foreseeable that an inadvertent act by the contractor could result in injury.

The earlier case *Dell’Oro* was an odd decision when examined in the context of *Bus*. *Dell’Oro* was a licensed electrical contractor, who employed licensed electricians, but who did not himself hold a electrician’s licence. Consequently, he should have been under constant surveillance and not left to his own devices. In respect of the terms of section 5F would the risk have been obvious to *Dell’Oro*? In the context of s.5G of the Act, would the determination have been any different as both *Bus* and *Dell’Oro* were experienced electrical contractors? It is argued that both claims would be likely to fail under the current *Civil Liability Act 2002 (NSW)* provisions of sections 5F,5G. As to section 5G(2) it is considered that *Bus* and *Dell’Oro* in the respective circumstances of their accidents would be aware of the kind of risk they were undertaking when working in close proximity to “live” electrical mains. Under section 5H which will be discussed in due course, there would have been no proactive duty to warn of the obvious risk to these two experienced tradesmen by Sydney County Council (defendant) supervising technician.

The many cases dealing with the care of public footpaths and roads indicate as Callinan J, stated in *Ghantous v Hawkesbury City Council*\(^{67}\) persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes, with some allowance made for inadvertence. Section 5F refers to a “*reasonable person in the position of that person***” which will take such conditions to be taken into account. This may permit the situation of disabled persons to be taken into account in applying the section. In *Haley v London Electricity Board*\(^{68}\) a plaintiff who was blind was injured when he had fallen into a hole dug in the public highway by the Board. Steps had been taken to protect sighted persons from falling into the hole but these were of no use in protecting blind persons. The House of Lords held the defendants liable on the ground that the risk of blind persons being present near the hole, though relatively slight, was nevertheless reasonably foreseeable. It is arguable that the risk was not

\(^{67}\) (2001) 206 CLR 512
\(^{68}\) [1965] AC 778.
obvious in the context of section 5F(1) to a reasonable person in the position of the plaintiff.

Section 5 H provides that a defendant does not owe a duty of care to a plaintiff to warn of an obvious risk with exceptions.

**5H No proactive duty to warn of obvious risk**

(1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:
   (a) the plaintiff has requested advice or information about the risk from the defendant, or
   (b) the defendant is required by a written law to warn the plaintiff of the risk, or
   (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

Although section 5H(1) does not exclude a duty of care to warn of an obvious risk in the circumstances set out in subsection (2), s 5H(3) indicated that there is no presumption that such a duty arises in those particular circumstances. The duty to warn may arise in relation to a professional such as in *Rogers v Whitaker*, which involved the provision of a professional service by the defendant, an ophthalmic surgeon.

The issues relating to risk may arise when members of the public gain access to utility property. It is quite common for the public to attach advertising material or flags to power poles. The pole is the property of the power utility although often situated in a public place. Climbing such a pole is a trespass. There are obvious risks if the climber comes too close to the live mains. This may affect children who climb poles and installations. It should be noted however that the definition of “obvious risk” under section 5F in relation to a person “in the position of that person” would allow the court to take into account the plaintiff’s age and experience.

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69 (1999) 175 CLR 479.
51 No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An "inherent risk" is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

What is an “inherent risk”? Inherent is interpreted as “existing in something as a permanent or characteristic attribute”. In Woods v Multi-Sport Holdings Pty Ltd Kirby J, used the term inherent risk to mean “those risks which could not be avoided by the use of reasonable foresight and care”. Barwick CJ, defined inherent risk in Rootes v Shelton [at 385–6]:

No doubt there are risks inherent in the nature of water skiing, which because they are inherent may be regarded as accepted by those who engage in the sport. The risk of a skier running into an obstruction which, because submerged or partially submerged or for some other reason, is unlikely to be seen by the driver or observer of the towing boat, may well be regarded as inherent in the pastime. Or that situation may be analysed by saying that that driver or observer owes no duty in respect of the unobservable obstruction. But neither the possibility that the driver may fail to avoid, if practicable, or, if not, to signal the presence of an observed or observable obstruction nor that the driver will tow the skier dangerously close to such an obstruction is, in my opinion, a risk inherent in the nature of the sport. In this connection an observable obstruction is one which would be observed by reasonable attention by the driver and observer to their respective tasks.

The section 51(1) definition appears to be stating the obvious that there is no liability for negligence if reasonable care and skill would not have prevented the harm. As such it can be inferred that there is no liability for negligence if there is no failure to take care where there is said to be an inherent risk. Hence, there is no breach of duty.

A failure to warn where a warning is required of an inherent risk may give rise to a liability if that inherent risk materialises. Whether such a warning is required is determined by the common law and with reference to s.5H, obvious risks (above). If the risk is obvious then unless the exceptions set out in s.5H(2) apply, there is no duty to warn.

The following case examples precede the Civil Liability legislation. They are used to illustrate the common law position and the possible reach of the legislation in relation to obvious risks. “Live” electrical apparatus always involves the risk of electrocution.

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In *Cain v Great Southern Energy* the plaintiff, an unauthorised mature person, climbed a pole to a platform carrying an electricity transformer to obtain a view into his neighbour’s house. On coming in close proximity to the live 22000 volt terminals of the transformer, he caused a flashover suffering severe burns and was thrown to the ground. Cain argued that the network service provider owed him a duty of care on the following grounds that the provider:

♦ Exposed him to risk of injury which could have been avoided by the exercise of reasonable care.
♦ Failure to carry out a proper inspection of the structure.
♦ Failure to place adequate warning signs by which to identify the danger involved in climbing the pole.
♦ Constructing the substation pole in such a manner as to make it easily accessible

In this case the injured plaintiff is a trespasser on to the property of the service provider. The risk may be regarded as obvious within s.5I. Was Great Southern Energy negligent?

The claim preceded the civil liability legislation. It was held that the provider was not liable in negligence. The Court rejected the plaintiff’s claim on the basis that his conduct involved voluntary conduct where there was an inherent and obvious risk. A similar outcome is likely under the *Civil Liability Act 2002* (NSW). There was a risk that would have been obvious to a person in the plaintiff’s position. It was not a situation where there was a duty to provide a warning under the Act.

Contrast the case of a minor who was severely injured when by means of a net attached to a telescopic aluminium handle, he attempted to rescue a pet parrot which had perched on a 33000 volt power line conductor. It is recognised in assessing whether a duty is owed to a minor that minors may be less likely to perceive the risk. This would be relevant under the civil liability legislation (see previous comment on age and experience). Entry by an uninvited person on to utility property including fixtures or land may be considered a trespass. This was considered to be the position

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75 (1967) 116 CLR 383.
76 Heard in the District Court, Albury, Nov 2000.
77 settled out of court.
in *Munnings v. Hydro-Electric Commission* 78 where a young boy climbed a substation structure and in *Thompson v Bankstown Corporation* 79 where an older boy climbed up a pole structure to obtain eggs from a birds nest. In each case the utility was held to be negligent for the reason that the utility failed to take reasonable steps to prevent the child from being injured by allowing the opportunity to gain access. In both cases it was accepted that despite the “mischievous disposition of children”, each of the child plaintiffs were trespassers when they climbed structures owned by the electricity undertaking, despite the fact that those structures stood on public land. This did not prevent a duty of care being owed to those children. There have been instances in which children have gained entry to major substations, eg climbing a fence, squeezing through a gate. The principle of trespass remains but the utility is obliged to take reasonable precautions to prevent trespass and can owe a duty of care to the trespasser. The content of that duty can take into account that the plaintiff is a trespasser. 80

The effect of the *Civil Liability Act 2002 (NSW)* on the standard of care of professional persons, such as doctors, lawyers, engineers is set out as follows.

**50 Standard of care for professionals**

(1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(1) Peer professional opinion.

The rule follows that of the common law as defined by Windeyer J, in *Voli v Inglewood Shire Council*, 81 that a professional person who owes a duty of care to a client or third party is required to exercise the care and skill of the ordinary skilled professional within that profession. In *Rogers v Whitaker* 82 where a professional was

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78 (1971) 125 C.L.R. 1, p.84.
79 (1953) 87 CLR 619 at 631.
81 (1963) 110 CLR 74.
82 (1992) 175 CLR 479.
held out to have a special skill or expertise, the standard of care may be affected by that particular skill. Gleeson CJ, in *Rosenberg v Percival*\(^83\) said:

*In many cases, professional practice and opinion will be primary, and in some cases it may be the only basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the doctor’s duty of care rests with the court, not with his professional colleagues.*

In the past a court could accept expert opinion to the effect that a professional person had acted in accordance with accepted practice.

Section 5O provides that a court must accept such expertise and find that a person who has acted in accordance with peer professional practice and has satisfied that standard of care. It excludes liability in negligence arising from the provision of a professional service if it can be established that the professional provided an opinion that at the time was widely accepted by peer professional opinion. Opinions differ, but if they are widely accepted this does not prevent any one or more opinions being accepted. Neither do they have to be universally accepted opinions. However if considered irrational in the circumstances then the court may find the professional liable.

Registered professional engineers employed by a network service provider would be expected to observe the same reasonable standard of care of the reasonable professional engineer occupying that position. Thus, where a service provider is sought to be made vicariously liable in respect of the in-house professional engineer\(^84\) the standard applied to determine whether the professional engineer was negligent is the professional standard. If the service provider is sought to be made directly liable for its own negligence, it is arguable that the professional standard set out in s.5O does not apply.

5.6 Non-Delegable Duty and Acts of Independent Contractors

An independent contractor is a person who contracts to perform services for others without having the legal status of an employee. The common law has traditionally maintained a distinction between employees and independent contractors. Employees are engaged under a contract of service, whereas independent contractors are engaged

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\(^83\) [2001] 205 CLR 439 at [paragraph 7 in HCA 18].

\(^84\) See earlier comment in Section 5.3 “Standard of Care”.

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under a contract for services. The courts have adopted a multi-factor test to determine whether a person is an employee or independent contractor. No single issue concerning control, independence or the description of the relationship in a contract is determinative. Courts will invariably place greater weight on some matters, in particular, on the right to control the manner in which the work is performed.  

The very fact that transmission and distribution service providers employ many private contractors in carrying out various operational and management tasks in respect of their power networks raises the question of the provider’s liability for the contractor’s negligence. The result of this form of employment practice, while not new, is more widespread in a market environment, and so demarcation differentiating that of an employee and an independent contractor has become increasingly blurred. In *Leichhardt Municipal Council v Montgomery*, a pedestrian was injured as a result of the negligence of an independent contractor who was carrying out road works for the Council. The High Court upheld the general rule that there is no liability for the negligence of an independent contractor. However, the Council might be liable if the Council was itself negligent in selecting the contractor, in supervising the work of the contractor or approving proposed works. The High Court held that the limited circumstances where there may be liability for the negligence of an independent contractor (non delegable duties) should not be extended to cover injuries to road users caused by negligent independent contractors. Exceptions are extra hazardous activities, and where there is special dependence and vulnerability such as in the relationships between hospital and patients, employers and employees, schools and pupils. These special relationships can make the hospital, employer or school liable for the negligence of an independent contractor.  

Before turning to the question whether a provider may be liable for the negligence of an independent contractor, the issue is affected by the *Civil Liability Act* 2002. The *Civil Liability Act* 2002 (NSW), s.5Q provides that liability for non-delegable duties are to be determined as if the liability were a vicarious liability. The section was based upon a recommendation of the Ipp Committee to ensure that plaintiffs do

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87 Gleeson CJ at [19]
not avoid the application of the other provisions of the Act by framing a claim as one of breach of a non-delegable duty of care which it asserted would not otherwise be caught by the provisions of Part 1A.

**Section 5Q Liability based on non-delegable duty**

(1) The extent of liability in tort of a person ("the defendant") for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

Section 5Q effectively imposes the vicarious liability “course of employment” test to limit liability for non-delegable duties. The section does not affect the circumstances where a non-delegable duty may arise. In relation to independent contractors, the negligent conduct must be such as would be regarded as being “in the course of the employment”. That is, if the negligence bore no relationship to the contracted work, then the principal would not be liable. For example, if a non-delegable duty existed, the provider might not be liable if a contractor ran down a pedestrian whilst undertaking work that was completely unrelated to the contracted work.89

The High Court in *New South Wales v Lepore* 90 restricted non-delegable duties to negligent conduct. This means that the provider would not be liable where the contractor intentionally injured or caused damage to a consumer or a member of the public. The critical question is, however, whether a non-delegable duty can be owed by a provider.

In the absence of some form of special relationship such as hospital/patient, employer/employee, school/pupil, the most likely basis for the imposition of a non-delegable duty is in relation to dangerous conditions, where the provider has control over the dangerous situation and the plaintiff is especially vulnerable and at risk. This was the situation in the case *Burnie Port Authority v General Jones Pty Ltd*.91

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91 (1994) 179 CLR 331.
Burnie Port Authority v General Jones Pty Ltd\textsuperscript{92} assimilated into the general law of negligence the old rule of strict liability in *Rylands v Fletcher*.\textsuperscript{93} The case involved an independent contractor whom the Port Authority employed to carry out welding operations on its premises. The contractor was welding near highly inflammable material stored in an area occupied by General Jones Pty Ltd. The welding caused the flammable material to ignite resulting in a huge fire which destroyed property and goods owned by General Jones Pty Ltd. The High Court held that the Port Authority was liable for the damage caused by the negligence of the independent contractor. The special features of the case were that the Port Authority was in a position to exercise some control or supervision over the conduct of the contractor; the flammable material was specially hazardous and a serious fire risk; the plaintiff was vulnerable in the sense that it had no capacity to take steps to prevent harm occurring. The majority judgment in the High Court explained (at [37]):

\begin{quote}
The relationship of proximity which exists, for the purposes of ordinary negligence, between a plaintiff and a defendant in circumstances which would prima facie attract the rule in *Rylands v Fletcher* is characterised by such a central element of control and by such special dependence and vulnerability. One party to that relationship is a person who is in control of premises and who has taken advantage of that control to introduce thereon or to retain therein a dangerous substance or to undertake thereon a dangerous activity or to allow another person to done of those things. The other party\ldots is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable danger.
\end{quote}

It could be argued that a service provider has a non delegable duty of care if the contractor is involved in a hazardous operation which involves high risk to vulnerable plaintiffs and the utility has some capacity to control the contractor’s conduct.

Would this be satisfied where an independent contractor is employed by the network service provider to lop trees located on a public right of way? If the contractor negligently causes a limb to fall on a power line and cause damage to customer appliances, would the service provider be liable?

Can a distinction be drawn between highly flammable material close to welding activities and the proximity of a power line to tree lopping? Would this be indicative

\textsuperscript{92} (1994) 179 CLR 331.  
\textsuperscript{93} (1866) LR 1 Ex 265.
of the type of “control”, “vulnerability”, “dependence” that the High Court envisaged in *Burnie Port Authority*? In *Leichardt Council v Montgomery* Kirby J (at [125]) distinguished between those special relationships (schools, hospitals, employers) which can result in liability for the negligence of an independent contractor (non-delegable duties) and the position of a road user. His Honour said:

> Users of roads are normally unknown and unknowable to roads authorities. They do not represent a closed category. Their identities and number are not typically known in advance. *They comprise pedestrians, truck and car drivers, motor cyclists…runners, walkers….Their individual needs are infinite in their variety. In such circumstances, to recognise a non-delegable duty in respect of them, would be extremely burdensome and costly. It would be such that the duty could not readily be met by reasonably adapted preventive measures.*

Similar reasoning based on this and the decision in *Burnie Port Authority* (see the passage extracted above) would suggest that no special relationship would exist between the provider of electricity and all those who might be exposed to some risk associated with an independent contractor’s negligence. But, it is arguable that a non-delegable duty is not absolutely foreclosed. There may be circumstances of extreme danger where it is, at least, arguable that a provider might be liable for the negligence of an independent contractor. The issues are highlighted in the case of *Harper v Southern Riverina County Council*.  

In *Harper v Southern Riverina County Council* the plaintiff, Harper, was crossing his father’s paddock on a motor bike. He made contact with the conductor of an 11000 volt power line and was injured. The conductor was suspended 1 m. above the ground and very difficult to see in the afternoon light. It was not obviously visible. Attached to the conductor was the 11000 volt support insulator and its cross arm pin assembly. The insulator had in fact broken free of the pole top wood cross arm, but the cross arm itself remained attached to the pole. Some six hours prior to the accident an intense summer storm had passed through the area causing damage to nearby properties. Ten days prior to the accident, the County Council had employed an independent contractor to do a helicopter patrol of its power lines. Their task was to identify urgent repair work before the advent of the bush fire season and in this

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94 [2007] HCA 6; (2007) 81 ALJR 686  
respect the contractor was adequately briefed by Council. In addition to the pilot, the helicopter carried an experienced line inspector who was employed by the independent contractor. There was no evidence to suggest that the inspector and contractor were not competent or not qualified in carrying out their contractual obligations. However, for reasons unknown, the particular spur line involved in the accident was not inspected and as a result, the degraded cross arm which had split at one end and released the insulator assembly carrying the conductor was not detected. The aerial inspection had in fact detected 180 degraded cross arms of which 5 required immediate replacement. When the case finally came to trial, the first defendant, the contractor, had gone into receivership leaving the utility as the single defendant. 97

Was the Council liable for the negligence of its contractor in failing to inspect the line and detect the decayed crossarm? Did the Council as the network service provider owe a non-delegable duty of care to the plaintiff? Was there the requisite control, vulnerability and dependence? If comparison is made with *Burnie Port Authority v General Jones Pty Ltd* 98 then:

1. It might be argued that the fallen “live” conductor brought an extremely dangerous condition on to Harper’s property equivalent to storing hazardous materials in proximity to the plaintiff’s property in *Burnie*. But does *Burnie* apply in this way? Is this an instance where, in the words of the *Burnie Port Authority* case (quoted above), the utility is in control of the property and by reason of that control introduced “a dangerous substance or..a dangerous activity” onto the land or allowed another to do so. It is arguable that unless electricity, itself, is regarded as “a dangerous substance or..activity”, the service provider does not have the requisite control. If the placement of power lines on the property is equivalent, it will mean that in almost every situation involving a contractor, the service provider would be liable for the contractor’s negligence. It is argued that the current reluctance of the High Court to extend the range of non-delegable duties 99 makes this extension of liability difficult.

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97 The accident occurred in 1995 and came to trial in 1998 by which time the contractor had become bankrupt.
98 (1994) 68 ALJR 331.

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2. The defendant power utility has control over the area and could have controlled
the loss. Again the issue is whether this is analogous to *Burnie*. The relevant
negligence of the contractor is a failure to properly inspect the power line. True it
was that the utility could itself have taken over that task, but then there would
have been no point in getting independent contractors to carry out line inspection.
If the relevant control relates to the Harper property, the utility could have entered
the property to deal with the situation if it had known of the fallen conductor.
Assuming no independent negligence on the part of the Council or knowledge of
the fallen conductor, it is difficult to see that it had the same type of control as the
Port Authority did in *Burnie*.

3. The vulnerability of the plaintiff. The plaintiff was at special risk from a fallen
power line which was not visible. It is arguable that this is analogous to *Burnie*
where the proximity of the flammable material close to Burnie’s property posed
special risks which Burnie could not avoid.
In *Harper’s* case, the court found that the County Council owed the plaintiff a duty of
care and that it breached that duty by failing to detect and replace the degraded
crossarm. From the information available, it is not clear whether the Court based its
decision on some independent negligence by the Council or on a non-delegable duty.
It is open to argument that following the later High Court decision in *Leichardt* that a
non-delegable duty would not be found.

If the Courts accept that a provider can be subject to a non-delegable duty based on
the decision in *Burnie Port Authority v General Jones*,\(^\text{100}\) the advantages that would
flow from the existence of a non-delegable duty include: that the utility is in the
position to see that appropriate care is taken in performing the relevant work; the
utility could obtain an indemnity from the contractor and insist that the contractor has
public liability insurance; the dangers of insolvent contractors is avoided.\(^\text{101}\)

The Chapter now turns to look more specifically at risk and safety which are of
special relevance to the electricity supply industry.

\(^{100}\) (1994) 68 ALJR 331.

\(^{101}\) See *Leichardt Municipal Council v Montgomery* [2007] HCA 6; (2007) 81 ALJR 686
Per Kirby J at [94][95].
5.7 Risk and the Marginal Utility of Safety

5.7.1 Introduction

Kirby P in *Cekan v Haines* \(^{102}\) deplored the failure of the common law to develop economic criteria which would balance the risk and the cost benefit of avoiding it. Or balancing the magnitude of the risk, in the light of the likelihood of an accident happening and the possible seriousness of its consequences, against the difficulty and expense of taking a particular precaution. The object in this examination is to attempt to reconcile the economic constraints of the regulatory regime as set out in Chapter 2 in respect of the economic theory of marginal utility.

The assumption applied to the economic analysis of law is that people are rational utility maximisers. That is, when faced with a choice they will choose that which produces for them the greatest personal satisfaction or "utility". Maximising utility does not necessarily infer money. It can mean anything that has some sort of value which can be matched, measured or balanced by other aspects of one’s utility. In this context the legal notion of "reasonableness" is replaced by the economic concept of "rationality". That is: a reasonable person before taking any action, weighs the costs and benefits of the action not only from their personal perspective but also from the broader social perspective of all the individuals within the scope of resulting harm \(^{103}\).

Rationality as such is not intended to be empirically applied to all individuals. It is predicated on some average kind of rational person functioning within a community. It concerns a pattern of behaviour which in an ideal market situation creates cost benefit equilibrium in which costs are minimised and total benefits maximised. For example, economic theory defines "Pareto" efficiency as an optimal state where it is impossible to increase the welfare of one individual without adversely affecting the welfare of another. However, this does not necessarily mean that it is socially desirable. The proposition that tort law has a price-system rationale poses the question, "exactly how much care is reasonable"? An example of the rationale is that expressed by the formula set out by Learned Hand J, in the appeal case of *United States v Carroll Towing Company*\(^{104}\). The respondents (Carroll Towing Co.) were

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\(^{102}\) (1990) 21 NSWLR 296.


\(^{104}\) (1947)159 F.2d 169.
adjusting the moorings of barges in New York Harbour when one of the barges broke loose and crashed into a tanker and sank. The issue on appeal was whether the appellants (tug company) could avoid paying damages to the barge owner. The tug company argued that there was a failure on the part of the barge owner in not providing a bargee. The decision by Hand J, was that the tug company was negligent and that there was contributory negligence by the barge owner. He suggested that whenever the cost of preventing the accident is less than the expected cost of the accident there is negligence. In this guise the judge is expected to measure:

1. probability (or gravity) of an accident = Pr{L};
2. the cost incurred by the accident = $C(Accident); and
3. the cost incurred to avoid or mitigate the accident = $C(Mitigate);

then liability will be implied if $ C(Mitigate) less than $ Pr{L} x $C(Accident).$

That is the cost of minimising the accident is weighed against the cost of the accident circumscribed by the probability of its occurrence taking into account the following.

1. The barge and tug boat owners are rational persons.
2. Liability standards are costless.
3. Parties are risk neutral.
4. Courts can accurately measure costs and benefits.
5. Neither party knows what level of care the other will take.

As a consequence the judge could make one of six decisions -

1. No liability on either part; or (2) negligence in respect of the defendant and contributory negligence on the part of the plaintiff; or (3) negligence only on the part of the defendant; or (4) strict liability on the part of the defendant; or Contributory negligence and negligence; or (5) strict liability and contributory negligence.

