

# **Jemena Electricity Networks (Vic) Ltd**

## **2016-20 Electricity Distribution Price Review Regulatory Proposal**

### **Revocation and substitution submission**

Attachment 8-6 Susan Brennan SC - Advice on  
vegetation management matters

Public

6 January 2016



## In the matter of the Electricity Safety (Electric Line Clearance) Regulations 2015

### MEMORANDUM OF ADVICE

#### Introduction

1. We have been briefed to advise Jemena Electricity Networks (Vic) Ltd (**Jemena**) on specific changes to the regulatory framework for electric line clearance applying to electricity distribution companies in Victoria. Specifically we have been asked to consider the implications of three changes which Jemena has identified as driving increases in its operational expenditure: tree cutting in accordance with AS 4373; amended notification and consultation requirements;  
[c-i-c]
  
2. In summary, it is our opinion that:
  - a. the new requirement to comply with AS 4373 as far as practicable justifies the use of qualified arboricultural personnel for assessment and cutting of trees and requires use of climbing spikes and mechanical equipment which damages the bark of trees to cease;
  - b. the new requirement to notify contiguous landowners extends to all those whose use of land is affected in any material way by tree removal, and the new requirement to provide a diagram of the tree to be removed does not permit a generic representation of any tree to be utilised;
  - c. [c-i-c]

#### Background

3. Jemena operates an electricity distribution network in the north-western area of greater Melbourne, encompassing suburbs including Heidelberg and Ivanhoe.
4. Electricity distribution networks are regulated by the Australian Energy Regulator (**AER**) under Chapter 6 of the National Electricity Rules (**NER**). Every five years Jemena submits a regulatory proposal to the AER setting out the services it

will offer over its network, the costs it expects to incur and the tariffs it needs to charge to recover its costs.

5. Jemena is currently engaged in the review process for the forthcoming regulatory control period (1 January 2016 to 31 December 2020). In accordance with the NER, Jemena is required to submit in its regulatory proposal its forecast operating expenditure across the 2016-20 regulatory period. Jemena submitted its regulatory proposal to the AER on 30 April 2015 and provided further information in relation to its regulatory proposal on 13 July 2015.
6. Jemena's forecast operating expenditure includes a component for vegetation management based on its historical costs, as well as an adjustment (or "step change") in forecast costs associated with implementation of new regulatory obligations, notably:
  - a. the *Electricity Safety Amendment (Bushfire Mitigation) Act* 2014, which came into operation on 1 April 2014, and amended the *Electricity Safety Act* 1998 (Vic); and
  - b. the *Electricity Safety (Electric Line Clearance) Regulations* 2015 (Vic) made under the *Electricity Safety Act* 1998 (Vic) which came into force by 30 June 2015 (**2015 Regulations**). Schedule 1 of the 2015 Regulations sets out the Code of Practice for Electric Line Clearance (**ELC Code**).
7. Energy Safe Victoria (**ESV**) administers the regulatory framework for electricity distribution in Victoria. Clause 30 of Jemena's distribution licence requires it to comply with all applicable laws.
8. In further information provided on 13 July 2015, Jemena submitted a total change in forecast vegetation management costs associated with the 2015 Regulations of \$15.89m over the regulatory period. Jemena's explanation for the cost increase is that there are new costs associated with three obligations prescribed by the 2015 Regulations and a responsibility for electric line clearance vegetation management for additional areas under the *Electricity Safety Act*.<sup>1</sup>

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<sup>1</sup> Neither AER nor ESV has disputed Jemena's responsibility for or forecast costs associated with additional areas for vegetation management arising from removal of the Roads Corporation as a responsible person under the Electricity Safety Act and this advice does not further address the responsibility for electric line clearance vegetation management for additional areas under the Electricity Safety Act.