5.7.2 The Application of the Safety Principle

How the formulations might be applied is dealt with first. Critical commentary of the principles will be discussed in 5.7.3. The first and second examples are deterministic applications. The third utilises a continuous probability distribution. In each the formulation of Learned Hand J is applied as set out above.
M v N involved a fire which destroyed an abandoned farm house and burnt out the surrounding grass and scrub land. The plaintiff made a claim for $160000. The property was supplied by a single phase (two conductor) 11000 volt high voltage power line and a 240 volt step down pole mounted transformer. Connected to each of the two high voltage bushings of the transformer as lightning and overvoltage surge protection were lightning arresters, the tails of which are bonded to ground. The cause of the fire was that one of the lightning arresters had exploded distributing molten parts on to the surrounding dry grass causing it to ignite which in turn set the house alight.

Lightning arresters of the type in question were of an early vintage. They were made up of solid silicon carbide blocks compressed into a sealed porcelain housing. The useful life of such lightning arresters depends on the extent of deterioration over time of the housing seal allowing moisture to penetrate into the housing to form a conducting path over the silicon carbide blocks. Eventually, sufficient leakage current to ground is generated to overheat the arrester and cause it to explode. How long this process takes to occur depends on local weather and lightning activity over the working life of the arrester. Since an exposed overhead line distribution power system has thousands of such lightning arresters in service, the issue of the marginal utility of safety is whether to:

1. replace the lightning arresters at some predetermined time, eg 25 years; or
2. leave the arresters to fail in service and bear the cost of any resultant liability?

The following is indicative of the probability \( Pr\{F\} \) of a fire conditional on the failure of a lightning arrester set in the context of the power utilities system.

- \( Pr\{Eq \mid Fault\} = \) Conditional probability of fire as the result of system equipment failure = 0.03173.
- \( Pr\{LA \mid Eq\} = \) Conditional probability of lighting arrester failure = 0.0684
- \( Pr\{Fr \mid LA\} = \) Conditional probability of a fire = 0.0684 x 0.03173 = 0.002064

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105 (1998). A settlement was made out of court.
106 Department of Minerals and Energy (NSW), "Risk Management for the Electricity Distribution Industry 1989 – 1991".
$C(\text{Accident}) = \text{Median value of an event claim associated with fires due to equipment failure occurring on the New South Wales distribution system} = \$150000 \text{ per annum (1998 value)} \text{ }^{107}.

- \Pr\{L\} \times C(\text{Accident}) = 0.002064 \times 150000 = \$309.00
- The cost of replacing two lightning arresters in this instance before failure is estimated at \$200.00 = C(Mitigate).
- Hence liability is implied if \( C(\text{Mitigate}) \) less than \( \{Pr\{L\} \times C(\text{Accident})\} \) or in this case \$200.00 is less than $309.00.

The cost of prevention \$C(\text{Mitigate})\) involving replacing thousands of lightning arresters in order to eliminate the danger of the chance of such an accident has to be balanced against community expectations and the high level of safety expected of an electricity undertaking. This raises the issue of what is “reasonableness” in the care of such undertakings? Reasonableness is simply not a question of raw economics but broader principles of responsibility\text{ }^{108}.

2. **Grimshaw v Ford Motor Co** \text{ }^{109} is indicative of the risk player adopting a risk preferring attitude. In the late 1960’s the Ford Motor Co. designed a sub-compact car the “Pinto”, which had the basic defect that if hit with sufficient force in the rear, the fuel tank would be punctured by the exposed bolts of the differential housing.

Grimshaw, a 13 year old boy, was a passenger in a “Pinto” driven by a Mrs Gray, which stalled on a freeway and was hit from behind by an oncoming car. It was ascertained that at the moment of impact the fuel tank was pushed forward and punctured, the car caught fire and was engulfed in flames. Both occupants suffered extensive burns and shortly after the accident Mrs Gray died. Grimshaw survived, but over the next 10 years had to undergo major surgery. Ford knew of the problems (they had appeared on the test track), but based on the following risk assessment decided to market the car:

- **Expected Liability:**

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\text{ }^{108} \text{See section 5B(1)(c), Civil Liability Act 2002(NSW) and the notation of D.Villa, Annotated Civil Liability Act 2002 (NSW), 2004, pp 34 – 38.}

\text{ }^{109} \text{(1981) APP.174 Cal.Rpt.,348.}
180 burn deaths, 180 serious burn injuries, 2100 burned vehicles.
Unit cost: $200,000 per death, $67000 per injury, $700 per burned vehicle.
\[ C(\text{Accident}) = (180 \times 200000) + (180 \times 67000) + (2100 \times 700) = 49,53 \text{ million} \]

- **Expected Costs to avoid the accidents:**
  Sales 11 million cars, 1.5 million utilities or 12.5 million vehicles.
  Unit cost $11.00 per car and $11.00 per utility to eliminate the problem
  Total \( C(\text{mitigation}) = (11 \times 11000000) + (11 \times 1500000) = 137 \text{ million} = CM \)

- **Probability \( \{L\} = \frac{2100}{12.5E6} = 0.000168 \) or 1 in 5953 vehicles.
  If the expected car life = 10 years
  \[ SC(\text{Mitigate}) < Pr\{L\} \times SC(\text{Accident}) : : 11 < 832 \text{ per vehicle per year} \]
  The Ford Company were found to be negligent and Grimshaw was awarded $US140 million in exemplary damages. However, on appeal, this was reduced to $US9 million. *Grimshaw* is a good example where "reasonableness" is replaced by the "rationality" of extreme market economics.

*Fraser v Lismore City Council* as detailed in section 5.7.1, was a leading case in the provision of a safe working environment. The aim here is to demonstrate and place in context the aging of a wood pole and the risk of it failing over time. A Linesman Fraser was injured when the pole he had ascended broke at the base and fell to ground. At issue were:

- The pole was some 27 years of age. Expert evidence suggested that poles of this age and species had much longer lives, but in general 25 years was considered a working life.
- The electricity utility had carried out two to three yearly inspections of its poles, but did not keep records. There was no indication that the pole in question had been regularly inspected.

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110 Under Part 2, Division 6 Clause 22: *Civil Liability Act 2002 (NSW): Limitation of Exemplary, Punitive and Aggravated Damages*, a NSW court cannot now award such damages.
111 (1954) 1 LGRA 34 (Privy Council).
The contributory negligence of Fraser climbing the pole without adopting sufficient safety precautions.

The Privy Council found that the duty of the employer was not to guarantee the safety of the pole but rather a duty to take reasonable care in the provision of a safe working environment. As such the Council was found liable.

The probability of occurrence of the accident Pr[L] is based on the degradation of the wood pole over time. In this example the ratio of the liability cost of the accident CA to the mitigation (preventive maintenance cost CM is expressed as 3:1 per unit value of money. The curves are derived from the optimisation equation shown in Figure 5.2. Where

- C(1) = CM (cost of avoiding liability or mitigation).
- C(2) = CA (liability cost which may include recovery in damages) and
- F(t) is the probability distribution which defines the characteristic failure distribution of the wood pole (Weibull distribution).
- R(t) the characteristic survivor distribution. R(x) is the mean life of the pole from its installation at time = 0 to failure time T.
- left CM * R(t) > CA * F(t) and there is no negligence;
- right, the reverse is true: CM * R(t) < CA * F(t) and there is negligence.

\[
C_{\text{opt}} = c(1) R(t) + c(2) F(t) \int_0^T R(x) dx
\]

![Figure 5.2: Optimisation Curves](image)

**Figure 5.2: Optimisation Curves**
CM is maximised in infancy and minimised at failure. The optimised cost occurs at around the 18th year of the installation of the pole, that is when CA) = CM. Thus, according to the Learned Hand formulation: to the left of the intersection, the cost of mitigation exceeds the cost of the liability incurred by the accident.

5.7.3 Criticism
The criticism of the Learned Hand principle is that reasonable care is a flexible standard which depends on the facts of the particular case, not some economic argument as to cost efficiencies of safety. Law critics of economic efficiency argue that focussing on cost benefit and money in the context of damages over simplifies the way people value goods. Fleming113 states that the calculus of negligence with its strong roots in individual morality and equity cannot and should not be reduced to an economic equation. Furthermore there is no evidence to suggest that the common law tends to economic efficiency, although legal scholarship accepts that this is a relevant objective114.

As to how a court treats prevention and deterrence in terms of levels of care is debatable. While it is possible to list an array of decisions a judge may take into account, it does not answer the question as to how a judge would weight such considerations. That is, how does it balance care in the prevention of an accident against the risk of an accident eventuating. What appears theoretically possible may be extremely difficult to apply in practice. Safety has been defined as freedom from unacceptable risks and personal harm. Hence the problem is what is acceptable depends on community standards. The courts have defined it as reasonable care in the elimination of danger where danger is the balance between the chance of an accident and its result.

5.8 Causation
5.8.1 Civil Liability Act 2002 (NSW) : Division 3 (Causation)
The third element of common law in establishing negligence in tort is that the defendant’s negligence must have contributed to the harm for which a claimant seeks damages. It is not the intention in this section to examine the various facets and

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nuances of causation in law as this is well catered for in a plethora of texts. The basic aim here is to apply the principles of Division 3 - Causation of the Civil Liabilities Act 2000 (NSW) placing emphasis on the conditions giving rise to the occurrence of harm or factual causation. It is postulated that an accident can be characterized by a sequence of conditional states and portrayed by event tree diagrams. The technique is applied to case studies of power system accidents\(^\text{115}\). Such diagrams are conceived as a tool to assess the connection between the risk of harm and negligent conduct involving multiple events in which conceptual errors can arise.

Section 5D, “General Principles” of the Civil Liabilities Act 2002 (NSW) set out below, applies as the result of a failure to take due care and skill regardless of whether the claim is brought in tort negligence, in contract\(^\text{116}\), under statute\(^\text{117}\) or otherwise\(^\text{118}\). Section 5E “Onus of Proof” arose out the Ipp Committe belief\(^\text{119}\) that the High Court judgment in \textit{Bennet v Minister of Community Welfare}\(^\text{120}\) cast the onus of proof on the issue of causation onto the defendant, once it had been established that the defendant owed the plaintiff a duty of care, that the duty had been breached and that the plaintiff had suffered a foreseeable injury. Consequently section 5E reinforces the rule that the onus of proof of any fact relevant to causation falls on the plaintiff.

\textbf{5D General principles}

\begin{enumerate}
\item A determination that negligence caused particular harm comprises the following elements:
\begin{enumerate}
\item that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
\item that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").
\end{enumerate}
\item In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
\item If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
\end{enumerate}


\(^{116}\) Breach of an implied term to exercise reasonable skill and care.

\(^{117}\) See Chapter 4: \textit{Trade Practices Act 1974} implies a warranty into contracts under s.74.

\(^{118}\) See section 5A of the \textit{Civil Liability Act 2002 (NSW)}: “Application of Part”.


\(^{120}\) (1992) 176 CLR 408, Gaudron J at 420-21.
(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to
paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is
inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other
relevant things) whether or not and why responsibility for the harm should be imposed on the
negligent party.

5E Onus of proof

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of
probabilities, any fact relevant to the issue of causation.

The leading Australian case which set out the principles involved in the legal analysis
of causation is that of March v E & MH Stramare Pty Ltd. The plaintiff (March)
who was intoxicated drove his car into the back of a fruit truck owned by the
defendant's (E & MH Stramare Pty Ltd) and as a result suffered injuries. The truck
had been placed in the middle of a main road in order to load the truck with bins
containing fruit and vegetables. The truck was illuminated with hazard lights both rear
and front. March sued alleging the injuries were caused by the negligent act of
parking the truck in the centre of the road. In the decision handed down in the
Supreme Court of South Australia both parties were found negligent with liability
apportioned 30 percent to Stramare, and 70 percent to March. On appeal, the
Supreme Court of South Australia found for Stramare. On appeal to the High Court
the original decision was restored, the court indicating that the parking of the truck by
Stramare did have some causative affect. Mason CJ said (at 515-17):

“Commentators subdivide the issue of causation in a given case into two questions: the question of
causation in fact - to be determined by the application of the "but for" test - and the further question
whether a defendant is in law responsible for damage which his or her negligence has played some
part in producing. It is said that, in determining this second question, considerations of policy have a
prominent part to play, as do accepted value judgments. However, this approach to the issue of
causation (a) places rather too much weight on the "but for" test to the exclusion of the "common
sense" approach which the common law has always favoured; and (b) implies, or seems to imply, that
value judgment has, or should have. no part to play in resolving causation as an issue of fact. As
Dixon CJ, Fullagar and Kitto JJ remarked in Fitzgerald v Penn: "it is all ultimately a matter of
common sense" and "[i]n truth the conception in question [ie, causation] is not susceptible of
reduction to a satisfactory formula”.

That said, the "but for" test, applied as a negative criterion of causation, has an important role to play
in the resolution of the question. So much was conceded be Dixon CJ, Fullagar and Kitto JJ in
Fitzgerald v Penn in their discussion of the unreported decision in this court in Skews v Public Curator
(6th September 1954) where A and B were driving their vehicles at excessive speeds in conditions of
poor visibility so that their vehicles collided. A was on his correct side of the road, B was not. A's
negligence was not causative of injury. Their Honours pointed out that, had the action been tried by a

jury it would have been correct for the judge to instruct the jury "to ask themselves the question whether they were satisfied that the collision would not have taken place with the same results if driver A had been driving at a reasonable speed".

In making a value judgement as to apportioning liability if the “but for test” was applied are: (1) would March have suffered harm if the truck had not been parked in the middle of the road or; (2) would March have been injured if he had not been intoxicated causing him to drive in an erratic manner? The problem can be resolved by affirming that the conduct of each party was necessary for a set of antecedent conditions to arise and then weighting the contribution of each.

Factual causation as in section 5D(1)(a) is exemplified by the case of Harper v Southern Riverina County Council discussed in Section 5.6. Six months prior to the incident the overhead line involved was taken out of service in order to connect a farm house property to the network. The service provider failed to use the shut down to implement a pole top inspection of the line and replace or repair a badly degraded cross arm. If the cross arm had been replaced or anti-split bolts fitted, the insulator assembly would not have split away due to the storm, the conductor would not have fallen, and so Harper would not have been injured. In other words, there was a reasonable connection between the harm threatened by not doing something earlier when the opportunity availed itself and the harm done.

Section 5D(2) has its origins in cases where for example:

(1) Harm is brought about by the cumulative operation of two or more factors, but it is not possible to determine the relative contribution of the various factors to the total harm suffered.

(2) Where the same negligence of successive defendants was capable of causing the harm that resulted, but where it is impossible to determine which of the defendants in fact caused the harm.

Section 5D (3)(a) provides that the test of causation in answering the hypothetical question as to what would the plaintiff have done “but for” the negligence of the defendant’s failure to warn of the risk. The test is a subjective one, however,

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122 (1998) heard in the District Court, Wagga NSW, February 1999 (unreported)

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section 5D(3)(b) provides that evidence of what the plaintiff would have done cannot be given after the event.

The type of augment to which section 5D(4) gives rise to is illustrated by the facts in Chapel v Hart\textsuperscript{125} a medical negligence case. The case involved failure to warn of inherent risk of an operation about which the patient had specifically inquired and who would have postponed the operation which she underwent if properly warned. The surgery was performed with due skill and care but a risk materialised. The issue was whether there was a causal connection between failure to warn and plaintiff’s physical injury. In favour of denying liability, it could be argued that in the absence of negligence on the part of the doctor in performing the operation, the harm suffered by the patient was a coincidence for which the defendant should not be liable. Alternatively, even if it was coincidence, it was the very risk about which the plaintiff had inquired. For that reason, the imposition of liability would be justified in order to justify the duty of the doctor to inform the patient of their freedom of choice. While s.5D(4) does not support either of these arguments it indicates the scope of liability\textsuperscript{126}.

5.8.3 Probability
Accidents are frequently the result of the combination of multiple errors. The following study illustrates how a logical tree analysis might be applied where there are a multiplicity of possible causes.

Case Study. Birch v Central West County Council\textsuperscript{127} concerned a situation in which it could be argued that Birch was just as liable for a fire which destroyed two refrigeration rooms as the defendant service provider. Birch was a market gardener who stored produce in two refrigerated rooms. The Central West County Council supplied electricity within that area and was an electricity supply authority within the meaning of the Electricity Development Act 1945 (N.S.W.). Prior to 1954 the Birch property was supplied by a three phase low voltage line sourced from a 11000/415/240 volt pole mounted transformer over a distance of some 300m. Birch was initially the sole customer served by the line. After 1954 the substation was

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\textsuperscript{124} Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32.
\textsuperscript{125} (1998) 195 CLR 256
\textsuperscript{127} (1969) 119 CLR, 652.

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increased in rating, but moved to a position where it could supply additional customers. The effect of the change was to increase the length of the low voltage line to 800m without any increase in conductor size. It was established that following these changes the voltage at the Birch property would fluctuate falling significantly below the notional level of 240/415 volts.

During 1957 and 1958 Birch installed air conditioning at his house and constructed two refrigeration rooms as part of a produce shed. The defendants, the County Council, had carried out the electrical work involved in the installation of one set of refrigeration equipment and were aware of the additional electrical loading imposed as a result of the air conditioning and the other refrigeration unit (contractor notification and council inspection). From 1957 through to 1963 Birch had considerable difficulty in keeping the refrigeration compressor motors operating in a satisfactory manner. This was "attributed to the fluctuation and at times sustained fall in the incoming voltage supply". Birch had on numerous occasions reported the problem to Council, but without result. In 1963 the produce shed and refrigeration rooms were destroyed by a fire.

It was accepted by the Court that the cause of the fire was the overheating of the refrigeration compressor motors. This was attributed to the long term overheating of the motors as they had to operate over long periods at less than their design voltage. It was also stated that there may have been a loss of one phase of the three phase incoming supply. Dangerous overheating of a three phase induction motor can occur when one line (phase) of the supply to the motors becomes open-circuited and the motor continues to operate on its two remaining phases.

It was held that the plaintiff was entitled to recover in that the service provider had a duty derived from the fact and circumstances of supply and the nature of the power supplied. Windeyer J [at 660] stated:

*by a failure to use due care and skill, a supplier of electricity provides a customer with current below its normal standard and potentially dangerous if used by the customer for normal purposes or particular purposes known to the supplier, an action for negligence lies if damage in fact results* .

and Walsh J, [at 662] said.
The plaintiff was entitled to a verdict not because the respondent had an obligation to supply the appellant with any particular ‘quantity’ of electricity or, indeed, to supply it at all. It is because...there was a duty which arose out of the relationship between the appellant [Birch] and the respondent [Central West County Council] which was supplying him with electricity for use by him in circumstances in which there was a known risk of damage created by the supply which was being furnished and avoidable by the respondent.

In revisiting the case, the question at issue is who was at fault, Birch or the service provider? The possibilities are:

- The probability of a failure of one phase of the customers internal 4 wire 415/240 volt three phase mains.
- The probability of a failure of one phase of the service providers 4 wire 415/240 volt service cable at the point of entry to the installation.

These are treated as independent events. A third possibility is that an internal phase failure and a service line failure occur simultaneously. For such an event, it could be argued that service provider and Birch were both at fault. However, the law does not permit the court to hold that both were negligent.\(^{128}\) Contributory negligence is always a situation where multiple negligent conduct has caused the damage. The problem arises when the court can only speculate whether the defendant was negligent on the balance of probabilities. If the evidence is equally balanced the plaintiff fails.

The diagram of Figure 5.3 illustrates the possible sequence of events involved in determining the cause of the fire. There are five sequential steps. We assume no eye witnesses as to the actual failure and that each of the primary fault states is equally possible. The sequence of events giving rise to the fire is as follows.

**Sequence Step 1:** the probability that the main fuses protecting the installation “blow” conditional with the loss of the phase. If so, there can be no fire as the refrigerator motors are now disconnected from the incoming electricity supply. However if the mains fuses remain intact and reliance is placed on sub main fuses to “blow” and isolate the power supply to the motor circuits, then we progress to the next sequence.

\(^{128}\) *Bringinshaw v Briginshaw* (1938) 60 CLR 336, Dixon J at 149.
**Sequence Step 2:** There will be no fire if the sub-main fuses to the motors “blow”, disconnecting the power supply to the motor circuits, conditional that the mains fuses protecting the whole installation are intact. However if they fail to operate then the motor windings will continue to heat up.

**Sequence Step 3:** Should the motor windings anneal due to overheating (the winding acts like a fuse) and before the heat is transferred to any surrounding inflammable material, there will be no fire, conditional that the sub mains fuses have not “blown”.

**Sequence Step 4:** Should the above not be so the temperature of the motor windings will continue to rise resulting in a fire.

**Sequence Step 5:** the temperature rise in the motors is such that the heat is transferred to the inflammable material surrounding the motors and it catches fire.

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**Figure 5.3: Sequential States**

If we were to assume that the provider’s service line had failed then such evidence would weight the probability that the defendant service provider was negligent in not augmenting the incoming line. Consequently, on balance the probability of
negligence would exceed the probability of non-negligence (> 50%). However, can the fire be fully attributed to the loss of the phase? The heating of the three phase motors due to the loss of a phase would not have necessarily resulted in a fire. The important contributing factor was that Birch relied on rudimentary electrical protection of the three phase motors by fuses. The court simply focused on the problem of a consistently low voltage supply. Whilst this may have been a contributing factor it is doubtful if low voltage in itself would cause the fire. The more likely cause of the fire was a loss of a phase and more than probable the use oversized motor fuses which allowed the motors to continue to function under fault conditions and overheat.

**Summary.** The case studies detailed throughout this chapter and this section can be said to use a “narrative - outline method” of analysis. The Birch case above demonstrates a “chart method” or a event tree diagram. The chart method is not new as a tool in the analysis of legal evidence. It has its roots in J.H. Wigmore, “the Science of Judicial Proof” (1913). The methods are in essence complementary. The cases illustrate the fact that where there is a complex of evidence the negative criterion of the “but for” test is in practical terms of little use . Experience indicates that in most accident cases concerning power systems more than one set of conditions contribute in varying degrees to the cause of an accident and each is conditional on a previous state or circumstance as exemplified in Figure 5.5 of the Birch case. Without actual statistical data, the probability weighting remains based on the subjective evaluation by the court of the available evidence. The methodology presents a rigorous and systematic means of identifying and appraising possible logical relationships based the evidential data associated with each step in the negligence argument.

**5.9 Contributory Negligence**

**5.9.1 Principles**

The basic principle embodied in contributory negligence legislation applies where a person suffers harm as the result partly of his or her own fault and partly of the fault

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130 See the case study of Appendix 1 of this Chapter and Petts v Northern Riverina County Council (2000) NSWSC 360, outlined in Section 5.8 below where a whole set of conditions came into play in the crash of a helicopter.
of any other person or persons. Early in the evolution of negligence it was recognised that if the plaintiff was negligent it might debar the recovery of damages against the defendant (Butterfield v Forrester). The common law rule was abolished in New South Wales by the Law Reform (Miscellaneous Provisions Act) 1965, which allowed for the apportionment of damages by reference to the plaintiff’s share in the responsibility for damage. The statutory apportionment of liability is limited to situations where the act or omission of the defendant either gives rise to a liability in tort in respect of which a defence of contributory negligence is available at common law, or an act or omission that amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort. The term “wrong” was introduced into the Act in response to the decision of the High Court in Astley v Austrust Ltd where it was held that no reduction of damages could be made where the defendant was sued in contract even if the plaintiff had a concurrent liability to the plaintiff in both contract and in tort.

Division 8: Contributory Negligence of the Civil Liability Act 2002 (NSW) applies to damages claims for failure to exercise reasonable care and skill. It is not limited to the tort of negligence in the context of failure to exercise reasonable care and skill. However, it does not apply to intentional torts; dust diseases claims; harm from tobacco related diseases; victims of crime, discrimination; sporting injuries, and workers compensation claims.

Section 5R of the Civil Liability Act 2002 (NSW) sets out the standard of care for contributory negligence. It establishes a single standard for both negligence and contributory negligence. Section 5S sets out to override the decision in Wybergen v Hoyts Corporation Pty Ltd where the High Court held that under a provision of the Law Reform (Miscellaneous Provisions Act) 1965 damages could not be reduced to the extent of 100 percent on account of a plaintiff’s own negligence.

5R Standard of Contributory Negligence

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131 Pennington v Norris (1956) 96 CLR 10 at 16, Dixon CJ, Fullager and Kitto JJ.
132 (1809) 11 East 60.
134 Section 3B of the Civil Liability Act 2002 (NSW) (1997) 149 ALR 25
135 (1997) 149 ALR 25
The principles that are applicable in determining whether a person has been negligent also apply to determining whether the person has suffered harm has been contributory negligent in failing to take precautions against the risk of that harm.

For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

5S Contributory Negligence Can Defeat a Claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100 per cent if the court thinks it just and equitable to do so, with the result that the claim for damages will be defeated.

5.9.2 Case Studies

The following cases illustrate the concepts involved.

Fraser v Lismore City Council: Fraser was a linesman of many years experience with the Electricity Supply Department of the Lismore City Council. He had prior to ascending a wood pole made an inspection to determine if it was solid enough to support his weight and that of a ladder. The inspection in the form of hammer sounding just above the ground line was an accepted method of test endorsed in a staff instruction by the Council. Fraser on being satisfied ascended to the head of the pole which subsequently cracked at the base line. He fell and was injured. The Council argued that Fraser should have propped the pole before ascending. The Privy Council found that the jury could find that the plaintiff (Fraser) had acted reasonably and that the Council had failed to establish Fraser’s contributory negligence.

Petts v Northern Riverina County Council: was an action for damages arising out of an accident in which a helicopter flown by the plaintiff struck a power line near the town of Barellan and crashed to the ground. A passenger, Mr Quade an employee linesman of the County Council, was killed and the plaintiff (Petts) was severely injured. On the morning of the accident Mr Petts had taken off from Quade’s property. Neither Quade nor another Council employee (McDonald) warned Petts of the presence on the property of the power line with which the helicopter collided. The County Council denied liability and alleged that Petts had been guilty of contributory negligence.

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136 (1956) 1 LGRA 34 (Privy Council on appeal from NSW).
The plaintiff, Mr Petts was employed by Masling Rotor Wing Pty Ltd as chief helicopter pilot. By specification and tender, Masling was employed to transport by helicopter Council observers engaged on visual inspection of part of the County Council rural electricity distribution and sub-transmission systems. The function of the observer was to both direct the helicopter pilot and annotate maps showing power lines and any faults which were detected. The observer could communicate with the pilot by means of an intercommunication system. When a power line was being inspected, the helicopter would be flown somewhat to the left and about two metres above the line, the observer being on the right hand side of the pilot. At the time of the accident Mr Petts had been carrying out line inspections for five weeks.

The helicopter had been parked overnight on Mr Quade’s property. On the Quade property a main power line ran in a east-west direction past the homestead where a pole mounted transformer was located. The departure pad for the helicopter was a little to the south of the homestead. Approximately 350-400 metres to the east of the departure pad was located a single wire earth return (SWER) power line running in a north-south direction. Whilst it was possible to see one pole of the SWER line from the departure pad, a second some 300 metres distant was obscured by trees. Evidence indicated that the conductor hit by the helicopter was of 3/12 (2.5mm), 90 tonne galvanised steel having a ground clearance of little more than 5.5m was extremely difficult to see from the take-off position into the early morning sun. Expert evidence suggested the pilot adopted a shallow departure on take-off into the early morning sun over terrain that had not been surveyed making it difficult to see and avoid the power lines in his flight path. The case was decided as follows:

1. The County Council owed a duty to Mr Petts to take reasonable care to warn him of the presence of the power lines which might constitute a hazard for a helicopter pilot doing line patrol work. In this context the County Council would be vicariously liable for any negligent omission by its employees to warn Mr Petts of the presence of the SWER line. On the morning of the accident the SWER line amounted to a hazard as it was virtually impossible to see. The failure to warn Mr Petts about the SWER line involved a risk of injury to Mr Petts; the magnitude of the risk was

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138 S.5F: Civil Liability Act 2002 (NSW) it could be argued that the power lines were an obvious risk.
great and there would have been no difficulty or inconvenience for Council employees, Quade and MacDonald to give a warning (Wyong Shire Council v Shirt).

Mr Petts was found to have contributed to the accident. He had been forewarned by MacDonald some seven days prior to the incident of the presence of the power lines on Quade’s property. On take-off he adopted an extremely low profile and directed the helicopter over terrain which had not been surveyed. Furthermore, he was aware that Mr Quade was an untrained observer and had never previously been in a helicopter.

Based on the extent to which the County Council and Mr Petts departed from the standard of care of the reasonable person and the relative importance of their conduct in causing the accident, the responsibility was apportioned 75 percent to the County Council and 25 percent to Mr Petts.

**Note:** This case was decided prior to the introduction of the *Civil Liability Act 2002* (NSW), s.5R. Whether s.5R would have resulted in a different apportionment is uncertain but possible.

Case law suggests that where children are involved as plaintiffs a lower standard of care is suggested. 139 Would a boy who enters a substation by squeezing through a gate to play with a football in the substation yard and subsequently is electrocuted be contributory negligent? Or as in *Kelly v Bega County Council* 140 involving an eleven year old boy who was electrocuted after climbing a pole carrying high voltage mains. The jury found for the boy but reduced the damages by 75 percent. The NSW Court of Appeal in *Kelly* stated that the Judge was correct in directing the jury that they could reduce the damages if they found contributory negligence on the part of the boy. However, the Court found that the jury assessment was perverse and substituted a reduction of damages to 25 percent. Glass JA, said that he would take the law to be that of contributory negligence of a particular infant to be measured according to the hypothetical conduct of an infant of the same age based on intelligence, experience, and development of the child. Under section 5R for example, if the plaintiff is a child

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140 Unreported: Court of Appeal NSW 13th September, 1982.
and the defendant an adult, the court is not obliged to treat the plaintiff as an adult.\footnote{Doubleday v Kelly [2005] NSWCA 151} The test is that the court considers what a reasonable person in the position of the plaintiff would have done in the circumstances.

A more lenient approach was typically adopted where employees were injured.\footnote{Commissioner of Railways v Ruprecht (1979) 142 CLR 563; 25 ALR 481, Ruprecht was the foreman of shunting operations at the railway yard and as such had overall control over the movement of wagons around the yard. He lost both of his legs when he stepped onto a railway line in front of a moving wagon, which had been released by a fellow employee. Because of his preoccupation with his duties he failed to look along the line before he stepped onto it. The High Court of Australia held that the plaintiff had not been contributory negligent in the circumstances.} Courts took into account that repetitive tasks may cause inattention and lack of concentration and appreciation of risk. Employee injuries are not subject to s.5R which does not apply to claims governed by workers compensation legislation.\footnote{The claims are subject to the general apportionment \textit{Workers Compensation Act} 1987 (NSW), s. 151N(4).}

Cases involving electrical contractors will be affected by s. 5R. In some situations of a competent licensed contractor, it may be held that the utility is not in breach of its duty. Such was the case in \textit{Sydney County Council v Dell’Oro} where it was held that there was no breach of duty by the Council in that the Council believed the contractor to be fully competent and licensed and that he was aware of the risk as part of his daily work. \textit{Bus v Sydney County Council} concerned the electrocution of an experienced electrical contractor when he came into contact with terminals of incoming mains in the switch room in which he was working. In Bus it was held in contrast to \textit{Dell’Oro} that the Council could:

1) owe a duty to take care towards a contractor who was aware of the risks of coming into contact with a live mains;
2) that the contractor’s knowledge of the special risks of injury was only one factor to be taken into account in determining whether the County Council were in breach of their duty to take care;
3) there was a foreseeable risk of injury to the contractor which could easily have been averted;
4) although the conduct of Bus could be regarded as contributory negligence it was held to be merely an inadvertent act.
It could be argued that both Bus and Dell’Oro were experienced contractors and as would have known of the obvious risks involved. In the context of Section 5R (b) of the Civil Liability Act 2002 (NSW) their conduct may well be judged to be contributory negligent assuming that claimants could overcome the limitations of section 5F, the “obvious risk” section, (see thesis section 5.5.2).

The High Court remarked in Dell’Oro that it was common ground between the parties that the deceased's own negligence was a contributing factor "and arguably the main, cause of his injury". It did not operate as a defence in this case because under the then New South Wales legislation the contributory negligence of the deceased could not operate to reduce the claim of damages to the dependent relatives under the Compensation to Relatives Act 1897(NSW). This has subsequently been changed so that the deceased’s contributory negligence must be taken into account.144

Following the New South Wales Civil Liability Act 2002, claimants in the situation of the Bus and Dell’Oro would have difficulty recovering damages because the risks were obvious (s.5F) and what might have passed for inadvertence prior to the legislation could now qualify as contributory negligence.

Although the claims have involved contractors and employees, the issues raised can be equally important for a customer who seeks to sue a utility for negligence in causing personal injury, or property damage, or economic loss.

5.10 Case Study of an Undetected Network Failure

The case study which follows is based on facts present at a Coronial Inquiry and a settlement made without litigation. It exemplifies a situation in which the circumstances which combined to cause the accident would be extremely difficult to foresee. The accident depicted in Figure 5.4 involved a combination of events which although unusual, each event in itself was foreseeable. The basic objective is to illustrate the issues raised as to the duty owed by the service provider and whether the accident could have been foreseen and prevented.

144 Civil Liability Act 2002 (NSW), s.51T.
The accident occurred on a rural property situated close to the coast. The deceased was a farmer who was electrocuted when the leading cow of a herd he was moving out of a paddock made contact with a partly fallen conductor of a 11000 volt overhead line. At the time of the accident the paddock was water saturated and the deceased had been attempting to manoeuvre the herd through a patch of water. The conductor had sagged to about 1.5 m above ground having come adrift as the result of the support insulator having broken away from its mounting. Over time the steel bolt assembly holding the insulator in place had been subject to severe and persistent localised heating due to leakage current, a consequence of the insulator having been punctured as the result of a lightning induced over voltage. The conductor was prevented from falling to ground by being held in place at the pole by a bridging connection. As to when the conductor came adrift is not known.

At the time of the accident the power line was estimated to be some 35 years of age. It utilised a small diameter copper conductor which due to oxidation would have been difficult to see against the background of hedge and trees. That the conductor had not come to ground meant that the fallen conductor could not be detected by any fault clearing equipment. The lead cow on making contact with the fallen conductor was electrocuted. A circuit breaker mounted some distance from the scene of the accident, sensed the fault and opened and disconnected the electricity supply. However, the circuit breaker was set for three automatic reclosures prior to lockout, hence it attempted to re-energise the line and as a result other cattle in the herd were electrocuted as was the farmer. On the fourth attempt to re-energise the line the circuit breaker locked out.

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145 Common industry practice is to set circuit breakers located on overhead lines in remote rural areas to open and close then pause when detecting a line fault. The operation is carried out three times with the object of clearing transient faults. If the fault is permanent, the circuit breaker will lock out on the fourth attempt. The policy is based on an assumption that 90% of faults on remote rural systems are transient in nature. See also Section 5.2.3 on urban area policy.
The network service provider had a policy of only inspecting its remote rural lines following a line fault. Aerial inspections were carried out from time to time to determine the presence of trees in the vicinity of power lines because of the prevalence of bushfires. About three months prior to the accident, the fault recording data indicated that the line had been subject to a fault but reclosure had apparently cleared what appeared to be a transient condition.

Structures involving wood - porcelain insulator combinations are susceptible to the electrical failure of the insulator as a consequence of storm induced over voltage stress and or pollution. The overstress is a function of the resistance of the wood, or in physical terms the volume of wood in circuit. The result is that while the insulator may appear mechanically sound, it can be punctured and its electrical insulation properties degraded. In due course moisture will infiltrate the insulator and generate leakage current to induce heating and charring where the wood of the structure makes contact with the steel assembly supporting the insulator. The breakdown and fire is demonstrated by the simulation shown in Figure 5.5.

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146 Charring occurs due to a temperature differential between wet and dry areas of the steel wood contact area and the movement of air in the vicinity, eg wind.
Figure 5.5: Fire Simulation

In this instance the death of the farmer was the result of a combination of elements which resulted in a rare or extreme event resulting in a pole fire and a fallen conductor. That the farmer came in contact with the fallen conductor was reasonably foreseeable in so far that he was a person who could be expected to be in the vicinity of the power line since it crossed his land and he was in effect powerless to abate, or to prevent the occurrence of the harm. That the direct cause of the accident was a damaged insulator which was undetected is not relevant. What is relevant is the increased risk of a fatal accident because of the omission by the utility to institute a preventive maintenance regime on a network which is susceptible to insulator and conductor failure (Lamb v Southern Tablelands County Council).

Consequently the risk of a fatality is “real” as opposed to being “far fetched” and as such is not insignificant.

The essential element in the tort of negligence is the existence of a duty of care. Where there is foreseeable physical harm to a class of persons the courts have generally been content to find a duty without any special requirements. However, in

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148 An event which is of major significance but having a very small probability of occurrence.
149 In Lamb v Southern Tablelands County Council (1988) ATR 220 (Supreme Court of New South Wales, the service provider was held liable for negligence for failing to undertake a replacement program involving conductor tie wire. A broken conductor tie wire had caused a high voltage conductor to fall partially to ground with the result that a Mr Lamb was killed when he rode his motor cycle into the conductor.
broad terms the existence of the duty of care involves a combination of foresight of the likelihood of harm, knowledge or means of knowledge of an ascertainable class of vulnerable persons who are unable to protect themselves from harm, such as the farmer, and control of the occurrence of activity from which the damage flowed. Consequently, it could be argued that the network operator had a duty to ensure the safety of persons who could come within the vicinity of the power line. While the network operator would not have direct knowledge of the fallen conductor, there would be constructive knowledge of what risks were involved and what protective measures could have been put in place. What these measures are reside in the technical competence of the service provider to apply its knowledge and skill to ensure the safety of persons coming within the vicinity of the overhead line. There would be reliance by persons coming within the vicinity of an overhead power that the power line would be so maintained that it would be free from hazards. The issue of power supply industry practice of auto-reclosing on to a line fault is negligent was dealt with in *Nationwide News Ltd v Power & Water Authority*.151

5.11 Summary

The objective of this Chapter has been to examine the concepts involved in the duty of care, standard of care, causation and the principal defences available to a network service provider set in the context of the New South Wales *Civil Liability Act 2002* (NSW). The Act restates in statutory terms principles of negligence stemming from a defendant’s failure to take precautions against a risk of harm. A person or an entity, such as a service provider, will not be liable for negligence unless they knew or ought to have known of the risk, the risk was not insignificant, and in the circumstances a reasonable person, or entity, would have taken precautions to prevent harm.

The chapter also demonstrates the limits of economic analysis and how probabilistic reasoning might be helpful in exploring multi-causal problems.

There is little doubt that civil liability legislation severely restricts the ability of the small end user with limited means to access the legal system when dealing with corporate energy providers in circumstances of negligently caused harm. On one
view the legislation makes individuals responsible for their own safety where there are obvious risks. Risk taking is a normal part of adolescent behaviour. In the past, Courts may have scrutinised the conduct of the utility to see whether some action on their part could have avoided the harm. Consequently, utility structures in close proximity to the public may have been required to take special measures to ensure that a trespasser could not gain access to the structure. The Civil Liability legislation promotes self responsibility and it is surmised Courts will have less capacity to find negligence on the part of the utility where the risk was obvious and the plaintiff was in a position to understand the risk. The reach of the Act is not limited to personal injury. There may be situations where as a result of the provider’s negligence, there is an obvious risk to the consumer’s property or goods. In obvious cases, the Act could apply to prevent a claim.

The outsourcing of work to independent contractors by network providers may shift liability for negligence to the contractor unless there is a non-delegable duty of care or some independent negligence of the provider. Ordinarily, a person is not liable in law for the wrongs done by an independent contractor as distinct from an employee. This principle has been repeatedly upheld by the High Court. In the most recent High Court case, *Leichhardt Municipal Council v Montgomery*, the High Court refused to extend the categories of cases where a non-delegable duty of care may be owed. Kirby J said, (at [127]):

To render the Council directly liable, notwithstanding the acts and omissions of [the contractor] and its employees, would therefore be unreasonable, given that the essential purpose of engaging [him] as an independent contractor was to delegate that responsibility to [the contractor] under conditions that rendered [the contractor] liable in law for its own acts and omissions and ensured that it could meet its liability by procuring appropriate insurance.

In this chapter, it has been argued that the mere fact that a utility provides electricity does not, of itself, give rise to a non-delegable duty within the principles set out in *Burnie Port Authority v General Jones Pty Ltd*. This effectively allows utilities to shift risk and liability to independent contractors and leaves the small consumer to bear the risk of the contractor’s insolvency.

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152 Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16 at 26, 35.
154 (1994) 179 CLR 331.
155 (1994) 179 CLR 331.
This chapter has been concerned with the general principles of negligence in its application to personal injuries and damage to a consumer’s property or goods. Liability for negligently caused pure economic loss has been left to a separate chapter. This is the subject of the next Chapter.
Chapter 6: PROVIDER LIABILITY FOR NEGLIGENCE:
PURE ECONOMIC LOSS

6.1 Introduction

The previous Chapter provided a general analysis of provider liability for negligence. This Chapter is concerned with the common law principles which govern the recovery of pure economic or pecuniary loss consequent upon a sustained loss of energy supplies. As an extreme example, on 14 August, 2003 north eastern North America was blacked out as the result of a series of preventable events. The day was one in which the north eastern transmission grid system was subject to very heavy electricity demand resulting in the electrical overstress of transmission line conductors. An Ohio transmission company which formed part of the interconnected system, had not kept up with its tree trimming, allowing highly loaded transmission lines to sag into the branches of trees which had been allowed to grow under the lines, generating a series of flashovers. The company’s monitoring equipment was not working and so it was unaware that a series of cascading faults had escalated into a major crisis. The result was that some 50 million customers were subject to a blackout lasting several hours causing incalculable commercial losses. There is no presumptive rule of liability in such a circumstance as there is for physically caused injury. To whom is the energy supplier legally accountable to and for what?

The category of cases to be analysed associated with power blackouts, are pure economic loss cases consequent on physical damage to someone other than the plaintiff (a third party) as distinct from other forms of pure economic loss. Typically in such cases the defendant’s negligence results in: damage to equipment or plant such as a power cable, or a water or gas pipe owned by a service provider; or a transmission or distribution service provider is negligent as in the above example of transmission line failure.

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3 B. Feldhusen, “Economic Negligence” 3rd Edition, Carswell, 1994 defines such cases as relational economic loss. For example, Professor Feldhusen cites that of a negligent motorist who strikes an electricity pole causing a power outage which shuts down an industrial complex. Firms occupying the complex are forced to shut down and as a result sue to recover financial loss. Part 1A, Division 4: Assumption of Risk - Civil Liability Act 2002 (NSW) includes in addition to physical damage that of economic loss.

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As a consequence this causes interference with a customer’s contractual rights to the utility’s service as well as the potential to cause loss to non-contracting parties. The customers as plaintiffs seek to recover damages suffered as the result of the negligence. When physical damage is involved, pure economic loss must be distinguished from consequential economic loss, which by definition, is causally consequent upon physical damage to the plaintiff or a plaintiff’s property. ³ For example, if income earning property, such as a leased helicopter is damaged having struck a power line, it is an established practice to allow recovery for not only the cost of repairing physical damage but also for “consequential” loss of earnings or profits from such damage during repair.⁴

Generally, a defendant will be held liable to the utility for damage to the utilities property where for instance, a contractor negligently cuts a power cable supplying a steel mill and surrounding industries. As a result the mill is forced to shutdown until such time as the cable is repaired. The local power utility which owns the cable would have a cause of action for negligence for the damage to the cable. However, is a claim available if the mill and surrounding businesses are forced to close temporarily, and as a result the profits of those businesses are drastically reduced and large numbers of employees are laid off in order to reduce costs? Furthermore, is a claim available if trade in the area declines causing shops to close? The issue is whether, in addition to being liable to the immediate claimant of physical harm (a utility), should the defendant also be held liable to some or all of the persons who suffer the related economic losses⁵? In the great majority of cases the courts have refused to permit recovery for economic loss in such circumstances with certain exceptions. However, it does not preclude the plaintiff from recovering for foreseeable physical damage, such as the loss of barley malt due to a loss of gas supplies.⁶

³ B. Feldthusen, “Economic Negligence”, 3rd Edition, Carswell, 1994, p 1. Ch.1: “the term physical damage or physical harm includes personal injury, property damage and consequential economic loss. The principles which govern recovery of each are treated as identical. The terms economic loss or financial loss, refer to pure economic loss. ”
The analysis begins with categories of economic loss suggested by Professor Bruce Feldthusen, followed by a discussion of the history and policy associated with of the current approach to the recovery of negligently caused economic losses. The threshold issue is whether in law there should be a duty to avoid causing economic loss. This is followed by authoritative cases involving economic loss which are considered pertinent to utilities operating in a regulated market environment and the delivery of energy supplies.

Although there are cogent political and policy reasons for limiting liability for negligent caused economic harm, adherence to an absolute rule excluding liability results in injustice to the more vulnerable in a society such as the small end user. Illustrative is the case of Johnson Tiles and Others v Esso Australia Pty Ltd and Others which arose out the Longford No.1 Gas Plant explosion, the loss of gas supply to Melbourne over twelve days and the proven negligence of Esso Australia, discussed in part 6.5 of this Chapter.

In relation to contracting parties, it has already been argued in Chapter 3 that the Trade Practices Act 1974 (Cth) can impose strict liability for defective supply. Reinforcing the strict liability position where power system failure occurs is the position taken by the Australian Consumer and Competition Commission. The ACCC has argued that under Division 2, Part V of the Trade Practices Act, an energy supplier is responsible for damage to a contractual customer's equipment in conditions of a system disturbance regardless of negligence. The Commission argued that under the TPA, s.71, a system disturbance resulting in a degraded supply or failure can amount to breach of the implied warranties under that provision.

Where services are involved, s.74(1) requires them to "be rendered with due care and skill", approximating the negligence standard. Consequently, in circumstances where care and skill is negligently applied in the delivery of services, there is an

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10 Director of Public Prosecutions v Esso Australia Pty Ltd (2001) VSC 263.
12 Victoria electricity legislation excludes liability for partial or total failure of supply except where it is the company's fault. For example, an incorrect system operation as was the issue in Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd (1999) SC of Vic. BC9904616. The ACCC contends that the Trade Practices Act 1974 overrides exclusions of liability. See Chapter 3.
arguable case for liability with the potential for recovery of economic loss for breach of contract.

Breach of warranties implied under the Trade Practices Act 1974 (Cth), ss71,74 give rise to contractual claims for economic loss. The loss must be caused by the contractual breach and must not be too remote. The principle applied in the law of contract is that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the result of the breach of contract. The capacity to recover is much more limited where there is no contractual relationship.

6.2 Categories of Economic Loss

This section is concerned with economic losses suffered by a plaintiff with whom the defendant does not have a contractual relationship. Professor B. Feldthusen has argued that not all economic loss is identical and can be divided up into categories each having unique policy considerations. Professor Feldthusen accepts that economic loss should be barred by an exclusion rule because of the important differences that exists between pure economic loss and other economic losses. Feldthusen reasons that: (1) Pure economic loss is by definition a secondary liability in that the tortfeasor is already liable to the victim of the physical damage. This means that the deterrence goal of tort law is at least partially fulfilled without need for further litigation. (2) An exclusion rule does not deprive the plaintiff from compensation. It merely "channels" the plaintiffs claim towards the property owner. If the contract between the two excludes the owner's liability, this will most likely be because the parties are agreed that the plaintiff is in the best position to insure against the risk at the lowest cost. (3) There is also recovery for the cost of repairing

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13 The principle is usually known as the rule of Hadley v Baxendale (1854) 156 ER 145. It is frequently divided into two sub rules. First, the defendant is liable for reasonably foreseeable damage. Secondly, the defendant is liable for damage occurring as a result of abnormal circumstances if, at the time of making the contract, there was sufficient notice of the facts making the damage foreseeable.

physical damage to personal or tangible property, but also for loss of earnings or profits which can arise during the course of rehabilitation and repair.\textsuperscript{15}

\subsection*{6.3 Duty of Care to Avoid Economic Loss}

The common law originally forbade any recovery for financial loss in the absence of reasonably foreseeable harm causing damage to the plaintiff personally. This exclusion rule has its origins in England around the second half of the 19\textsuperscript{th} century. One of the earliest illustrations is the case of \textit{Cattle v Stockton Waterworks}.\textsuperscript{16} There the plaintiff suffered economic loss when the defendant negligently caused flooding of the land of a third party. This made it more difficult and costly to tunnel on the third party's land which the plaintiff was contracted to build the tunnel. The plaintiff informed the defendant waterworks company of the problem. They failed to do anything with the result that the contractor's contract with the landowner became much less profitable. The court held that there was no liability in the waterworks company. Blackburn J, in rejecting the claim, explained that the plaintiff could not recover the loss because the damage suffered was not a "\textit{proximate and direct consequence of the defendant's wrongful acts}".

This exclusion principle was followed in a number of English decisions early in the present century to gradually evolve into a rule. The rule was applied in Australia, New Zealand, Canada and United States. In general, legal policy relating to economic loss is that "\textit{the loss should fall where it lies}".\textsuperscript{17} This somewhat arbitrary rule prevented a plaintiff from recovering economic loss flowing from damage to a third party. But although the courts have been willing to find specific cases warranting a departure from the exclusion rule, they have had difficulty in proposing an alternative rule. If a plaintiff suffers economic loss as the result of personal injury to the plaintiff or to the plaintiff's property as the result of another's negligence, then damages are recoverable in respect of that 'consequential' economic loss. In contrast, if the plaintiff suffers pure economic loss without personal injury or property damage, it is necessary to first determine whether to recognise any duty at all. The High Court in its most recent decisions adopted incrementalism which tends against

\textsuperscript{16} \textit{Cattle v Stockton Waterworks} (1875) LR 10 QB 453.
\textsuperscript{17} Early English cases for example are \textit{Remorquage à Hélice (Société Anonyme) v Bennetts} (1911) 1 KB 243; \textit{Elliott Steam Tug Co v The Shipping Controller} (1922) 1 KB 127 at 139-141.
the enunciation of broad general principles, relying on a case by case development as in: Caparo Industries Plc v Dickman,\textsuperscript{18} Woolcock Street Investments Pty Ltd v CDG Pty Ltd\textsuperscript{19} and Vairy v Wyong Shire Council.\textsuperscript{20} In Perre v Apand Pty Ltd, Gleeson CJ identified at least three considerations as influential in precluding a duty of care in particular cases of economic loss: \textsuperscript{21}

First, bearing in mind the expansive application which has been given to the concept of reasonable foreseeability in relation to physical injury to person or property, a duty to avoid any reasonably foreseeable financial harm needs to be constrained by "some intelligible limits to keep the law of negligence within the bounds of common sense and practicality". 

Secondly, to permit recovery of foreseeable economic loss, which may or may not occur in a commercial setting, for any negligent conduct, may interfere with freedoms, controls and limitations established both by common law and statute in many legal contexts.

Thirdly, in those cases where the loss occurs in a commercial setting, a third party, C, may suffer financial harm as a result of conduct which is regulated by a contract between A and B. It may be that the consequences of such conduct, as between A and B, are governed and limited by the contract. This is a problem which commonly occurs in relation to maritime claims, and may help to explain the strictness with which an exclusion rule has been applied in shipping cases.

The reluctance of the courts to recognise liability for negligence involving pure economic loss where no physical damage is involved is based on protecting commercial interests from a flood of claims for damages. As Brennan J said in Bryan v Maloney: \textsuperscript{22}

If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would destroy commercial competition\textsuperscript{23}, sterilise many contracts and, in the well-known dictum of Chief Judge Cardozo\textsuperscript{24}, expose defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.

Utilising the Cardozo\textsuperscript{25} test, the critical question is whether there is indeterminate liability. Concern about indeterminacy most frequently arises where the defendant cannot determine how many claims might be brought against it, the value of those claims, or what the general nature of them might be. The economic loss must not be “indeterminate in amount, time and class”\textsuperscript{26}. Professor Jane Stapleton has pointed out that economic loss can ‘ripple’ down a chain of parties”. For example, the loss of

\textsuperscript{18} [1990] 2 AC 605.
\textsuperscript{19} (2004) 216 CLR 515.
\textsuperscript{20} (2005) 80 ALJ R 1.
\textsuperscript{22} (1995) 182 CLR 609 at 632.
\textsuperscript{23} Lord Reid in Dorset Yacht Co v Home Office (1970) AC 1004 at 1027.
\textsuperscript{24} Ultramares Corporation v Touche 255 NY 170 at 179 (1931) a case involving fraud set in the time of the great economic depression of the 1930’s.
\textsuperscript{25} Ultramares Corporation v Touche (1931) 255 NY 170.
profits which D causes P may in turn cause loss of profits to P's supplier and in turn to that supplier's suppliers, etc”. 27 This militates against finding a duty.

In *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* 28 the response to the indeterminacy argument was that pure economic loss was recoverable if the defendant had knowledge (or the means of knowledge) that a particular person (not merely as a member of an unascertained class) would be likely to suffer economic loss as a consequence of the defendant's negligence. 29 In *Perre v Appand*, Hayne J said 30:

*It is important to understand what is meant by indeterminate liability. It means more than “extensive” or “large”. The damage suffered by persons affected by the defendant's negligence may be very large; there may be many who are affected. But neither of those considerations means that the liability is indeterminate. What is meant by indeterminate in the present context is that the persons who may be affected cannot readily be identified. That formulation invites attention to when this identification is to be possible: is it to be possible at or before the time of the negligent act or omission, or is it sufficient if it is possible to identify the class of those affected after the event? I do not think it necessary to say, in this case, whether identification at the later time would suffice. If, as here, it was possible to identify those who would be directly affected by the conduct concerned at the time of the act or omission that is said to be negligent, and it was known to the person alleged to have been negligent that that was possible, then the liability to those persons is not indeterminate.*

The ripple down effect and the indeterminacy argument is observed in this particular example. A contractor employed by a service provider constructing the foundations of an extension to a distribution substation severed a cable supplying a shopping complex of some 30 shops and a supermarket. Part of the shopping centre was without power for 30 hours. Shops were closed, employees stood down and refrigerated food had to be destroyed. 31 It is arguable that it was possible to identify those shops and the supermarket affected by the loss of power supplies, but not the employees. Indeterminacy of the class is proxy for limiting the extent of liability. Even if 30 shops could be identified this does not assure recovery. The decision in *Perre and Others v Appand* 32 (discussed in Section 6.5) gives some scope for the argument of recovery. *Perre* involved six related couples, two companies, and a joint venture all involved in the growing and processing of potatoes within 20km of the site of a blighted potato crop. If such a class of plaintiff where property was affected was considered sufficiently proximate, why not a small cluster of shops?

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28 (1976)36 CLR 529
29 (1976) 36 CLR 529 at 544, 558, 584-585.
31 A case reported on by the author in 1998.
32 (1999) 164 *ALR* 606
This example illustrates the difficulties with the test as formulated in *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad.* When will there be sufficient identification? Does it depend upon how many are affected? A shopping centre with a thousand shops could all be quite easily identified by request to the shopping centre proprietor. It is arguable that this test is elusive in its application. It also begs the question why should a large enterprise such as Caltex Oil can recover when it could have quite easily structured the relationship with its related companies to provide property rights? Yet significant numbers of small users continue to be denied recovery. *Johnson Tiles Pty Ltd and others v Esso Australia Pty Ltd and others* concerned the loss of gas supplies over a period of twelve days to Melbourne affecting thousands of businesses and homes (discussed in greater detail later in 6.5 of this Chapter). Small business users were held not entitled to recover where there was no property damage and no claim was available to workers who had been stood down or by domestic users that were inconvenienced by the stoppage. There were 7,000 workers stood down in the vehicle industry alone. The plaintiffs in the class action (in total about 10,000) who did not suffer property damage were held not entitled to recover. This finding was not surprising as .4 million households and 89,000 businesses were affected; the loss to the Victorian economy alone was estimated at $1.3 billion.

6.4 Economic Loss: Utility Cases

This section examines cases where a large number of customers are contractually dependent on a service provider’s assets. In each case, the defendant had damaged power utility equipment resulting in interference with customers contractual rights to the service; the customer sought to recover damages for economic loss. Professor Fleming says of this type of case: 35

> It has long been established practice to allow recovery not only for the cost of repairing physical damage to personal or tangible property, but also for ‘consequential loss of earnings or profits resulting from such damage during rehabilitation or repair’....

Other illustrations of the principle limiting recovery to persons with a proprietary or possessive interest in a damaged chattel comes from the problem of negligent damage to power cables supplying nearby businesses. Here an additional factor is the spectre of

33 (1976)36 CLR 529
34 [2003] VSC 27. See also [2004] VSC 466.

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incalculable commercial losses. English cases eventually settled on a distinction between loss of profits from two different causes. In the case of physical damage to the plant or material itself, as when molten metal solidified as a result of the power failure, the plaintiff might recover not only the cost of melting it by other means, but also the expected profit of that particular melt as economic loss consequential on physical damage; not however expected profit on other melts foregone prior to restoration of power.

Figure 6.1, illustrates the usual situation where a negligent third party cuts a power cable or interferes with power lines, or water mains or gas mains which cause economic loss to water or energy customers.

Turning now to the decisions, the English courts emphasised the exclusionary rule which precluded recovery for economic loss generally. The English cases came after the decision in *Hedley Byrne & Co. v Heller & Partners Ltd* 36 which recognised a cause of action for pure economic loss based on negligent misrepresentation.

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Figure 6.1: Relational Economic Loss and Consequential Proximity.

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Seaways Hotels Ltd v Cragg (Canada) Ltd and Consumers Gas Co.\textsuperscript{37} was the leading Canadian authority in its time. Contractors installing a gas pipe for a public utility severed an underground cable supplying electric power only to the Seaways Hotel. Prior to the construction of the gas pipe, Toronto Hydro-Electric had warned the defendants of the presence of the power cable. At first instance it was held that plaintiff had no cause of action on the ground that Toronto Hydro Electric owned the cable. The defendants also argued that the damages claimed were too remote and indirect to justify recovery. On appeal, the Ontario Court of Appeal held that it was reasonably foreseeable that the plaintiff's injury was likely to follow from the interference with the duct carrying the cable, and that the defendants ought reasonably to have foreseen such injury. The Court treated the pure economic loss suffered by the plaintiff in exactly the same way as the physical loss and damage. The plaintiffs recovered losses referable to the spoilage of food and loss of all profits due to the early closure of their hotel dining rooms and bars.\textsuperscript{38} Gibbs CJ in \textit{Caltex} thought that the decision could be explained on the ground that the cable supplied the hotel exclusively.\textsuperscript{39}

\textit{British Celanese Ltd v A.H. Hunt (Capacitors) Ltd.}\textsuperscript{40} was an English case decided in 1969 after \textit{Hedley Byrne}.\textsuperscript{41} The plaintiff and the defendant owned factories in close proximity to one another on the same industrial trading site. Power was supplied to both factories from an exposed electricity supply sub-station owned and operated by a third party (the power utility). The substation was situated in the vicinity of the factories. Metal foils from the defendant's factory (A.H.Hunt) blew onto the power supply company's live busbars causing a power failure which brought the plaintiffs' machines to a halt. The materials in the plaintiffs' machines solidified and the machines had to be cleaned before production could continue. The plaintiff suffered damage by way of additional expenditure in replacing and repairing machinery and the loss of profits on a lost production run based on the product which would have been produced by the lost molten metal.

\textsuperscript{37} [1960] 21 DLR (2d) 264.
\textsuperscript{38} The decision was discussed in the \textit{Caltex Oil} case at 548-9. The Caltex Case is dealt with later in this Chapter.
\textsuperscript{39} \textit{Caltex v The Dredge Willemstad} (1976) 136 CLR 529 per Gibbs J at [32], Stephen J at [8]
\textsuperscript{40} (1969) 2 All ER 1252.
\textsuperscript{41} [1964] AC 465 establishing liability for negligent misrepresentations resulting in economic loss.
Lawton J held that the defendants owed the plaintiffs a duty to take reasonable care to prevent the metal foil from being blown about in such a way as to foul the bus-bars of the substation, and that they were liable for the material damage and the consequent loss of profit. Lawton J reasoned that the case of physical injury with consequential loss of profits was analogous to the ordinary accident case in which a plaintiff suffers some physical injury which in turn gives rise to loss of earnings. He said:

The second of the defendants’ answers is a repetition of the argument which was addressed to me on remoteness of damage. I accept that those who are only indirectly affected by a nuisance cannot sue for any damage which they may suffer; but for the reasons I have already given I adjudge that the plaintiffs were directly and foreseeably affected.

Consequently, the plaintiffs losses were the direct result of the defendants negligence and the plaintiff was able to recover.

S.C.M. (United Kingdom)Ltd v WJ. Whittall and Son Ltd. Contractors, in the course of building a wall, damaged a high voltage cable which ran alongside the road. This cut off power for over seven hours to many factories including the plaintiff’s factory. The plaintiff manufactured typewriters and copying machines. The effect of the power failure was to cause molten metals in their machines to solidify. This required the machines to be disassembled, the solidified metal removed and then reassembled. Parts of the machinery could not be reused. Much of the time the power was off was used to remove the solidified metal. The plaintiff’s claim was limited to the damage done to the machines and the loss of production resulting directly from that damage. It did not include loss of profits that might have been made had the factory been able to continue in operation throughout the period of power loss. It was held that the contractors had been negligent in damaging the power cable and that it was foreseeable that if the cable was damaged that interruption to supply would lead to loss and damage. Consequently, the plaintiff could recover for the costs of reinstating and repairing equipment and the loss of profits which was related to the damage to the machines. Despite not having been able to operate the factory, the plaintiff was not able to recover for any further or future loss of profits.

42 At 1250. Lawton J relied in part on the Canadian case of Seaways Hotels Ltd v Cragg (Canada) Ltd and Consumers Gas Co (1960) 21 DLR(2d) 264.

Lord Denning M.R\textsuperscript{44} and Winn LJ\textsuperscript{45} held that economic loss independent of damage to the plaintiff or plaintiff’s property which arises from a negligent act is not recoverable as damages, except where such loss is the direct consequence of the negligence.\textsuperscript{46} However Lord Denning\textsuperscript{47} observed that this should not be taken as saying that that pure economic loss is always too remote, as there are some cases in which pure economic loss is the consequence of the negligence. Thus by the time the Court came to consider this next case there was a clear authority in favour of recovery for property damage and consequential economic loss in the circumstances of negligent interruption to power or gas or water supplies by a third party.

*Spartan Steel and Alloys Ltd v Martin and Co (Contractors) Ltd*\textsuperscript{48} was a 1973 UK Court of Appeal case which again considered the issue of the loss of power supply. The defendant damaged a power cable while digging up a road. The cable supplied electricity from the Midland Electricity Board directly to the plaintiff’s factory. The electricity supply to the factory was interrupted for over 14 hours. The plaintiff suffered property damage and economic loss. The interruption to electricity supply necessitated the removal of molten metal from furnaces to avoid metal solidifying. The plaintiff used oxygen to melt the metal and pour it out of the furnaces, and claimed the depreciation by £368 of the trade value of the metal at the time the electricity supply failed, and £400 for loss of profits on the failed melt. The plaintiff also claimed for a further loss of £1,767 in profits that would have been earned upon further melts scheduled for the period of the interruption. The defendant admitted liability under the first two heads but disputed the claim with respect to the £1,767 loss of profit.

In the Court of Appeal, the majority held that the plaintiff could only recover the loss in value of the metal actually in the furnaces, and the loss of profit on that melt. The remaining loss was held to be unrelated to any physical damage and therefore irrecoverable. Lord Denning MR (Lawton LJ concurring) stated that there was good reason for permitting redress for some economic losses which flowed from the

\textsuperscript{44} at 344.
\textsuperscript{45} at 349-351.
\textsuperscript{46} As to remoteness of damage in negligence and the test for remoteness.
\textsuperscript{47} at 345.
wrong and which could be reasonably foreseen. But His Lordship rejected suggested tests of duty and remoteness as evasive in distinguishing recovery from irrecoverable economic losses. His Honour advanced a number of policy reasons for denying recovery for pure economic losses where interruption is caused to essential services, including what he called the "nature of the hazard", being one he characterised as being "regarded by most people as a thing they must put up with". His Lordship also referred to what he called the "multitude of persons" likely to be affected, the potential for vast litigation should claims be permitted, and the difficulty of proving claims. Lord Denning also expressed a concern in relation to "loss spreading", stating that the loss suffered in such a case ought to be spread among the community at large, rather than burdening the contractor.

**Barret Burston v Esso Australia** 49 arose out of the *Johnson Tiles* (see Section 6.5) class action case but was dealt with separately. The claim was by an individual group member seeking damages for negligence having obtained permission by order of the court to take part in the group proceeding for the purpose of determining a question that related only to its claim, namely its entitlement to compensation. 50 Barrett Burston operated four plants manufacturing malt from barley. It was unable to continue its business because of the cessation of the gas supply as a result of the loss of the Longford Esso Gas Plant for some 12 days and as a result barley that was in the process of being manufactured into malt was spoiled and had to be disposed of. Barrett Burston claimed four heads of damage. They were: the cost of the spoiled barley, the external costs of disposing of it, the internal costs of removing the spoiled barley from the production line and loss of profit in the disposed product. On the assumption that there would have been a loss component of an economic nature, because of the inability to sell the spoiled barley, the court based its decision on *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd.* 51 The court found that the spoilt barley was analogous to the loss of the molten steel in *Spartan Steel*. Consequently, the court decided that in respect of the spoilt barley, the plaintiff was entitled the value of that barley and the profit which would have resulted from its sale. Barrett Burston was held to be entitled to recover damages set at $1.1million.

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48 (1973) QB 27 (CA).
49 [2003] VSC 211.
50 s.33R of the *Supreme Court Act* 1986.
The decision in this case demonstrates the preference given to physical damage and the related economic loss. It contrasts with the decisions dealing with pure economic loss in particular the quite exceptional case of *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'*.\(^{52}\)

### 6.5 Economic Loss Cases: Indeterminate Economic Loss

The cases which follow suggest that in the context of an energy delivery system, there may be some exceptional cases where pure economic loss is recoverable. But it should be pointed out that these are altogether exceptional with very few subsequent authorities allowing recovery for pure economic losses.

*Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'\(^{53}\)* is the leading Australian case. It recognised that there are circumstances where a defendant would be expected to accept responsibility for pure economic loss caused by a negligent act, but the plaintiff suffers no actual physical damage. In this case the High Court in effect abandoned the broad exclusion rule that pure economic loss dissociated from physical damage, sustained as result of negligence, could not be recovered.\(^{54}\) In essence the Caltex case stressed that liability was “controlled” both as regards the claim and the loss. Professor J G Fleming,\(^{55}\) classified this type of case a *transferred loss* case. That is, one in which a loss that would otherwise be suffered by the owner of property is transferred to another person who is not the owner of that property and that person was not of a general class. The loss claimed was not loss of profits but an expenditure incurred by an entity which relied exclusively on the use of the asset damaged. In these types of cases, *transferred loss* cases, the fear of indeterminate liability is absent:

*One could substitute a user of a pipeline for the owner of that pipeline without increasing the danger of unascertained damage, if the user is in much the same position and would suffer much the same loss as the pipeline owner normally would.*\(^{56}\)

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\(^{52}\) (1976) 136 CLR 529.


\(^{54}\) at 544, 558 and 584 –85. Also B.Feldthusen, *Economic Negligence* 3rd Edition, Carswell, 1994, p 6. (1) the apprehension that liability in negligence for pure economic loss would give rise to indeterminate liability, that is too remote; and (2) the wrongdoer owed no duty of care to avoid causing economic loss.


\(^{56}\) The helpful explanation is provided by Doyle CJ in *Seas Sapfor Forests Pty Ltd v Electricity Trust of South Australia* (1996) South Australia Supreme Court Judgment 5718 at [74].
The dredge *Willemstad* while dredging a channel in Botany Bay cut through a pipeline owned by Australian Oil Refining Pty Ltd (AOR). The pipeline carried oil from AOR’s oil refinery to the Caltex oil terminal. As a result, Caltex suffered considerable losses in setting up alternative transport for its refined products from the AOR refinery to the Caltex terminal in Botany Bay. Caltex alleged that those losses had been caused by the defendant’s negligent navigation. The High Court held unanimously that the plaintiff could recover the cost of putting in place alternative measures for transporting oil from the refinery to its terminal. This was even though Caltex had not suffered any physical damage to its own property. Each member of the Court applied a form of proximity test. Gibbs J said:\(^5\)

\textit{In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which a duty is owed. \ldots{} All the facts of the particular case will have to be considered.}

Stephen J considered that the wide range of matters thrown open by Lord Denning’s approach in *Spartan Steel* must lead to uncertainty in the law if the sole criterion for the recovery of economic loss was to be a “\textit{matter of policy}” determined by an individual judge.\(^5\) He also rejected the rule that economic loss will be recoverable only if immediately consequential upon injury to property or persons: \(^6\)

\textit{(By) rejecting all recovery for pure economic loss unless accompanied by and directly consequential upon such physical injury is Draconic; it operates to confer such physical injury a special status unexplained either by logic or by common experience.}

He went on to say that the concept of proximity was an appropriate control mechanism of indeterminate liability. Proximity provided a ‘\textit{control mechanism}’ that would counter the possibility of indeterminate liability without the arbitrariness of the distinction between pure and consequential economic losses. Of that ‘\textit{control mechanism}’, he said: \(^6\)

\textit{Its precise nature and the extent to which it should restrict recovery for purely economic loss must depend upon policy considerations. \ldots{} In the general realm of negligent conduct it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity}

\(^5\) The dredge is the defendant as it relates to its maritime status.
\(^5\) at \(555\).
\(^5\) at \(574\).
\(^5\) at \(568\).
\(^6\) at \(574-5\).
between tortious act and the compensation detriment. The articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty ...

Stephen J listed five features of the case that gave rise to a duty of care in the circumstances and concluded that Caltex was within the reasonable contemplation of the defendants as an entity likely to suffer economic loss if the pipelines were cut.\textsuperscript{62} Mason J\textsuperscript{63} expressed the view that:

\textit{A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons ...}

No single unifying principle emerged from this decision but other judgements have interpreted it to mean that there is no absolute bar to the recovery of pure economic loss providing some form of relationship of proximity can be established. Particularly relevant is whether the defendant can foresee that a specific individual, as distinct from an unascertained class, would suffer economic loss. The current status of the proximity rule is referred to in \textit{Perre v Apand} discussed later in this section.

\textbf{Canadian National Railway Co v Norsk Pacific Steamships Co}\textsuperscript{64} has similarities to that of \textit{Caltex}. It set the pattern for future Canadian decisions. A tug boat owned by Norsk negligently collided with a railway bridge which was used principally by the plaintiff, Canadian National Railways (CNR). CNR had no property rights in the bridge which was owned by the Canadian Government, however it accounted for around 85\% of traffic using the bridge, the remaining traffic being that of three other rail companies. CNR also owned land and rail tracks close to either side of the bridge and had used the bridge continuously since 1915 under contract to the Canadian Government. This contract, unlike those made with the other three railway companies using the bridge, required CNR to undertake general maintenance work and to make any necessary repairs to the bridge at government expense. CNR also arranged inspections of the bridge from time to time and provided consulting services to the Canadian Government free of charge. In the case of damage to the

\textsuperscript{62} at pp. 576-7. 
\textsuperscript{63} at CLR 593. 
\textsuperscript{64} (1992) 1 SCR 1021.
bridge the contract totally excluded the liability of the Canadian Government to CNR. CNR sued Norsk for its added costs in re-routing its trains over an upstream bridge and by land. The Supreme Court found for CNR.

The majority decision in the case was delivered by McLachlin CJ. After reviewing the developments in other jurisdictions, her Honour identified two different approaches to the problem of defining the legal parameters of common law rules: the exclusionary rule approach and the incremental case by case approach. Her Honour adopted the two-step process that proximity is a necessary, but not sufficient, condition of liability which may be negated by policy considerations – that is:

*Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case.*

Proximity was in essence the solution to the indeterminacy problem based on the universal concept capable of subsuming different categories of cases involving different factors. Applying this test to the facts, her Honour found firstly that CNR was in close physical proximity to the bridge by virtue by its high use of the bridge, such that its trains were actually in danger of physical injury by the accident, although this did not eventuate. More importantly was the proximity between and the obligation CNR owed to the government which in essence was joint venture. Consequently, there were no policy reasons why CNR were not entitled recover their costs.

In dissenting La Forest J, rejected the view that all economic losses could be treated as a homogenous group.

*To phrase the key issue in this case as a simple one of "is pure economic loss recoverable in tort is misleading".* I do not doubt that pure economic loss is recoverable in some cases. It does not follow, however, that all economic loss cases are susceptible to the same analysis, or that cases of one type are necessarily relevant to cases of another. The fact is that different types of factual situations may invite different approaches to economic loss, and it seems to me to be at best unwise to lump them all together for purposes of analysis.

In applying the exclusion rule to CNR’s claim La Forest J disagreed that CNR was engaged in a joint venture with the government in that CNR was not required to

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67 Noted in the Caltex Oil case.
68 A joint venture is an association of persons for particular trading, commercial, mining etc., with view to mutual profit. The High Court in Caltex Oil emphasised that Caltex and AOR were pursuing a
contribute to any government loss, and CNR did not have to perform any service without payment. CNR argued that it was entitled to recover under the "transferred loss" doctrine. Under this principle, the property owner's loss is transferred to the plaintiff. This was rejected on the basis that there was no transfer of the loss because CNR never assumed the risk of property damage as the government was clearly required to pay for repairs to the bridge as a contractual arrangement. In essence the claim was purely for loss of use and as such CNR had nothing more than a contractual right of usage and not a property right. Exception should only be made to the exclusion rule where the plaintiff could respond effectively not only to the concern about indeterminacy but also show that no adequate alternative means of protection was available. In this case, CNR was clearly in the position to protect itself against the loss it suffered by building the price of insurance for loss into its contract with the government.69

Both judgments were in essence trying to find a principled solution to the problem of indeterminacy. McLachlan CJ, adopted an proximity style test as the mechanism for controlling indeterminate liability and rejected strict rules based on different types of damage. In contrast La Forest J, dismissed proximity; the approach required is one that depends upon the different types of cases involving economic loss.70

The later decision in Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd71 endorsed the La Forest J approach in Norsk with the Canadian Supreme Court continuing to commit to the methodology of La Forest J. Bow Valley Husky indicated that it is possible to adopt a set of determinative general principles in respect of negligently induced pure economic loss based on different categories of economic loss and for which different factors and circumstances may be particularly relevant.72 The case was essentially a claim in negligence but raised issues of transferred economic loss. It involved two companies named Husky Oil and Bow Valley who decided to pursue an oil drilling venture off the coast of Canada. One of

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69 There had been previous unsuccessful litigation.
70 In essence this was enunciating Professor Feldhusen’s categories of economic loss cases – *Economic Negligence*, Carswell, 3rd Edition, 1994, p. 2.
Bow Valley's subsidiaries contracted with Saint John Shipbuilding for the construction of a drilling rig. In order to take advantage of offshore financing Husky and Bow Valley incorporated an offshore company, Bow Valley Husky Ltd (BVH), to which they transferred ownership of the rig before construction began. Husky and Bow Valley then entered into four year leases of the rig for drilling. These required that they pay BVH day rates in the event that the rig was not functioning. Due to the negligence of Saint John and BVH a fire caused the rig to be taken out of service for several months and as a result Husky and Bow Valley sued for the wasted hire costs and maintenance expenses. However, as lessors of the rig, all it gave Husky and Bow Valley was a contractual right to services from BVH, which supplied both the rig and (indirectly through a separate entity which ran the rig operations) the workers. The Supreme Court of Canada in a unanimous decision held that Bow Valley and Husky could not recover for the wasted hire and maintenance expenses. In doing so, it virtually followed the methodology proposed by La Forest J in Norsk.

McLachlin CJ and La Forest J followed the reasoning of La Forest J in Norsk. The losses claimed by the drillers could not be classified as "transferred loss". Their claims were for contractual relational economic loss which is recoverable only in special circumstances. These circumstances can be defined by reference to the following:

(I) claimant has a possessory or proprietary interest in the damaged property; or
(II) relationship between the claimant and property owner constitutes a joint venture.

This has been described as the exclusion rule with exceptions.

The Bow Valley Huskey claims for wasted hire and maintenance expenses did not fall into any of these categories. New categories may be recognised, although courts should not assiduously seek them. What was intended in Norsk was a clear rule predicting when recovery was available. The first step in the process was to inquire whether the relationship of neighbourhood or proximity necessary to found a prima facie duty of care was present. It was present here. The second step was to inquire whether the policy concerns that usually preclude recovery of contractual relational economic loss, such as indeterminacy, were overridden. In this case, they were not.

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The prospect of indeterminate liability, and the absence of any logical basis for recognising the exploration companies claims in preference to those of other potential relational claimants, negatived the duty of care. In addition, liability to the owner had already provided a substantial measure of deterrence, as Bow Valley Huskey had already allocated their losses by contract to the company they created. The test McLachlin CJ applied in Bow Valley was the exclusion rule only referring to the proximity concept later in deciding whether a cautious exception to the rule should be permitted.

The problems the Norsk case posed were conspicuously absent in Bow Valley. Unlike the public rail bridge used by four companies, the rig was private property and was used only by Husky and Bow Valley. Husky and Bow Valley also had a close relationship with the property owner Bow Valley Huskey which they had created and in which they owned shares. This is in contrast to the distinct entities of CNR and the Canadian Government. Further, the leases between Bow Valley, Husky and Bow Valley Huskey did not contain the clause found in CNR's contract with the Canadian Government which totally excluded liability to CNR in the case of damage to the bridge. No such inference could be made between the parties Bow Valley, Husky, who had leased the rig and Bow Valley Huskey the owners of the rig.

The Canadian test is now the exclusion rule with exceptions. Where a situation does not fall within the exceptions, there is a possibility that a new exception may be created if a sufficiently principled basis can be suggested. What is clear is that the case-by-case proximity approach no longer applies.73

In Australia, the Caltex decision must be considered along with the more recent High Court decision in Perre and others v Apand Pty Ltd.74 The significant features of the Perre case were: first the class of affected plaintiffs was ascertainable. Second, the plaintiffs were vulnerable in that they were unable to do anything to protect themselves from the harm that befell them.75 Third, the relationship and circumstances governing the parties was such that it was reasonable to require the defendant to have regard to the interests of the plaintiff when engaging in the


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conduct at issue. Fourth, duty of care did not interfere with the ordinary business activity.

The seven Justices delivered seven separate judgements allowing some or all of the plaintiffs to recover economic losses. In essence it was an endorsement of the *Caltex Oil* decision that pure economic loss was recoverable if the defendant had knowledge (or the means of knowledge) that the plaintiff as a member of an ascertainable class of vulnerable persons would be likely to suffer economic loss as a consequence of the defendant's negligence. As Gummow J, stated:

*The decision of this court in the Caltex Oil is authority at least for the proposition that, in cases such as the present, one does not begin with an absolute rule that damages in negligence are irrecoverable in respect of economic loss which is not consequential upon injury to person or property.*

The class of possible plaintiffs was limited by reference to activities related to potato growing within a 20 kilometre radius from Sparnon’s land. All of the judges considered that reasonable foreseeability alone was insufficient to find for the existence of a duty of care, that it needed to be augmented by additional elements. It was in defining what these elements should be and how they should be applied to future law which generated the differing judgments.

The Perre interests consisted of six related couples and two companies and a joint venture, all controlled by the Perre family and all involved in the growing and processing of potatoes. The respondent was Apand Pty Ltd, a major operator in the potato crisping industry in Australia who had provided non-certified potato seed from a source in Victoria to the Sparnons in South Australia. That seed produced a crop, which was found to suffer from a disease known as bacterial wilt. The three groupings of Perre interests, conducted their respective business operations within a radius of 20 km of the Sparnon’s property. However, the potato crops with which this group were concerned were not infected with bacterial wilt. That is, they

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76 The plaintiff's vulnerability may not always be enough in itself to give rise to a duty.
76 *Tame v New South Wales; Annets v Australian Stations* (2002) 211 CLR 317 (decided jointly).
77 Gleeson CJ at [33] "The second policy consideration is that, in a competitive commercial environment, "a duty to take reasonable care to avoid causing mere economic loss to another ... may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage."[37] It is because of this that the law requires some special factor or factors before it will impose a duty of care in protection of commercial interests, opportunities or, even, advantages. However, the factor or factors which will attract liability may be of a somewhat broader character when economic loss results from the destruction or impairment of a legal right". at 172.
suffered no physical damage. In the normal course of events 80% of the Perre crop would have been exported to Western Australia. However, that State had a strict legal regime designed to quarantine it from any risk of the importation of bacterial wilt. It required a certificate to permit the entry of potatoes into the State. The permit would not be granted in respect of potatoes grown within 20 km of a known outbreak of bacterial wilt occurring in the previous five years, or which had been harvested, cleaned, washed, graded or packed using equipment or premises within that radius. In consequence of the withdrawal of this certificate following the bacterial wilt on the Sparnons’ property, the Perre interests lost their export market to Western Australia and as a consequence suffered significant financial losses. At trial, and on appeal to the full Federal Court, it was held that Apand owed the Sparnons a duty of care which had been breached when Apand supplied them with the diseased seed. The claim of the Perre interests was rejected in that there was no proximity of relationship between the Perre interests and Apand. The High Court overturned this decision.

In general the methodologies argued at arriving at establishing a duty of care were:

(1) The three stage test of *Capro Industries v Dickman* \(^{79}\) approach as suggested by Kirby J in *Pyrenees Shire Council v Day* \(^{80}\) indicating at [289 - 302] :

*The foregoing analysis brings me to the third option. It was expressed in my reasons in Pyrenees Shire Council v Day. As an approach or methodology for deciding whether a legal duty of care in negligence exists, I suggested that the decision-maker must ask three questions:

1. Was it reasonably foreseeable to the alleged wrongdoer that particular conduct or an omission on its part would be likely to cause harm to persons who have suffered damage or a person in the same position?

2. Does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of “proximity” or “neighbourhood”?

3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of such a person? “*

The risk of harm to the Perre interests was considered to be foreseeable as there existed a proximity relationship between Apand and the Perre interests in respect of the supply of potatoes to the Apand factory supplemented by knowledge of the quarantine requirements of West Australia where most of the potatoes were exported.

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\(^{79}\) [1990] 2 AC 605.

Out of that relationship originated Apand’s knowledge of the vulnerability of the Perre interests to an outbreak of bacterial wilt.

(2). Gaudron J argued that the approach to establishing a duty of care in pure economic loss cases should be based on determining categories from case law, focussing on negligent misstatements. Her Honour suggested the existence of a new category of case that would attract a new duty of care, economic loss suffered on consequence of the loss or impairment of a legal right at [34]:

The law of tort already protects contractual rights from intentional interference ... [and the] torts of trespass, conversion, detinue and slander of title are intimately concerned with the protection of legal rights. And that is so even where loss or impairment results in pure economic loss. In that context, it is not surprising that, in some situations, the law of negligence may be invoked where economic loss is suffered in consequence of the loss or impairment of a legal right. On the contrary, there are situations (for example, the retained solicitor whose negligence results in a cause of action becoming statute barred) in which it would be surprising if the law of negligence could not be invoked.

Gaudron J concluded at [42]:

In my view, where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.

(3). McHugh J argued for an incremental approach. When the question is whether an existing principle is to be extended to a new fact situation, this should be decided upon policy grounds.81 The concept has its similarities with the thesis of Professor Bruce Feldthusen that all economic loss is not identical and can be divided up into distinct categories, each involving unique policy considerations.

At [97] McHugh J stated:

...Professor Feldthusen has said that relational economic loss exists "when the defendant damages property owned by a third party and the plaintiff thereby suffers economic loss because of some relationship that exists between the plaintiff and the third party.” However, this case is not a typical case of relational economic loss as the relationship between the third party (the Sparmons) and the plaintiff (the Perres) is purely a matter of physical proximity.

If a case did not come within one of these established categories, then the question is whether the harm suffered by the plaintiff a reasonably foreseeable result of the defendant’s act or omissions. If answered in the negative then there was no duty of

care. If in the affirmative, then it is necessary to turn to the analogous cases and subject the analysis to the incremental development based on those cases.

The rationale is indicated by the following questions: 82

1) Was the loss suffered by the members of the group reasonably foreseeable?
2) If yes to question 1, would the imposition of a duty of care impose an indeterminate liability on the plaintiff?
3) If no to question 2, would the imposition of a duty of care impose an unreasonable burden on the autonomy of the defendant?
4) If no to question 3, were the plaintiffs vulnerable to loss from the conduct of the defendant?
5) Did the defendant know that its conduct could cause harm to individuals such as the plaintiffs?

(4) Gummow J relied on the “salient features “of the case at [198]:

The question in the present case is whether the salient features of the matter gave rise to a duty of care owed by Apand. In determining whether the relationship is so close that the duty of care arises, attention is to be paid to the particular connections between the parties. Hence what McHugh J has called the “inherent indeterminacy” of the law of negligence in relation to the recovery of damages for purely economic loss. There is no simple formula which can mask the necessity for examination of the particular facts. That this is so is not a problem to be solved; rather, as Priestley JA put it in Avenhouse v Hornsby Shire Council, “it is a situation to be recognised”.

At [201] he said:

I prefer the approach taken by Stephen J in Caltex Oil. His Honour isolated a number of "salient features" which combined to constitute a sufficiently close relationship to give rise to a duty of care owed to Caltex for breach of which it might recover its purely economic loss. In Hill v Van Erp and Pyrenees Shire Council v Day, I favoured a similar approach, with allowance for the operation of appropriate "control mechanisms". In those two cases, the result was to sustain the existence of a duty of care.

Gummow J 83 regarded knowledge and control over the circumstances creating the risk of loss as salient features pointing towards a duty. Indeterminacy of liability created the necessity to invoke a control mechanism. This approach was favoured by Hayne and Callinan JJ, 84 the former placing emphasis on the identification of factors pointing towards a duty and control mechanisms providing an ordered development of the law. Callinan J supported the need for control mechanisms to

82 At para [133].
83 At para [202].
84 at para [333], [335], and [406].
limit liability where there was a risk of indeterminacy. Gleeson CJ, whilst agreeing with the reasons for finding a duty as per Gummow J, emphasised actual or constructive knowledge and foresight of an individual or ascertainable class and the vulnerability of the individual or class through circumstances such as reliance. There was a deal of commonality in the decision. The majority supported an incremental approach to the finding of a duty of care involving pure economic loss. Gleeson CJ, Gummow, Hayne and Callinan JJ also favoured the identification of relevant factors and control mechanisms, Kirby J argued for the three stage approach.

In this context, the basic determinants of duty of care which evolved out of the case are:

1. **Avoiding Indeterminacy**: the basic driver in rejecting the existence of a duty of care is that of exposing a defendant to indeterminate liability. Indeterminacy occurs when the liability flowing from the duty cannot be realistically calculated and it is not possible to limit the ripple effect of distant claimants. However, the High Court expanded the liability for pure economic loss by adopting constructive knowledge for a duty to arise and in being prepared to accept that a class will not be indeterminate even if the members cannot be identified accurately. In this context it is sufficient that the relevant group is ascertainable.

2. **Autonomy of individuals**. Providing there is a legitimate pursuit of commercial advantage, the law should seek to avoid unnecessarily burdening an individual’s freedom of action. In *Perre*, Apand already owed a duty of care to Sparnon, a finding that Apand also owed a duty to the Perre interests, did not impose any further burden. As McHugh states at [114]:

   *One of the central tenets of the common law is that a person is legally responsible for his or her choices. It is a corollary of that responsibility that a person is entitled to make those choices for him or her self without unjustifiable interference from others. In other words, the common law regards individuals as autonomous beings entitled to make, but responsible for, their own choices. The legal doctrines of duress, undue influence and criminal liability are premised on that view of the common law. In any organised society, however, individuals cannot have complete autonomy, for the good government of a society is impossible unless the sovereign power in that society has power in various circumstances to coerce the citizen. Nevertheless, the common law has generally sought to interfere with the autonomy of individuals only to the extent necessary for the maintenance of society. In the law of liability for economic loss, we have a notable example of the common law's concern for the autonomy of individuals.*

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85 at 12 – 15.
86 The limiting criteria in respect of any flow on effect in *Perre* was the 20km radius limit imposed in the West Australian legislation.
(3). **Defendant’s actual or constructive knowledge.** Knowledge is relevant to
defining indeterminacy, in defining a defendant’s culpability and to a lesser extent
the vulnerability of the plaintiff. Apan had a dominant position in the potato
industry. It must have known what the risk was and who would be harmed should an
incidence of potato bacterial wilt arise and the impact on the local growers under the
West Australian quarantine provisions. Hence, the knowledge extends to whom and
what class of person should be held in contemplation.

(4) **Vulnerability.** The vulnerability of the plaintiff to harm from the defendant's
conduct is relevant to imposing a duty. A plaintiff will fail to establish a duty of care
in cases of pure economic loss where imposing a duty of care exposes the defendant
to indeterminate liability or interferes with legitimate business activity. There is no
reason for imposing a duty on a defendant to protect the plaintiff from economic loss
where it would have been open to the plaintiffs to take steps to protect themselves
from loss. If the plaintiff has taken, or could have taken steps to protect itself from
the defendant's conduct and was not induced by the defendant's conduct from taking
such steps, then the law will not step in and impose a duty on the defendant to protect
the plaintiff from the risk of pure economic loss. \(^87\) Vulnerability can arise from
circumstances other than reliance as was indicated in the *Caltex Oil* case.\(^88\)

The more recent decision of the Victorian Supreme Court in *Johnson Tiles Pty Ltd
and Others v Esso Australia Pty Ltd and Others* \(^89\) provides important guidance to the
issue of liability for economic loss where there is a widespread, lengthy loss of
energy supplies. It arose out of the Longford Gas Plant explosion of 1998. The case
is analogous to the situation which was alluded to in the opening paragraph of this
Chapter in which a fault occurs on a transmission system giving rise to physical and
financial harm to third parties that have no contractual relationship with the
defendant. The case was concerned with two situations:

♦ Where plaintiffs suffered physical damage to their property and lost profits
  related to the physical damage. These losses are recoverable. The decision in

\(^{87}\) G.Hancock and A.Baron, “Pure Economic Loss: the implications of Perre’s Case”, Law Institute

\(^{88}\) *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad' (1976)* 136 CLR 529 at 555, 576-577, 593.

\(^{89}\) *(2003)* VSC 27.
Barrett Burston v Esso Australia\textsuperscript{90} concerning these claims was discussed earlier in Section 6.4 of this Chapter.

\begin{itemize}
  \item Where the loss was pure economic loss without accompanying physical damage to the plaintiff’s goods or property.
\end{itemize}

Esso Australia was in all but name the monopoly supplier of natural gas for Victoria with Melbourne particularly dependent on gas supplies. In September 1998 an explosion occurred at Esso’s No.1 Gas Plant at Longford, Gippsland, killing two men and injuring several others and as a consequence the gas supplies to Melbourne were unavailable for nearly two weeks. The class action which was mounted claimed in total approximately $500 million. The accident itself resulted in legal proceedings involving a Royal Commission of Inquiry\textsuperscript{91} which resulted in a criminal prosecution under the \textit{Occupational and Safety Act (Vic)} which found Esso criminally negligent.\textsuperscript{92}

The plaintiffs comprised industrial, commercial and domestic gas consumers and employees who were stood down due to the gas crisis. There were two possible causes of action against Esso Australia. The first was breach of contract by service retailers against Esso Australia, or consumers against gas retailers, and the second a tort claim for negligence. Esso had a contract with service retailers who in turn had negotiated or deemed contracts with end users. All such contracts between retailers and end users contained an exclusion clause which gave them immunity for events beyond reasonable control, including negligence of a third party. Consequently, the case was argued in tort on the basis of negligent conduct on the part of Esso Australia.

At the time of the Longford incident, Esso had been the sole supplier of gas to Melbourne for some 30 years and as such and at all relevant times there was no available alternative source of supply and were therefore dependent on a gas supply for the purpose of operating their businesses. In this context, the relationship between Esso and end users was so close and direct that Esso would have held them in contemplation when it failed to exercise reasonable care in operating and

\begin{footnotes}
\item[90] (2003) VSC 211.
\end{footnotes}
maintaining the Longford Plant. The proceedings in the Victorian Supreme Court rested on the proposition that Esso had a duty of care in respect of the plaintiffs and that Esso had breached that duty by their negligent conduct in the operation of the No.1 Longford Gas Plant. Esso did not dispute the fact that they were negligent in the operation of the gas plant and admitted that this negligence had caused a loss of gas supplies, but it argued that these admissions were irrelevant because it did not have a duty of care to end users in so far that the end user was at the end of a chain of contracts. The basic thrust of the plaintiffs’ argument was expressed as giving rise to the question:

whether the defendant Esso owed a duty to exercise reasonable skill and care in operating and controlling the Longford Plant, to avoid causing physical damage to property and or economic loss to the category of plaintiffs named in the submission?  

The court set out the following issues to be decided in the proceedings: 

1. Did the defendants owe a duty to exercise reasonable skill and care in designing, installing, operating and maintaining the Longford Plant to avoid –
   (i) physical damage to property of; and/or
   (ii) economic loss resulting from damage to property of; and/or
   (iii) economic loss which did not result from damage to property of –
       (a) the first plaintiff;
       (b) business users who were supplied with gas –
           leaving aside any fact relevant to the issues which are peculiar to the plaintiff or a particular group member?

2. Did the defendants owe a duty to exercise reasonable skill and care in designing, installing, operating and maintaining the Longford Plant to avoid –
   (i) physical damage to property of; and/or
   (ii) economic loss resulting from damage to property of; and/or
   (iii) economic loss which did not result from damage to property of -
       domestic users leaving aside any fact relevant to the issues which are peculiar to a particular group member?

3. Did the defendants owe a duty to exercise reasonable skill and care in designing, installing, operating and maintaining the Longford Plant to avoid stood down workers losing wages or annual leave entitlements as a result of being stood down from their employment by reason of the September stoppage, leaving aside any fact relevant to the issues which are peculiar to the second plaintiff or a particular group member?

4. Was the interruption to the gas supply from the Longford Plant on or after 25 September 1998 caused by the negligence of the defendants, their employees and/or agents?

5. Did the first and second plaintiffs and any group members who give evidence as sample group members, suffer some loss as a result of the interruption or cessation of the gas supply on or after 25 September 1998 (unquantified)?

6. If the defendants or either of them breached any duty of care to the plaintiffs and any group members who suffered damage from the interruption or cessation of the supply, was the negligence a cause of the damage suffered by –

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93 Plaintiffs final submissions.
94 at 44.
(i) the first plaintiff and/or the business user group members who are permitted to give evidence as sample group members;
(ii) the second plaintiff and/or the domestic user group members who are permitted to give evidence as sample group members;
(iii) the second plaintiff and/or any stood down worker group members who are permitted to give evidence as sample group members - or was the chain of causation broken by the act or omission of someone other than the defendants, leaving aside any fact relevant to the issues which are peculiar to any plaintiff or a particular group member?

The court acknowledged that the distinction between property loss and purely economic loss was not clear cut. The example given was that of food purchased to be cooked and sold in a restaurant. If it goes bad before it is cooked because there is no gas available, is it property damage or economic loss? If a person purchases food for consumption and it goes bad, does that person suffer property damage or economic loss? Gillard J stated:  

This inconsistency may appear strange and lacking in logic. However, the common law of negligence has not developed uniformly. The principles applicable to one category of common law negligence do not apply to another category; compare a negligent misstatement case with a manufacturer’s liability or nervous shock case. Also, even within a category, such as a claim for purely economic loss, compare the negligent misstatement case with the negligent preparation of a will. The law relating to negligence causing economic loss has developed slowly and cautiously.

It was held that Esso Australia did not owe any duty of care to avoid economic loss to the gas customers or stood down workers. Esso owed a duty of care to the business users to avoid causing them property damage. Consequently, the business users were entitled to recover from Esso their property damage and any economic loss consequential upon that property damage. Esso owed a duty of care to gas customers in the management and operation of its gas processing plant to avoid a stoppage of gas causing property damage, but on the other hand, did not owe a duty of care to avoid purely economic loss. Gillard J held that in relation to first line victims, gas customers, commercial, industrial and domestic users, there was no indeterminate liability. Esso had the means of knowledge of the number of users that would be harmed and would have been able to estimate the extent of losses. The period of loss was not indeterminate. In contrast, stood down workers were an indeterminate class of persons and the extent of liability was indeterminate. They were second line victims to whom no duty of care was owed. Gillard J (at [940] agreed that the reason for denying these claims was

95 at [56].
96 At para [1346].
That the burden of compensating anyone besides the primary casualty was feared to be unduly oppressive because most accidents are bound to entail repercussions, great or small, upon all with whom he had family, business or other valuable relation.\(^7\)

The Court previously accepted that the losses sustained were not indeterminate for first line victims, commercial, industrial and domestic gas users. Gillard J then (at [993]) proceeded to examine other factors of relevance, that is, assumption of responsibility, reliance, vulnerability, control and policy factors:

(i) In relation to the cessation of gas supply, Esso as the producer had relevant control of supply and this was directly related to losses suffered by customers (at [1009]).

(ii) Esso assumed responsibility to the gas customer for providing uninterrupted supply (at 10013]) but this was a qualified responsibility.

(iii) As to reliance and vulnerability (at [1347]):

\[\text{Gas customers are aware that there is no guarantee of uninterrupted supply, and that steps can be taken to avoid or minimise the risk of harm to their particular business or interest and it is their choice as to what they should do. Whilst the gas customer is vulnerable, gas customers should be in a position to assess their likely loss due to interruption of supply and to be able to take out insurance based upon a reasonable assessment of the likely harm and to factor the expense of the premium into the price of their products or services.}\]

(iv) Also relevant is the contractual matrix. Esso had a qualified contractual duty to supply gas to Gascor. Retail customers agreed to buy gas on terms which would not have provided compensation for failure to supply (at [1144]):

\[\text{A finding of general duty of care allowing recovery for purely economic loss would be inconsistent with the contractual obligation of Esso and the expectation of the gas customer. The recognition of such a duty of care goes further than Esso’s contractual obligation and...is inconsistent with it. It strikes at the very heart of the assumption of responsibility by Esso to supply gas to Gascor.}\]

Gillard J concluded that the obligations of the parties should be a matter of contracts and that tort law has no role in rewriting those contracts. In terms of economic efficiency, it was argued that where contracting parties had allocated liability, there was no warrant for interference by the law of torts to interfere and impose a different regime.

(v) The gas customer and the defendants are the beginning and end of the supply chain, joined by contracts which deal with the basis upon which the parties supply and purchase. The parties have rights, obligations and expectations

and they should be left to their contractual arrangements to determine their rights and duties (at [1347]).

(vi) Compensation for pure economic losses resulting from a failure of supply, is a matter for government rather than the law of torts (at [1347]):

_The State has, through Parliament, regulated all aspects of the gas industry and does so in the public interest. Supply of an essential service is very much the prerogative of government whose concern it is to ensure that the interests of the community. Consequently, the State should be the one to decide, after proper consultation, investigation and consideration, whether the gas producer should be liable to the community for a stoppage of supply. In this context, the State is in the best position to strike a reasonable balance between the rights of the community, the rights of the producer and the demands of society._

His Honour concluded that no claims were available for pure economic losses suffered by commercial, industrial and domestic users. The law of torts should not intrude into the area of purely economic loss in the circumstances of this case, involving as it does potential claimants numbering up to some 43,000.

The consequence is that at common law a large number of small end users are left without remedy and are expected to take precautions against those risks. Where foreseeable damage to property or goods is sustained, there is recovery as in the case of Barrett Burston Pty Ltd (lost materials and related profits). Recovery of economic losses under the _Caltex_ case is likely to be extremely limited and even then is limited in the type of damages that are recoverable, in that case the costs of setting up alternative transport for transporting the refined product to its terminal.

### 6.6 Discussion and Conclusions

The introductory statement to this Chapter instanced the negligence of a transmission line provider negligently causing a major blackout. Where the plaintiff does not suffer property damage, there is no presumptive rule of liability in circumstances involving relational pure economic loss.

Where there is pure economic loss, small end users will inevitably be disadvantaged. The _Caltex Oil_ and _Perre_ cases are exceptional and unlikely to be replicated in the circumstances of a power blackout. However, based on the criteria set out in

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98 _Caltex Oil (Aust) Pty Ltd v The Dredge ‘Willemstad’_ (1976) 36 CLR 529.
Perre v Apand, in very limited circumstances a claim might be available against service providers as exemplified by the following incident.

An interruption of power supplies occurred as the result of tripping of a 33000 volt feeder out of a 132000 volt substation and interrupting supply to a main city substation. The circumstances associated with the interruption are somewhat complex but it was likely that the service provider has been negligent. In simple terms, the cause of the power failure was that an underground 11000 volt cable had been damaged by a hole borer, the fault had then translated to a main feeder fault as the result of the malfunctioning of the network protection system. The interruption lasted for some 5 hours affecting seven small businesses. Claims were made by four businesses in respect of business (pure economic) losses and three as the result of economic loss and equipment failure. The boring of the hole was carried out by a subsidiary company of the power utility responsible for system design, construction and maintenance. The power company denied the various claims on the basis that they were beyond their reasonable control as set out in the terms of the electricity supply contract.  

It could be argued that on the basis of the Perre case:

1. The class of affected electricity interests was ascertainable. In Perre the various groupings of Perre interests conducted their respective business operations within a radius of 20 km of the affected Sparnon property. The Court did not consider it necessary to identify in detail those affected by the conduct at issue or where they were located. Furthermore, the Perre interests could have insured for economic loss as the result of their inability to export their potato crop to West Australia because of bacterial blight on the Sparnon property. In relation to the power failure, the small commercial end users affected would have found it difficult to protect themselves from the harm that befell them. Like the Perre interests they could have insured against economic loss to cover an interruption to power supplies, or installed emergency power equipment. Like business users in the Esso case involving loss of gas supply, the power company does not guarantee

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100 See the limiting terms and exclusion clauses of the standard form connection contract discussed in s.4.3 Chapter 4 and s.71 Trade Practices Act 1974 discussed in Chapter 3.
But unlike gas consumers in the *Esso* case, it is not a case of widespread loss of supply affecting very large groups of both domestic and business consumers where the Courts are likely to leave economic losses where they fall. It is arguable that in this context, that although electricity customers should be regarded as “vulnerable” as in *Perre*. Although a customer might be able to set up alternatives for lack of power supply, it would be unreasonable to require them to undertake significant expense in putting in place alternatives against a future, unknown but foreseeable risk.

2. **The relationship and circumstances governing the parties.** The power utility construction company should have had reasonable regard for the interests of the claimants when engaged in boring the hole. In *Perre* the Court indicated that actual or constructive knowledge is relevant to a defendant’s culpability and the vulnerability of the plaintiff. The knowledge extends to whom and what class of person should be held in contemplation. Consequently, a service provider must consider potential sources of information which indicate a class of potentially vulnerable plaintiffs. In this context it was pointed out in *Perre* that it is sufficient to know who may be at risk but not necessarily to specifically identify them.

3. **The autonomy of commercial interests.** In *Perre*, Apand already owed a duty of care to Sparnon. Hence, the Court found it did not impose any further burden on Apand by finding that they owed a duty to the Perre interests and as such the duty of care did not interfere with the defendant’s commercial autonomy. The power company similarly would have already owed a duty to those whose property was damaged.

The above demonstrates that applying the limiting criteria enunciated in the *Perre* decision, a small end commercial user (in this set of circumstances) who suffers pure economic loss as a consequence of the negligent act of a provider and who can be reasonably identified, may be able to recover damages for economic losses.

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101 as above.
Johnson Tiles & Others\textsuperscript{102} is an example of the application of the basic principles of relational economic loss applied to a situation involving a loss of energy supplies to a large population of customers over a sustained period of time. Industrial and commercial interests who suffered property damage were able to recover damages. Those plaintiffs which the court considered to have simply suffered a deprivation of income and no property damage did not. In his concluding statement, Gillard J stated:\textsuperscript{103}

\begin{quote}
Esso owed a duty of care to gas customers in the management and operation of its gas processing plant to avoid stoppage of gas causing property damage, but on the other hand did not owe a duty of care to avoid pure economic loss.
\end{quote}

These issues were also raised in February 1998 when the central business district of the City of Auckland was subject to a loss of power supplies which lasted some five weeks. The loss was due to the failure of four 110000 volt cables. The New Zealand Government instituted a Ministerial Inquiry which found that the service provider, Mercury Energy Limited, the distributor and retailer of electricity supply, was derelict in their duty to ensure the proper operation and management of the system. Liability for negligence was not tested in law. Instead the government imposed on the service provider a duty to compensate those who had suffered economic loss.\textsuperscript{104} This reflects Gillard J’s view in Johnson Tiles that where there is a mass loss of supply the decision to compensate rests with the state to determine what is best for the community.

This review of authorities indicates a very narrow range of cases where a small end user may be able to recover economic loss resulting from a defendant’s negligence. Where economic loss is associated with property damage, it is recoverable. But in other instances, a small end user is very unlikely to bring themselves within the ambit of such authorities as Caltex Oil and Perre. The vulnerability test utilised in Perre and in the Esso cases poses real obstacles for small consumers. Where a very large utility with enormous economic resources negligently causes economic losses to a limited number of foreseeably injured small retail consumers, a duty of care should not be denied on the ground that a small consumer could have put in place

\footnotesize
\textsuperscript{102} [2003] VSC 27.
\textsuperscript{103} At [137].
\textsuperscript{104} No details are available as to who received compensation other than $NZ 20 million paid by Mercury Energy Ltd.
expensive alternative energy sources to compensate for the risk of loss of supply at some possible future point of time. It is argued that such a burden should not be imposed on small retail customers.

In the next Chapter, the role of the industry Energy Water and Gas Ombudsman and its capacity to provide compensation for a small end user of electricity is examined.
Chapter 7: THE ROLE OF THE OMBUDSMAN

7.1 Introduction

The objective of this chapter is to examine the role of the New South Wales Energy, and Water Ombudsman (EWON) scheme in the resolution of disputes between a network service provider and aggrieved small end users. The object of the scheme is to provide an expeditious resolution to a dispute at no cost to the small end user. The claimant is not bound by determinations under the scheme and can seek to resolve the matter by litigation. As will be indicated, the jurisdiction of the Ombudsman is essentially limited to small claims by small retail customers. Awards of compensation are restricted to $20,000, with an upper limit of $50,000 with agreement of the parties. If the claimant accepts the Ombudsman’s decision this releases any further claim against the service provider. This has the effect that a small end user with significant losses will need to pursue other remedies.

The Chapter examines the functions and powers vested in an Ombudsman and reviews the *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd.* case which dealt with the critical issue of the Ombudsman’s power to make a binding decision in a dispute between a scheme member and a claimant. It will also examine the Ombudsman’s decision awarding compensation to a small business operator.

7.2 Articles of Association

The memorandum and articles of association of EWON state as its objectives:

> The establishment of an energy and water industries ombudsman scheme and the appointment of an Ombudsman to receive, investigate and resolve, among other matters, complaints about the provision or supply of such services by a member to a customer, or persons who may not be customers, but who may have been aggrieved by the actions of the licensee.

The articles provide for a Constitution to which each member of EWON agrees to be bound by the terms of the Constitution and any future modifications to the Constitution. The Constitution contains a scheme for complaint or dispute resolution between a customer or an aggrieved person and a regulatory licensed network service provider. To this end, the scheme established under the

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1. *Electricity Supply Act 1995 (NSW)*, s.96B(2)(g)

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Constitution sets out the functions, jurisdiction, procedures and powers of the Ombudsman. Small customers may apply to a network provider or a retailer for a review of a decision the provider makes in relation to any matter arising under the customer supply or connection contract. Retailers are obliged to inform customers in writing upon receiving a complaint that the customer has a right to raise the complaint to a higher level in the company, and if not satisfied, the customer may refer the complaint to the Energy and Water Ombudsman. During the financial year 2004 – 2005 the Energy and Water Ombudsman investigated 8703 complaints from gas, water and electricity customers of which 8259 were resolved. By far the largest number of complaints related to electricity. In relation to electricity complaints:

<table>
<thead>
<tr>
<th></th>
<th>Electricity %</th>
<th>Gas %</th>
<th>Water %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supply</td>
<td>6</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>retail competition</td>
<td>8</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>customer service</td>
<td>10</td>
<td>15</td>
<td>12</td>
</tr>
<tr>
<td>Billing</td>
<td>24</td>
<td>33</td>
<td>26</td>
</tr>
<tr>
<td>Credit</td>
<td>45</td>
<td>37</td>
<td>10</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
<td>10</td>
<td>34</td>
</tr>
</tbody>
</table>

Overall, 75% of energy complaints were related to retail issues with 22% concerned with network distribution issues, eg quality, reliability or provision of supply.

### 7.3 Statutory Powers

The Energy, Water and Gas Ombudsman (NSW) is a company limited by guarantee established to administer a scheme with respect to the energy and water service industries inclusive of gas. EWON Ltd has all the powers set out in s.124 of the *Corporations Act 2001*. A licensed distribution network service provider is a subscriber and is obligated under statute to be member of EWON Ltd. The statutory requirements are set out in the following provisions of the *Electricity Supply Act 1995 (NSW)*:

**Section 96** A small retail customer may apply to a network provider or a retailer for a review of a decision of the provider in relation to any matter arising under the

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3 EWON Annual Report 2004 – 2005 pp. 16-19; 75% were electricity claims.

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customer supply or connection contract or any other matter prescribed by the Regulations. They may also apply to a service provider for a review of a decision to classify the person as being or as not being a small retail customer. Network service providers are required by the terms of their licence to put in place a process of complaints handling based on the *Australian Standard on Complaints Handling (AS4269)*. Retailers are obliged to inform a customer in writing, upon receiving a complaint, that the customer has a right to raise the complaint to a higher level in the company, and if still not satisfied, the customer may refer the complaint to the Energy and Water Ombudsman (EWON Ltd).

Section 96A allows a small retail customer, and any other person of a class prescribed by the regulations to apply to the Electricity Industry Ombudsman under the approved ombudsman scheme for review of a decision in a dispute or complaint made to the service provider. It does not affect any jurisdiction of the Consumer, Trader and Tenancy Tribunal (NSW). Persons who may apply for a review of a decision are:

- A small retail customer;
- A tenant of residential premises who is supplied with electricity by a landlord as defined in Section 72 (3) of the Act, concerning a decision of the landlord relating to the supply of electricity or the provision of connection services;
- A person to whom connection services are provided, or is supplied with power, under an arrangement exempted from a provision of the Act under clause 66 or 68 (other than clause 68 (2) (e) or (f)) and who occupies residential premises and whose electricity consumption is measured by a separate meter; (d)
- A small retail customer who is subject to a new occupant supply arrangement or an exempt last resort arrangement.
- A small retail customer in respect of a decision of the supplier under a previous customer supply contract between the customer and the supplier, if that matter arose not more than 12 months before the application was made.
- A small retail customer in respect of a decision of the service provider under a previous customer connection contract between the customer and the
service provider, if that matter arose not more than 12 months before the application was made.

If a dispute or complaint involving an electricity marketeer, or a landlord arises, and such persons fail to comply with a decision of the Ombudsman then it constitutes an offence under the Act.\(^5\) All copies of public reports issued by the Ombudsman are to be given to the Minister, and The Minister must be notified of any changes in the policies and procedures to be adopted in connection with the ombudsman scheme.

Section 96 B requires that the ombudsman scheme be approved by the Minister. The Ombudsman is required to deal with disputes and complaints by small retail customers under customer connection contracts, customer supply contracts; complaints about electricity marketeers and any other disputes and complaints prescribed by regulation whether or not under contract involving a small end customer. It is not clear from the Act, regulations or Constitution of EWON whether complainants must have an existing or deemed contractual relationship with the provider member. The Electricity Supply Act 1995, s.96B(1)(a) refers to “disputes and complaints under customer” connection and supply contracts “entered into with small retail customers”. If the Ombudsman’s jurisdiction it limited to claims by customers in an existing or deemed contractual relationship, (see chapter 4), it would exclude, for example, a claim by a customer’s spouse, partner, child or lodger for damaged equipment arising from a negligently caused power surge or a claim by a small business not separately metered. This would seem unduly restrictive in the light of the fact that a tenant may be able to make a claim.\(^6\)

Code participants licensed within the jurisdiction must be members of the scheme and as such have agreed to be bound by the decisions of the Ombudsman. Membership is accessible to all potential members and gives representation to all members in relation to the scheme's governing body. The Ombudsman operates independently of all scheme members. The scheme is accessible to small retail customers and other customers prescribed by the Electricity Supply (General) Code participants licensed within the jurisdiction must be members of the scheme and as such have agreed to be bound by the decisions of the Ombudsman. Membership is accessible to all potential members and gives representation to all members in relation to the scheme's governing body. The Ombudsman operates independently of all scheme members. The scheme is accessible to small retail customers and other customers prescribed by the Electricity Supply (General) Code participants licensed within the jurisdiction must be members of the scheme and as such have agreed to be bound by the decisions of the Ombudsman. Membership is accessible to all potential members and gives representation to all members in relation to the scheme's governing body. The Ombudsman operates independently of all scheme members. The scheme is accessible to small retail customers and other customers prescribed by the Electricity Supply (General)

\(^5\) Section 96C(b).
\(^6\) Electricity Supply (General Regulation) 2001 (NSW) reg 50(1)(b). It might also limit claims by tenants in e.g. a supermarket or industrial complex where there is no separate metering, see Electricity Supply Act 1975 (NSW) ss.72(3),96A.
Regulations 2001. It applies to all disputes and complaints arising under customer contracts relating to small customers and to any prescribed persons. There is no charge and customers who submit a complaint can choose whether or not they wish to be bound by a determination. The ombudsman can refer disputes or complaints to other forums if considered appropriate. The Ombudsman has to inform the Minister of substantial breaches of licence conditions, the Marketing Code of Conduct or of the Act.

7.4 Functions of the Ombudsman

The functions of the Ombudsman are to receive, to investigate and to facilitate the resolution of:

1) complaints as to the provisions or supply of (or the failure to provide or supply) electricity services by a member to a customer as required by a licence or agreement;
2) billing disputes;
3) the administration of credit and payment services in the circumstances of a particular customer;
4) disconnection and security deposit complaints;
5) complaints from owners or occupiers of land or other property about the way in which a member has exercised its statutory powers in relation to that particular land or other property or in relation to neighbouring land or other property;
6) complaints referred by the Office in relation to the conduct of a member's electricity business; and
7) such other complaints as may by agreement with the Ombudsman and the complainant, be referred to the Ombudsman by a member.

Complaints may be made to the Ombudsman by consumers of energy services and by persons directly affected by the provision of supply of (or the failure to provide or supply) such services provided by scheme members. Complaints may be made to the Ombudsman on behalf of a complainant by an authorised representative of the complainant. The focus of the scheme is on individual complaints which may be oral or in writing. A complaint must have arisen from events which became known to the

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7 EWON Constitution s 3.
complainant less than one (1) year prior to the complaint being lodged. The Ombudsman has discretion to investigate any complaint arising from events prior to re-structuring. The Ombudsman has jurisdiction to investigate and determine complaints involving the conduct of members’ employees, servants, officers, contractors or agents, and may make a determination binding the member in relation to such complaints.

7.5. **Jurisdiction of the Ombudsman**

The jurisdiction of the Ombudsman extends to the functions enumerated but does not extend to the following:

1. Setting of prices or tariffs or determining price structures.
2. Matters which are within the functions of the Independent Pricing and Regulatory Tribunal (IPART),
3. Commercial activities which are outside the scope of the member's licence.
4. The content of Government policies, legislation, licences and codes.
5. Complaints which are specifically under consideration by any court or tribunal, or which have been considered by any of those bodies previously. Participants are encouraged not to initiate legal proceedings whilst a matter is being actively considered by the Ombudsman.
6. Any matter specifically required by legislation (including subordinate legislation or rules), codes, licences, and orders made in accordance with the law.
7. Customer contributions to the cost of capital works.
8. Complaints or disputes between any Members of the Company.

7.6. **Procedures of the Ombudsman**

In consultation with the Council, the Ombudsman is responsible for developing procedures which include the following.

1. The Ombudsman on receiving a complaint, will verify with an officer designated by the member concerned whether the member has had the opportunity to consider the complaint:
The Ombudsman may proceed to investigate the complaint only after the member has had this opportunity, subject to reasonable time limits to avoid undue delay in dealing with the complaint, and the member has been notified that the Ombudsman intends to investigate the complaint.

Upon receiving notification of an investigation by the Ombudsman, the member concerned shall provide to the Ombudsman all documentation relevant to the complaint other than documentation containing confidential information of a third party, who despite the reasonable efforts of the member, has refused to consent to disclosure of the information to the Ombudsman. If a dispute arises in relation to the provision of documents under this clause, the Ombudsman in his or her absolute discretion is to determine whether the documents or any of them are to be produced;

With respect to all information concerning or relating to a complaint, the Ombudsman must act in accordance with accepted privacy principles. In complying with any subpoena for production of documents, the Ombudsman must notify the person who has provided the information which is the subject of the subpoena so that the person concerned is afforded the opportunity to appear in court to oppose production of the documents.

7.7. **Powers of the Ombudsman**

Set out below is the Section 6 clause of the Constitution of the Energy and Water Ombudsman (NSW) Scheme which defines the binding powers of the NSW Ombudsman in a determination between a service provider and a claimant.

### 6. POWERS OF THE OMBUDSMAN

6.1 After completion of an investigation and in the absence of a conciliated settlement of a complaint, the Ombudsman shall resolve a complaint:

(a)  
(i) by making a determination that the member the subject of investigation pay compensation to a complainant;  
(ii) by directing a member to provide an energy or water service;  
(iii) by directing a member to amend, or not to impose, a charge in relation to a service;  
(iv) by directing a member to supply goods or services the subject of the complaint or undertake any necessary corrective or other work to resolve the complaint;  
(v) by directing a member to make an appropriate correction, deletion or addition to a record;
(vi) by directing a member to attach to a record a statement provided by the complainant of a correction, deletion or addition sought by the complainant, and/or
(vii) by directing a member to do, not to do, or to cease doing, an act;

provided that the total of such determinations or directions in relation to an individual complaint, or in relation to claims against any one member as a result of any one event or series of related contemporaneous events, does not exceed in value $20,000; or

(b) by dismissing the complaint.

In addition to the above, the Ombudsman, with the consent of the member, may make a determination or direction the value of which exceeds $20,000 but does not exceed $50,000.

6.2 All decisions by the Ombudsman under paragraph 6.1 shall be automatically binding upon members. However, the complainant may elect whether or not to accept the decision of the Ombudsman within twenty-one (21) days of the Ombudsman’s decision. If the complainant accepts the decision of the Ombudsman, the complainant shall fully release the member from all claims, actions etc., in relation to the complaint. In the event that the complainant does not accept the decision of the Ombudsman, the complainant may pursue their remedies in any other forum the complainant may choose and the member is then fully released from the Ombudsman’s decision.

6.3 In exercising the powers of determination or recommendation under paragraph 6.1, the Ombudsman shall not make a determination or recommendation which, when given effect, would involve a member contravening any code, licence, regulation or law of the Commonwealth or of a State. Where there is a dispute between the Ombudsman and a member about the effect of the law or of regulatory instruments, the Ombudsman may refer the matter to Senior Counsel or the courts for authoritative advice or determination, as the case may be, at the member’s expense.

Note: There may be variations in the rules applying in individual states. For example, Clause 4.2(g) of the Constitution of the Electricity Industry Ombudsman, Victoria, a member is not liable for: “events beyond the reasonable control of a participating company and their consequences, bearing in mind current law and reasonable and relevant industry practice”. There is no similar provision in New South Wales.

The Ombudsman must provide a complainant and members with written reasons in support of a decision. Furthermore, the Ombudsman has the discretionary power to decline to investigate a complaint if in the opinion of the Ombudsman:

(1) the complaint is frivolous or vexatious or was not made in good faith;
(2) the complainant does not have a sufficient interest in the subject matter of the complaint;
(3) an investigation, or further investigation, is not warranted;
(4) or the complaint is more appropriately or effectively dealt with by any other body.

The nature and extent of the Ombudsman’s jurisdiction was examined in the Victorian decision of Citipower v Electricity Industry Ombudsman (Vic) Ltd to which
we now turn. Again it should also be noted that the Victorian provisions differ from the NSW provisions.

7.8 CitiPower v Electricity Industry Ombudsman (Vic) Ltd 12

7.8.1 Facts and Determination

In CitiPower v Electricity Industry Ombudsman (Vic) Ltd, three customer claims were submitted to the Ombudsman in 1997 for resolution. Each of the claims arose from an interruption to power supply that occurred on 14 November 1996. The first claimant alleged that as the result of a power surge irreparable damage was caused to a CD player and claimed compensation from Citipower for $3,940. The second claimant was the owner of a car wash business alleging that as a result of the same interruption to the power supply its car-wash programmer system was damaged and claimed compensation of $2,432.25. The third claimant alleged that as a result of this same power failure damage occurred to a computer system and claimed the sum of $3,630.00.

It was conceded by Citipower that an interruption to electricity supply of 20 minutes occurred on 14 November 1996, but at the time of the interruption the power system was under the control of the Victorian Power Exchange and maintained by GPU PowerNet. Consequently, Citipower contended it was not party to the interruption. An expert opinion from an independent electrical engineer was provided to the Ombudsman. It confirmed that Citipower had no control over the interruption which was caused by GPU PowerNet.

Figure 7.1 illustrates the contractual relationships. The claimants (A) had a deemed contract with Citipower (B) who have a contract with the Victorian Power Exchange (C). GPU PowerNet is part of (C) in so far that they had the care of the transmission system but not its control.

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Although the Ombudsman agreed that the interruption to the power supply occurred as a result of an operational error by a GPU PowerNet employee, the Ombudsman directed that Citipower pay the respective amounts claimed. Separate written reasons were given for each matter as findings of fact as follows.

1) An interruption to electricity supply did occur for period of 20 minutes on 14 November 1996 to each of the claimant's place of supply and each claimant suffered damage wholly or largely as claimed.

2) The interruption occurred as a result of the negligence of an employee of GPU PowerNet, the party responsible for maintenance of the power supply. The employee being contracted to the Victorian Power Exchange, the party who controlled power supplies.

3) Citipower had no control over the interruption to power supplies and Citipower was not directly responsible for the damage suffered by each of the claimants.

4) The Ombudsman could not determine a complaint against the Victorian Power Exchange as that body was not a member of the Ombudsman scheme.  

5) As the continuity of supply was a matter between Citipower and the Victorian Power Exchange, Citipower was able to claim under its contract with the Victorian Power Exchange for damage suffered. Consequently, Citipower carried responsibility for the damage suffered by each claimant.

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Victoria Power Exchange functions as the transmission system operations manager.
6) Consumers (including the claimants) were entitled to the benefit of an implied contract with Citipower which was to supply power and to make appropriate arrangements to maintain the supply of electricity to such consumers. 

**Note:** There is no indication in the decision as to whether the supply contracts between Citipower and the claimants contained an exclusion of liability clause.\(^{14}\)

### 7.8.2 Argument by Citipower

Senior Counsel for Citipower sought declarations and orders that each of the three determinations of the Ombudsman were made:

1. beyond the powers vested in the Ombudsman; and
2. in breach of the contract constituted by the memorandum and Articles of Association of the Ombudsman scheme and the Constitution and as such the Ombudsman acted beyond contractual power and therefore Citipower was not bound by the determination.

It was not contended that the Ombudsman lacked jurisdiction to entertain such complaints. Rather, in determining that the interruption was not an event within the control of Citipower under the constitution, the Ombudsman no longer had jurisdiction. In this respect, the Ombudsman erred in law in the interpretation and application of the Ombudsman’s powers. Once the Ombudsman had found the power outage was not within the control of Citipower in that it lay with the Victorian Power Exchange, then it was excluded from the jurisdiction as an event beyond the "reasonable control" of Citipower and relevant industry practice.

### 7.8.3 Argument by Victorian Electricity Industry Ombudsman

The Ombudsman argued that it had jurisdiction to make these awards. Although Citipower was not directly responsible for the power outage, it was nevertheless responsible as the interruption of supply was an event which was within the reasonable control of Citipower to prevent. In each of the decisions the Ombudsman made (1) it was the responsibility of Citipower to make appropriate arrangements to maintain the supply of electricity to customers premises; and (2) the failure of continuity of supply was a matter between Citipower and the Victorian Power Exchange.
Consequently, the Ombudsman had characterised the event as one within the reasonable control of Citipower (albeit not direct control) and that, accordingly, the Ombudsman had jurisdiction to proceed to determine each of the three claims. Furthermore, that upon the Ombudsman finding that Citipower bore responsibility to ensure that an appropriate system was in place, the Ombudsman was entitled to bring to account its own knowledge about the use of system agreements within the electricity industry and about the ability of Citipower to make appropriate arrangements to maintain the supply of electricity to customers. The Ombudsman in making a decision had received a report from Citipower that highlighted the ease with which appropriate arrangements could have been made to maintain electricity supply and, to ensure that the loss of electricity supply did not take place.\(^{15}\) In addition the Ombudsman had the benefit of a further report arising from a joint meeting between Citipower, the Victorian Power Exchange and GPU PowerNet that showed how Citipower could have put in place appropriate arrangements to avoid the interruption to supply.

7.8.4 Decision

The question which the court first considered was whether it should interfere with the determination of the Ombudsman? In her decision Warren J, relied on Tagdell JA, in the case *Australian Football League Ltd v Carlton Football Club Ltd*\(^ {16}\)

Where the parties have agreed to have their disputes decided by domestic tribunals designated for the purpose, the courts have been in the habit of respecting the agreement or, one might say, not countenancing a breach of it by one party wishing to desert it and to resort to the civil courts for resolution of a dispute that the tribunal was designed to decide.

"..... The courts have not taken the view that a privately-founded, privately-managed organisation - is necessarily to be subject to control by the courts. That is not to say that such an organisation may treat itself as above the law: it is merely to acknowledge that the courts will not discourage private organisations from ordering their own affairs within acceptable limits. If the courts are given statutory jurisdiction to entertain a complaint about a decision of a private tribunal they will of course entertain it if asked or if the statute requires but, equally obviously, they will confine themselves to exercising only the jurisdiction which the statute confers."

In this context, the Ombudsman is treated as a "*domestic tribunal*". Where parties have agreed to have their disputes decided by domestic tribunals designated for the purpose, the courts have respected the agreement. The parties had bound themselves voluntarily to a contract constituted by the Constitution of the Electricity Industry

\(^{14}\) See Thesis Chapter 4.

\(^{15}\) This is not necessarily equivalent to a negligent failure to supply.

\(^{16}\) (1998) 2 VR 546 at 569.
Ombudsman (Victoria) Ltd\(^{17}\) and that vested jurisdiction for the determination of complaints in the Ombudsman. Such a determination is binding provided that it is consistent with that contract. Courts are reluctant to interfere with these binding determinations but can do so. Warren J\(^{18}\) referred to the judgment of Tadgell JA in *Australian Football League Ltd v Carlton Football Club Ltd*:\(^{19}\)

...... the courts have been disposed to interfere in a limited way with decisions of private or domestic tribunals in order to protect private rights that have been adjudged to deserve protection, including rights in property. The concept of property has been broadly interpreted for this purpose and, in cases within that category, I believe that there is no decision of a private or domestic tribunal with which the courts will refuse to interfere if interference be considered necessary for the attainment of justice. If a tribunal's decision purports to owe its binding quality, for example, to a contract or a trust the courts, exercising jurisdiction in respect of contracts and trusts, will recognise that the making of the decision is to be consonant with the contract or trust before it is binding.

Citipower had argued that once the Ombudsman found no fault on the part of Citipower that finding constituted a finding that the relevant event was for the purposes of Section 3.4.2(g) “events beyond the reasonable control of a participating Citipower as a member company and their consequences, bearing in mind current law and reasonable and relevant industry practice.” Consequently, it was not open to the Ombudsman to take account “current law and reasonable and relevant industry practice”. The court found that this construction was inappropriate and distorted the clear intention of the parties in committing themselves to be bound by the terms of the Constitution. To dissect the sub-clause was erroneous, in that the Constitution does not contemplate two separate findings for the purposes of satisfying the provision. The court concluded that it would not interfere with the determination of the Ombudsman based on the following reasons.

(a) Citipower and the Ombudsman were contractually bound by the Constitution.

(b) There was a well established principle that a tribunal such as the Ombudsman must perform due inquiry based on the task designed for it.

(c) There was no aspect of the determination of the ombudsman that could be regarded as in error. The Ombudsman had considered the facts and took account of current law, the legal obligations between Citipower and the Victorian Power Exchange, and also aspects of current industry practice, guidelines and arrangements.\(^{20}\)

\(^{17}\) Articles of Association.

\(^{18}\) See *Citipower v EIOV* at paras [18],[20] and [25].

\(^{19}\) (1998) 2 VR 546 at 569.

\(^{20}\) Jurisdiction of the Ombudsman: Section 3, clause 4.2(g).
(d) That the interruption to power supply was an event about which Citipower could have done something and that there was nothing about the determinations that could lead to the conclusion that the decision was irrational.

Summary. The Ombudsman scheme is concerned with disputes and complaints arising under customer connection contracts and customer supply contracts relating to small retail customers. In relation to the Victorian scheme, the Citipower decision suggests that the Ombudsman is not restricted to awarding compensation only in those cases where a claim would necessarily succeed according to law. The Ombudsman is also entitled to take into account current industry practice, agreements and guidelines in coming to a decision. It is also notable that the exclusion of “events beyond … reasonable control” may be broader than the negligence test. That is, a provider might be liable even if the individual provider has not been negligent and was not directly responsible for the entity that inflicted the harm.

The Constitution governing the operation of EWON in New South Wales is not identical. The Ombudsman is charged in clause 5.1 with handling complaints in “a fair, just, informal and expeditious manner” with no equivalent to the Victorian clause 4.2(g) (above). It is arguable that this does not limit the Ombudsman to ordering compensation only where the complainant would have a compensation claim under the law. For example, if contractual exclusion clauses limited liability to $5,000 for all claims the customer may make in any one calendar year, what would be the point of jurisdiction allowing compensation awards of $20,000? Relevant to the determination of what claims should be awarded compensation should be whether exclusion clauses in supply and connection contracts are “fair” and “just” in those circumstances. It is arguable that it is not fair and just for a

21 Electricity Supply Act 1995 (NSW) s.96B(2)(f). Small retail customers are defined in s.92.
22 This decision preceded the litigation concerning strict liability under the Trade Practices Act 1974 (Cth), s.71, see Electricity Supply Association of Australia v Australian Competition and Consumer Commission [2001] FCA 1296 discussed chapter 3.3.
23 Clause 6.3 of the EWON Constitution prevents the Ombudsman from awarding compensation in contravention of any code, licence, regulation or law of the Commonwealth or State but this is not the same as saying that compensation can only be awarded when the claim would be available under the law.
24 See chapter 4 p.81 for such a clause.
consumer to be bound by an exclusion clause of which the consumer was unaware and in relation to which there was no real power of negotiation.  

How then does the power of the Ombudsman to award compensation fit in with the principles of negligent conduct set out in chapters 5 (negligence) and 6 (economic loss)? It is arguable that the broader mandate of the Ombudsman may permit an award of compensation when it is not clear whether a claim would have been available under the general law. For example, it may have been that an exclusion of liability clause prevented a claim for negligence. In New South Wales, the issue is what is “fair” and “just”? On the one hand it could be argued that it is not fair and just that thousands of claims for economic loss be compensated every time there is an interruption to supply. This reflects the general common law rule that there should be no recovery for economic loss unconnected with property damage, see chapter 6. Nor would it seem fair and just that a provider should be liable for failure to supply in situations of natural disaster such as flooding, cyclone, earthquake, bushfires and the like. The reality is that the limitations on compensation would, in any event, prevent large numbers of claims. The proviso to the NSW clause 6.1(a) provides that the total amount in relation to an individual complaint “or in relation to claims against any one member as a result of any one event or series of related contemporaneous events, does not exceed in value $20,000” or in the final proviso to clause 6(1) it may be extended to $50,000 with the consent of the member. Read restrictively it would limit all claims arising out of a single event to $20,000 ($50,000 with member consent). These limits appear especially restrictive in cases where a substantial number of small users have sustained damage to equipment resulting from a single event and seek to recover compensation for that damage.

Would the Ombudsman be able to make an order for compensation for a small end user who has suffered economic loss unrelated to property damage? Would it be “fair” and “just” to do so? This type of loss, although generally not recoverable under the law of negligence, might be recoverable under the Trade Practices Act 1974 (Cth), s.71 (goods are not fit for purpose). Strict liability under this provision overrides contractual exclusion clauses, see Chapter 3.3. However, the implied

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25 See discussion in 4.3.2.
warranty under s. 71, only applies where there has been defective supply as distinct from a failure of supply. If liability existed under the *Trade Practices Act*, there would seem to be little argument that it is “fair” and “just” to order compensation where the legislature has provided a remedy. Even if legal liability is unclear, it is arguable that the Ombudsman is entitled (as in Victoria) to take into account current procedures and practices in determining whether compensation should be awarded. This is likely to result in no award of compensation where there has been a failure to supply except to the extent where guidelines provide some very small amounts for loss of supply. 26

### 7.9 Case Study

The case study has been extracted from the 2004 - 2005 Annual Report of the NSW Energy and Water Ombudsman. 27 The case illustrates a small claim submitted under the Ombudsman Scheme for determination.

“Dan runs an entertainment venue which was due to stage a special one-off event. He had invested considerable money in sponsorship and promotions, as well as having booked extra staff for the night. During the afternoon of the scheduled event, there was an outage which affected a number of customers in the area. Dan was very concerned about the success of the event that evening, and rang the energy company a few times to inquire about the likelihood of further outages. He explained his situation and his need for accurate information to guide his decision about whether to go ahead or cancel the event.

Around 6pm. Dan contacted the call centre and was advised there was an outage planned for 10.30pm to allow urgent repair work to be done.. Dan left his contact details in case the situation changed, but decided to cancel the event in view of the company’s advice that the outage would occur during the peak time for the venue. However, the planned outage did not occur at the time he was advised. Instead, it happened in the early hours of the following day which meant Dan could have opened for business after all and held the complete event.

Dan was very upset, mostly because he had been in contact with the call centre a number of times throughout the day and had specifically asked the company to contact him if the supply situation changed. He lodged a claim seeking compensation for losses associated with cancelling the event. The company refused the claim and so Dan contacted EWON.

26 In some states there may be modest payments where there have been continuing disruptions to supply; for example in Victoria, $300 is payable for unplanned interruptions of more than one minute for more than 60 hours in a calendar year. Vic Essential Services Commission: “Electricity: your entitlement to a reliable supply”.
27 at p 15.
EWON tried to negotiate a settlement without success. After careful consideration, the Ombudsman made a determination that the company should make payment of $9,500 to compensate Dan for part of his losses and for the significant failure in customer service on their part”.

As Dan operates an established entertainment venue as such it is expected that there is a contractual relationship between Dan and the network service supplier for connection to the network. In this regard it is probable that the contract would include exclusion of liability clauses (see Chapter 4) which provide for loss of power supplies for reasons beyond the control of the service provider. However, this is an instance where an undertaking has been given to the customer in a business context and in circumstances there was known and reasonable reliance on the representation relating to interruption to supply. At common law this may have provided the basis for a claim for negligent misrepresentation resulting in economic loss. Depending upon the width of exclusionary clauses, liability for negligence might have been excluded under the contract, see chapter 4. There is also potential liability under Trade Practices Act 1974(Cth), s.52 on the grounds that the representation amounted to misleading or deceptive conduct. In relation to future matters, if a representation is not made on reasonable grounds, s.51A, it may be misleading and deceptive conduct. Although the Ombudsman did not publish the reasons for the award of compensation, it is arguable that under Trade Practices Act 1974 (Cth), s.52 Dan may have been able to recover for wasted expenditure. The award of compensation in that case is arguably based on the member’s responsibility at law.

Consequently the network service provider would have been held liable in having misled Dan as to the time of the planned outage and in doing so it was reasonably foreseeable that Dan would suffer economic loss. The Australian Competition and Consumer Commission is of the view that electricity suppliers that make statements claiming that they were not liable for blackouts unless there had been negligence on their part and represent to consumers that they have no, or only limited, liability for such events are likely to contravene Trade Practices Act 1974 (Cth) section 52 (misleading conduct), section 53(g) (false representation) and section 55 (misleading conduct involving characteristics, suitability, or quantity of goods).

7.10 Discussion and Conclusions

Under the *Electricity Supply Act 1995 (NSW)*, s.96 the Ombudsman has the responsibility to resolve disputes and complaints arising under a customer supply or connection contract or other matter prescribed by Regulations. The Ombudsman’s scheme provides an alternative dispute resolution process with the Ombudsman having the power to make a binding decision in respect of disputes between licensed members and the complainant. In this context, the small retail customer has recourse to an inexpensive review process where the service provider has rejected a claim for compensation.

It is important to appreciate the fact that most small end users of energy services have little or no comprehension of the underlying causes of a power system disturbance which results in harm to their property. In this regard the small end user is disadvantaged when pursuing a claim unless they are able to call upon expert opinion as to a possible cause. Thus, without some form of intervening independent adjudication the small end user is seriously handicapped.

The New South Wales Ombudsman Scheme is unhelpful where there are a number of small consumers who have sustained losses arising out of a single event where the cumulative value exceeds $20,000 ($50,000 by agreement). It is also limited in relation to large claims especially by small businesses. Subsequent to the decision involving the Victorian Ombudsman in *Citipower v Electricity Industry Ombudsman*, Industry Guidelines were issued in Victoria allow limited automatic compensation for unauthorised voltage variation but exclude recovery for pure economic losses. The consumer need not show that the provider has been negligent. It is argued that NSW should follow suit on the basis that it merely recognises the operation of the implied warranty under the *Trade Practices Act*, s.71 (fitness for purpose).

Neither the guideline, nor s. 71 covers failure of supply. Whilst it is impossible to compensate all economic losses resulting from failure to supply, it is argued, that in

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line with common law liability, (see ch 6), the Ombudsman should be able to compensate small retail customers for actual damage to property or goods even if an exclusion of liability clause might apply. This redresses the unequal relationship in which restrictive contracts are forced on consumers without adequate notice of exclusion of liability clauses. Where no property damage occurs, it may be argued that it is not “fair” and “just” to allow a very large volume of claims for economic losses. No system can hope to compensate for the ripple effect of endless economic losses. Under the current NSW provisions, economic losses caused by a widespread blackout are not likely as claimants may be restricted to contractual consumers and compensation is limited to $20,000 arising out of a single event. But it is arguable that where there has been negligence on the part of the provider, a small retail customer ought to be able to recover for pure economic losses where there was an arguable case based on Perre v Apand31 (see ch. 6) without the need to resort to expensive court litigation. Then the Ombudsman would be providing an alternative and cheap mechanism for resolution of disputes. The limits on compensation would prevent endless liability to an indeterminate class over an indeterminate period.

In conclusion, the jurisdiction of the Ombudsman is limited to small claims by small retail customers. These restrictions have the effect that even if negligence can be shown, a small end user is unlikely to recover unless the incident giving rise to the damage only affects the individual consumer or a very, very small group of consumers with very modest losses. It is recommended: (1) that the Ombudman’s jurisdiction should not be limited to contractual customers but should at least extend to persons in the same household or small businesses say in the same shopping complex. (2) the limitation on awards arising from a single event should be changed to allow an award where an individual claimant has sustained damage to goods or property not exceeding the prescribed amount ($20,000), ($50,000 by agreement). (3) the Ombudsman’s jurisdiction in New South Wales, should be broadly construed in favour of the small retail customer. It should not be restricted by exclusionary clauses where it is not fair to do so.

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31 (1999) 198 CLR 180, see discussion ch.6.
Chapter 8: CONCLUSION

8.1 Introduction

This thesis has argued that the small end user of electricity in New South Wales is unfairly disadvantaged in the recovery of damages for losses against electricity suppliers and distributors.

First it has been argued that the system of regulation of electricity looks to the protection of the system at the expense of the small customer. Consumers who have contracts with both suppliers and distributors are especially disadvantaged by the wide use of exclusion clauses contained in connection and supply contracts. This might be partially ameliorated by the non-excludable implied terms under the Trade Practices Act 1974(Cth) ss. 71,74 where there is an existing contractual relationship.

Secondly, the small end consumer is also not assisted by the common law regime when it comes to economic losses unrelated to property damage or personal injury to the claimant. They are likely to be within a large indeterminate class of plaintiffs who cannot recover. Thirdly, whilst there is some scope for industry dispute settlement to provide compensation to small end users, the capacity is both limited and small in amount.

8.2 Regulation and the National Electricity Market

Chapter 2 examined Regulation and the National Electricity Market. It noted that the 2005 changes to the regulatory regime creating the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) (see section 2.4.2) indicate a retreat from light handed market regulation\(^1\). It argued that the powers vested over service providers by the AEMC and AER in respect of rule making, governance, and capital and revenue review is essentially dictatorship by a centralised bureaucracy leaving the provider with the legal and commercial risk associated with operating in a market environment. Unlike the position of state instrumentalities which were granted some level of crown immunity, state owned corporations and

\(^1\) See National Electricity Code, Chapter 1, Code Objectives, l.4(b)(1). Hilmer Report (1993), National Competition Policy (Independent Committee of Inquiry into National Competition Policy) Canberra, AGPS.
private companies operating in the market are not public authorities and as such have no crown immunity.\(^2\) The thesis asked what is the standard of care that the community can expect from such undertakings taking into account the economic and political constraints applied by the regulatory regime? At one end of the spectrum is the negligence standard applied to the pre 1995 state franchised trading monopolies as discussed in *Cerkan v Haines* concerning resources and services.\(^3\) At the other extreme is that of strict liability taken by the Australian Consumer and Competition Commission\(^4\) pursuant to Section 71, Division 2, Part V of the *Trade Practices Act 1974*, that an electricity supplier is accountable for damage to customer's equipment in conditions of a system disturbance regardless of negligence.

Chapter 2 also examined the protection granted under the *National Electricity Law* ss.119,120. Whilst it is accepted that protection is required where national or system security is at risk, the capacity of small end users to recover compensation where immunity clauses are invoked is severely limited. Sections 119,120 give NEMMCO and service providers wide discretion as to how they act in securing the safety of the market system other than where they act in "bad faith or negligence". It is difficult to envisage what operational reasons can give rise to a claim of *bad faith or negligence*. It is argued that these are broad brush terms capable of being widely interpreted. Bad faith denotes a deliberate act, such as fraud, an improper action, or something against community interests. Negligence is an inadvertent act of carelessness in the performance of a function. It is not necessarily the same as liability in the tort of negligence. It is argued that it would be beyond the resources and capabilities of a small end user to produce evidence to successfully challenge the claim that an operational action by NEMMCO, or a network service provider was not genuine or was negligent. Assuming that the potential liability for conduct in “bad faith” or “negligence” has not been excluded,\(^5\) the difficulties that confront the small end user in showing bad faith or negligence would be so costly as to make litigation unlikely.

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\(^2\) *State Owned Corporations Act* (NSW) ss9,20F Schedule 5 states unequivocally that state owned corporations are not agents of the crown and have no crown immunities or special protection under civil liability legislation.

\(^3\) (1990) 21 NSWLR 296.

\(^4\) See Thesis Chapter 3 at 3.3,

\(^5\) Liability can be contractually varied under *National Electricity Law* ss119,120 but liability for directions given in bad faith are not excludable under s.116, see 2.5.
Although sections 119(5) and 120(2) allow contractual variation so that a wider (or narrower) protection may be bargained for under contract, only that party to the contract will be bound by the variations. As such, it would be unreal to believe that a small end domestic customer or small shop user could negotiate a variable price contract.

8.3 Trade Practices Act 1974 (Cth)
Chapter 3 examined the operation of the Trade Practices Act 1974 (Cth) and its possible application to damage caused by the defective supply of electricity. It noted that the exclusionary clauses in deemed contracts are partially mitigated by the imposition of a strict liability regime. Central to this is the Trade Practices Act 1974 s.4 which states that “goods” includes “electricity”. This has the effect that it is subject to the strict liability implications of s 71 that “goods” are of merchantable quality and expected to be reasonably fit for the purpose for which they are sold.

The thesis argues that the Trade Practices Act s.71 can apply to impose strict liability for defective supply and this provides important redress for small end consumers. Under s.74 where the supply of electricity is associated with delivery of services, those services must be rendered with due care and skill. The advantage of this provision is that, unlike common law negligence, in relation to domestic consumers, the duty cannot be excluded by contract. Remedies under these provisions are limited to consumers in direct contractual relationship with the provider.

The chapter also commented on the application of Part VA (liability of manufacturers for defective products) and the unsuitability of the definition of “supply time” for these purposes. Electricity is a multi-faceted product sent from its generation source to end consumers via bulk supply terminals. The physical configuration of large power systems is such that supply and quality of power is often disturbed during transmission and particularly when distributed. It was argued that “supply time” should be redefined to read the time at which electricity is delivered to the end user after it was generated, not before. If for some reason the electricity is degraded on delivery, the small end user has very limited means of challenging the contentions of a network service provider as to whether and at what
time the electricity (goods) was manufactured (generated and transmitted) and whether it was “defective”. Thus, it is argued, that as the distribution service provider has the expertise and the resources to monitor the electricity supply at the point of distribution, then it is the distributor who should be held strictly liable under Part VA (defective products). This is subject to the distributor qualifying as a “manufacturer” for purposes of Part VA. This would permit recovery for damage to other property or goods by a consumer.

8.4 Contractual Relationships
Chapter 4 examined the nature of contractual relationships between the small end user and providers. In the National and State Electricity Acts which came into force with the electricity market and full retail competition, there is a requirement that service providers and retail entities have deemed standard form contracts with their small customers and that these contracts set out the terms of connection and supply. However in New South Wales they are only required to make available to small customers copies of the contracts on request. How this is done in a legal sense leaves much to be desired. It is argued that it is inconsistent with basic consumer protection principles and that it assists the network supplier to the detriment of the small end user. Furthermore, it negates the very essence of common law contract in which the terms of the contract must be brought to the notice of the party entering into the contract.

Large commercial and industrial customers have the privilege of negotiating the terms of their contract including the tariffs. Consequently, in a dispute situation, they are not handicapped by a lack of knowledge of the contents of the contract when it comes to liability and exclusion clauses, as would be the small end user subject to a standard form contract. Thus, where the provider, for example cites force majeure as a denial of liability in circumstances causing harm to a customer, that customer is legally disadvantaged as they would be unaware of the terms supposedly agreed upon in the contract. While there may be potential for legal proceedings against

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7 Chapter 4, Part 4.2.
8 To draw customer attention to the conditions of supply a brochure is inserted with the bill. Argued is the cost of issuing a specific contract against the benefit derived.
9 Chapter 4, page 88.
10 Chapter 4, page 89.
providers and market retailers by an aggrieved small end user, it is doubtful if in the context of the information available such persons would have the resources to do so, let alone the inclination.\footnote{Chapter 7 the function of the Electricity, Water and Gas Ombudsman in dispute resolution.}

A network service provider is obligated by statute to provide customers with information in respect of their rights under the respective standard form connection contracts, but is only required to provide a copy of a the respective contract upon request.\footnote{Chapter 4: Part 4.2 requirements of the \textit{Electricity Supply Act 1995 No.94 (NSW)} (2004) 219 CLR 165.} This appears to be a contradiction in terms. Further compounding the issue is that the unseen contract is also an unsigned contract. It is argued that this is legally significant when the issue of liability under an exclusion clause of the contract is in contention. The High Court in \textit{Toll (FGCT) Pty Limited v Alphapharm Pty Ltd} \footnote{see also the \textit{Queensland Electricity Act 1994} and the consolidated Acts of other States.} made it quite clear that the party to the contract must be given notice of the contract and that it contains an exclusion clause which affects their rights under the contract. If the end user has neither seen nor signed the contract and if it can only be obtained upon request then this is at odds with the basic rules of contract law. However, the statutory deeming of contracts under the \textit{Electricity Supply Act 1995(NSW)} and regulations probably dispenses with the common law rules relating to notification prior to contract of contractual exclusion clauses. It is argued that the provisions contained in the \textit{Electricity Supply Act 1995 (NSW)}, Divisions 2 and 4, and Part 4 Division 1 s.42 of the \textit{Electricity Supply (General) Regulations 2001(NSW)}\footnote{see also the \textit{Queensland Electricity Act 1994} and the consolidated Acts of other States.} should be amended to require that all small retail customers receive a copy of their contracts, deemed or negotiated. Accompanying the contract should be explanatory notes setting out the exclusion and liability clauses including reference to s. 119 and s. 120 of the \textit{National Electricity Law}. It should also provide a clear explanation of liability for defective supply and failure of supply.

Exclusion clauses attempt to restrict liability of service providers against liability for both contract and tortious liability to the contracting party. Exclusion clauses in the contract may also rely on the immunities contained in the \textit{National Electricity Laws} to limit responsibility. In relation to a small domestic end user, the \textit{Trade Practices Act 1974} prevents suppliers from excluding warranties under ss.71 and 74. It is
argued that outside the protection available under the *Trade Practices Act 1974*, contractual exclusion clauses are weighted against small end customers. The small end consumer is especially disadvantaged when it comes to contracts which contain extensive liability exclusion clauses. The exclusion clauses are such that an ordinary consumer would have difficulty understanding the extent of responsibility that a provider may have under these contracts. It is meaningless to a small consumer to advise in a supply agreement “If you have the benefit of…warranties implied by the *Trade Practices Act 1974*, nothing in this Agreement is intended to exclude…those conditions and warranties”. Unlike large industrial users, a small end user is not in a position to negotiate contractual terms. Fairness to small end users requires that agreements spell out in language appropriate to a small consumer the extent of their liability for non-supply or defective supply taking into account obligations under the *Trade Practices Act 1974* (Cth).

8.5 Liability for Negligence

Chapter 5 examined liability for negligently caused physical injury and property damage resulting from electrical accidents independently of contract or liability under the *Trade Practices Act 1974* (Cth). It also noted the reach of the New South Wales *Civil Liability Act 2002* (NSW) which (with some modifications) restates in statutory terms the principles of negligence. A person or an entity, such as a service provider, will not be liable for negligence unless they knew or ought to have known of the risk, that the risk was not insignificant, and that in the circumstances a reasonable person, or entity, would have taken precautions to prevent harm. In this context, it impacts most on those with limited means particularly when dealing with a large corporate energy service provider. The general principles apply to property damage as well as personal injury.\(^\text{15}\) An electricity consumer may be especially affected by the principles related to the “obvious risk”.\(^\text{16}\) The legislation also affects the assessment of damages for personal injury. In this respect electricity consumers are equally disadvantaged as other plaintiffs.

The chapter (5.7) also examined risk in the context of the economic theory of the marginal utility of safety. The object being to reconcile the economic constraints

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\(^{15}\) Chapter 5, Section 5.7.2, “General Principles” Section 5D of the Civil Liabilities Act 2002 (NSW).

\(^{16}\) Chapter 5, Section 5.5.2, “Obvious Risk” Section 5F of the Civil Liability Act 2002 (NSW).
associated with Pareto efficiency inherent in energy market economics and the regulatory regime. For legal economists, the notion of the reasonable person standard in negligence calls for a balancing of the risk of an accident against the cost of avoiding it. It is extremely difficult to quantify in practice the statistical probability of the risk, let alone the cost burden of the accident as demonstrated by the case studies of Part 5.7.2, Chapter 5. How a court weighs prevention and deterrence against levels of care is problematical. There is no evidence to indicate that common law tends to economic efficiency.

8.6 Negligently caused Economic Loss
Chapter 6 analysed liability for negligently caused economic loss. Typical cases have concerned damage to power cables resulting in power failure and consequent economic losses to end users. It is apparent from the case law that a small end user will rarely be able to recover damages for economic losses. Only in the very limited situation of foreseeable equipment damage and directly associated financial losses, can there be recovery. The usual outcome for a small end user will be no recovery as they will come within a large indeterminate group suffering economic loss. It is ironic that a large single commercial or industrial user may be able to recover economic loss but small consumers who may be put out of business as a consequence of power supply failure cannot. Such was the experience of small business suffering economic losses as a consequence of the 1998 Melbourne gas crisis. This was despite the fact that Esso had previously been found criminally negligent in respect of the operation and management of the Longford Gas Plant and the resultant loss of gas supplies to Melbourne.

In a market economy the economic impact of such crisis on the small end user, who unlike large commercial and industrial interests, has no means of off setting loss of income, is critical to his or her financial survival. In the Johnson Tiles case, the court recognised those litigants which suffered physical harm, but based on the exclusion rule arguing the ripple down effect, denied the claims of those which suffered pure economic loss. The Caltex Oil and Perre decisions allowed

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17 See Chapter 2, Part 2.4.
18 Johnson Tiles and Others v Esso Oil Pty Ltd (2003) VSC 27.
20 Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad” (1976)136 CLR 529.
recovery in the former to a very large corporation and the latter to a consortium of commercial interests, each with substantial resources none of whom suffered property damage. This is contrasted with the Johnson Tiles\textsuperscript{22} involving the Esso Oil and Gas interests where small businesses and domestic consumers who sustained economic losses were unable to recover.

In essence, the exclusion rule negates the legal tradition in torts of compensation for negligently caused injury. Small end users are particularly affected by this rule. Almost invariably they will be in an indeterminate class suffering indeterminate economic losses. The issue is always - where should the losses fall? It is argued that the Ombudsman should be given jurisdiction to provide some limited compensation to small end users where it is established that a service provider has been negligent. The current jurisdictional limits ($20,000 or $50,000 by agreement) provide a reasonable upper limit to compensation. Recovery should be tested by reference to the principles established by the High Court in Perre v Apand\textsuperscript{23} for the recovery of pure economic losses. This would provide, in a limited way, amelioration for vulnerable small end users who cannot offset their financial losses. It does not expose the provider to endless liability to an indeterminate class over an indeterminate period.

8.7 Ombudsman Schemes

Chapter 7 considered the role and jurisdiction of the Electricity Ombudsman in New South Wales. In this regard, the small end user of energy services has access to an inexpensive means for settling complaints. This is not to say that in some instances, energy service providers do not attempt to use their economic and legal resources to frustrate and stall the resolution of claims.

Particular reference was made to the decision in Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd.\textsuperscript{24} The case involved a legal challenge to the powers of the Ombudsman in respect of a dispute between one of its own members and

\begin{footnotes}
\item[22] Johnson Tiles and Others v Esso Oil Pty Ltd (2003) VSC 27.
\item[23] (1999) 198 CLR 180.
\end{footnotes}
The principles underpinning the decisions of the Ombudsman are contained in the Constitution and Articles of Association of the relevant Ombudsman. The Ombudsman scheme has its limitations in respect of the amount that can be recovered and is confined to its licensed members. That is:

1. a maximum of $20,000 or by agreement with service providers up to but not exceeding $50,000.
2. to contracting parties to the Ombudsman scheme.
3. to the award of compensation where, in New South Wales, it is “fair and just” to do so.

Unlike Victoria, the New South Wales the articles of association do not have a provision that a member is not liable for “events beyond the reasonable control of a participating company and their consequences, bearing in mind current law and reasonable and relevant industry practice.” This permitted the Victorian Ombudsman in the Citipower case to order compensation even if the claim might not have succeeded according to strict legal principle. The NSW Constitution requires the Ombudsman to pursue complaints “in a fair, just, informal and expeditious manner”, clause 5.1. Fairness and justice would, it is assumed, require reference to whether the applicant for compensation would be entitled to compensation under the applicable law. But it is argued that the role of the Ombudsman should not be limited to ordering compensation when the claimant would at law have been entitled to compensation. It has also been argued that the jurisdiction is too restrictive if it is limited to contractual consumers. This would exclude e.g. lodgers, family members and consumers in a shopping centre or industrial complex where there is no separate metering from claiming for damage to equipment.

It has also been argued that the limitation on compensation awards where numerous consumers have sustained damage through a single event ($20,000) means that the Ombudsman’s jurisdiction can only deal with very minor cases where a very small number of consumers are affected. This seriously inhibits the usefulness of the Ombudsman in providing redress for small consumers forcing many to undertake

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25 A licensed market participant only and a constituent member of the Ombudsman Limited contractual scheme of arrangement.
26 The Ombudsman cannot make a determination involving a service provider who is not contractually bound by the constitution.
expensive litigation to obtain recovery. It has been recommended (1) that the jurisdiction of the Ombudsman be expanded to allow claims by non-contractual consumers, at least those within the same household or complex. (2) the limitation on awards arising from a single event should be changed to allow compensation where an individual claimant has sustained damage not exceeding the prescribed amount ($20,000, $50,000 with consent). (3) the Ombudsman’s jurisdiction should not be limited to claims recoverable at law. It should be extended to instances where the provider’s negligence has caused damage to property or goods.

The Victorian decision in *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd* did not indicate how far the Ombudsman Scheme would or could provide compensation where no claim was available under the general law. For example, a multitude of small business claims as the result of a power blackout, or loss of gas supplies. No system could compensate for endless economic losses. For example, the Longford gas explosion was estimated to have cost $1.3 billion just to the Victorian economy. The class action for damage to goods and property was settled for $32 million. Accepting that it is impossible to compensate for economic losses resulting from failure to supply, it is argued that compensation should be available to compensate for damage to goods or property sustained by the small end consumer. The Victorian Industry Guideline providing for automatic compensation of a limited amount for unauthorised voltage variation goes part of the way to achieving this. This should come within the NSW Ombudsman’s mandate.

8.8 Recommendations

Specifically it is suggested that:

(1) There should be an amendment to the *Trade Practices Act 1974 (Cth)* Part VA particularly in relation to the supply of defective goods in s.75AK, see chapter 3.2. The goods (electricity) must be defective at “supply time”, meaning at the time of generation prior to transmission and distribution. This does not make sense. If the provision is meant to have any effect at all, it should be amended to refer to the time of delivery to the end user, being a time after it was generated. This amendment alone might not be sufficient to produce liability under Part VA.

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28 *Johnson Tiles and Others v Esso Oil Pty Ltd* (2003) VSC 27.
as the provider would need to come within the definition of “manufacturer” for the purposes of Part VA. If that hurdle were overcome, Part VA would have the benefit that non-contractual domestic consumers could recover for losses caused by defective supply where this caused personal injury or damaged other goods or property. Proof of negligence would not be required, see Chapter 3.2.

(2) The position of a small end user is seriously complicated in a system within which the responsibility for electricity supply involves separate connection and supply contracts. The small end user is relatively powerless. Contracts for connection and supply for the small end user are usually standard form or default contracts (see chapter 4.2) in which providers attempt to exclude liability wherever possible. The small end user is rarely aware of these exclusion clauses. In New South Wales, there is no responsibility on the provider to bring these exclusion clauses to the notice of the consumer, see chapter 4.2. At the very minimum, the consumer should be informed about these exclusion clauses in accordance with normal contract law principles. This should be in language which the ordinary consumer will be able to understand.

(3) Special provision is needed to ameliorate the relative powerlessness of the small end user. Consequently, a form of strict liability should be recognised in cases where damage to a small end user’s property or goods has resulted from defective supply.

Firstly, in relation to a non-contractual consumer, where a claimant has suffered personal injury or damage to domestic goods or property, the suggested amendment to s.75AK Trade Practices Act 1974 (Cth) (above) and the inclusion of providers as “manufacturers” may achieve this outcome, see chapter 3.2.

Secondly, in relation to consumers in a direct contractual relationship with the provider, claims for damage and economic losses flowing from defective supply are available under the Trade Practices Act 1974(Cth), s.71 (fitness for purpose, merchantability). The benefit is limited to consumers. A consumer is defined in the Trade Practices Act 1974 (Cth), s.4B as a person who has acquired goods

ordinarily acquired for personal, domestic or household use or consumption; if the goods are not acquired for domestic purposes, the value of the goods acquired must not exceed the prescribed amount, $40,000. This can include small business losses. But in relation to small business losses, contractual exclusion clauses can prevent recovery unless it can be shown that it is not fair or reasonable for the corporation to rely on the contractual exclusion of liability, s.68A. It is arguable that small businesses are just as vulnerable as domestic consumers. They are not in a position to negotiate connection or supply contracts and are likely to be unaware of the exclusion clauses. A case might be made that it is not fair or reasonable for the exclusion clauses to apply.

Thirdly, whilst contractual consumers are able to recover some economic losses under the Trade Practices Act 1974, s.71, where there is defective supply, non contractual consumers have little prospect of recovering economic losses where they have not sustained damage to property or goods. The recommended changes to Part VA of the Trade Practices Act 1974, would provide a remedy for damage to property or goods by a non contractual consumer. It does not (except for one minor exception) allow recovery for economic losses. Should a claim be available?

Where there has been a failure or interruption to supply, it has been noted that in tort, a consumer who has suffered damage to equipment due to the negligence of the provider is able to recover not only for damage to the equipment but the loss of profits resulting directly from loss of product caused by equipment damage, see 6.4. It has also been noted that the distinction between economic loss and physical damage is often difficult and results in inequities between small end users that have suffered loss.\(^\text{30}\) It is, however, recognised that no system could sustain liability for endless economic loss that might result from electricity failure. But where the provider has been negligent, rather than leaving the loss where it falls on the small business or the domestic customer, limited compensation should be available through the mechanism of the Electricity Ombudsman. It is argued that the circumstances warranting recovery should be tested by reference to the principles enunciated by the High Court in Perre v
Apanda\textsuperscript{31} (see ch. 6). This has several advantages: (a) it avoids the expensive and lengthy processes of court litigation (b) the amount recoverable is subject to the limits on compensation that the Electricity Ombudsman can award, currently \$20,000, with the parties agreement \$50,000; (c) it avoids indeterminate liability to the provider and protects vulnerable small end consumers.

Fourthly, It is further recommended that this broader basis of liability be explicitly incorporated into the jurisdiction of the Electricity Ombudsman.

8.9 Concluding Remarks
The underlying concern of this research work was to question whether the legal mechanisms created by \textit{National and State Laws, Regulations and Codes} and the regulatory regime over the past decade has enhanced consumer sovereignty and reinforced small end customer rights relative to the old regime of franchised monopolies. For the many reasons set out in the body of this thesis, and the author’s experience in industry, the answer is in the negative. It is considered that economic criteria have and will continue to encroach upon issues of liability for negligence despite the inhibitors described by Professor J.G Fleming:

\textit{The calculus of negligence includes some important non-economic values, like health and life, freedom and privacy, which defy comparison with competing economic values. Negligence is not just matter of calculating the point which the cost of injury to victims exceeds that of providing safety precautions. The reasonable man is by no means a caricature of cold blooded economic man.}\textsuperscript{32}

It is far from reality that the divestiture of gas, electricity, and in some instances water, to the private and or corporate sector has meant that the State has disengaged from the area of utility services. The State obviously remains a significant presence in the form of a regulator of public utility services. Public utilities involved in essential services occupy too important a place in the welfare of the community for governments to abandon them to the vagaries of market economics. In this sense it is a pity that economic management plays such an important role in policies governing energy and water utilities. It is concluded that in the context of the existing regime, the small end user of energy services is not only disadvantaged but disenfranchised.

\textsuperscript{30} See \textit{Johnson Tiles Pty Ltd v Esso Australia Pty Ltd} (2003) VSC 27 and discussion ch.6.
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