9. The AER made its Preliminary Decision on 29 October 2015, setting out the components of Jemena's regulatory proposal which it accepted or rejected. Jemena's response to the Preliminary Determination in the form of a revocation and substitution submission is due to be filed with the AER by 6 January 2016.
10. The AER in its Preliminary Decision acknowledged that while changed regulatory obligations may give rise to a justifiable step change for vegetation management, on the basis of the information and evidence Jemena submitted, it did not have sufficient material to form a view as to the quantum of the step change.
11. In making its Preliminary Decision, the AER consulted with ESV which advised that it intended to provide guidance to all Victorian distribution companies to ensure that they understood the manner in which ESV will administer its rules.<sup>2</sup>
12. The AER noted ESV's statement that it does not accept that the 2015 Regulations will have cost impacts in the order of those claimed by the distribution companies. According to ESV, the distribution companies' interpretation does not reflect either the 2015 Regulations as gazetted or the intent that ESV will clarify through more detailed guidance notes.<sup>3</sup>
13. Based on the feedback from ESV, the AER did not consider Jemena's revised cost of \$15.8 million to reflect the change in compliance costs for the ELC Code because it was not consistent with the manner in which ESV will administer the ELC Code.<sup>4</sup> The AER recorded its expectation that Jemena's revised proposal would reflect the manner in which ESV will administer its rules.<sup>5</sup>
14. ESV has not published any detailed guidance notes on the interpretation of the 2015 Regulations. In a meeting with Jemena and subsequent correspondence to Jemena dated 27 November 2015, ESV provided further clarification about how it will interpret the 2015 Regulations and how they may be administered.

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<sup>2</sup> AER, Preliminary Decision Jemena distribution determination 2016 to 2020 attachment 7, October 2015, page 7-72 referring to Energy Safe Victoria, Response to AER email on electricity distribution proposals – ESV audit intent, 28 July 2015, page 4.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, page 7-73.

## Advice requested

15. We have been requested to advise whether the 2015 Regulations introduce new obligations or otherwise increase the burden of existing requirements on distribution companies, insofar as they relate to the three issues identified by Jemena in its regulatory proposal as drivers for increased operational expenditure.
16. Below we set out each of the issues identified by Jemena and their regulatory underpinning. We then consider the response in relation to each issue given by ESV to the AER as recorded in the AER Preliminary Decision and to Jemena in its correspondence of 27 November 2015. Finally, we advise whether we consider that the additional costs identified by Jemena are referable to an increased regulatory obligation on Jemena as a consequence of the 2015 Regulations.
17. This advice does not address all of the changes made by the 2015 Regulations and concerns only those parts of the 2015 Regulations which relate to the three issues identified by Jemena.
18. Further, advice as to the reasonableness of the quantum of the costs identified in Jemena's regulatory proposal of April 2015 and further information of July 2015 and whether the costs identified are offset or mitigated by cost reductions (if any) which might be realised by the 2015 Regulations are outside the scope of this advice.<sup>6</sup>

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<sup>6</sup> We note the acknowledgement in correspondence from ESV to Jemena dated 30 November 2015 that in relation to the reintroduction of exceptions for structural branches, ESV does not see a significant reduction in effort from existing practices by the distribution businesses when carrying out electric line clearance activities in accordance with the 2015 Regulations.

## Adoption of amenity tree management standard AS 4373

### *Comparison of the 2010 Regulations and 2015 Regulations*

19. The 2010 Regulations and Code required a responsible person to, as far as practicable, restrict cutting or removal of native trees or trees of cultural or environmental significance to the minimum extent necessary to ensure compliance with the clearance requirements of the 2010 Code or to make an unsafe situation safe: 2010 Regulations, Clause 2(3). The 2010 Regulations did not include requirements otherwise limiting or restricting the pruning of trees generally.
20. Clause 9(2) of the 2015 Regulations requires preparation of a management plan relating to compliance with the ELC Code.
21. Clause 9 of the ELC Code provides:

A responsible person cutting a tree under Division 1 must, as far as practicable, cut the tree in accordance with AS 4373 as published or amended from time to time.
22. The reference to AS 4373 is a reference to the Australian Standard AS 4373-2007 *Pruning of Amenity Trees* (**Standard**).
23. Clause 9 introduces a new requirement into the ELC Code by requiring compliance with the Standard, as far as practicable. Most relevantly, the Standard specifies:
  - a. the use of arborists for inspection with Certification 3 qualifications: Standard, clause 4;
  - b. the use of arborists for cutting with Certification 2 qualifications: Standard, clause 4, Note 2; and
  - c. the prohibition on use of equipment on sections of a tree to be retained that wounds bark and conductive tissues (eg spikes or other tools that will penetrate or severely bruise bark and conductive tissue): clause 5.1.
24. Clause 9(3)(j) of the Regulations allows the management plan to specify the procedures to be adopted if it is not practicable to comply with the requirements of the Standard while cutting a tree in accordance with the ELC Code.

*ESV's position*

25. ESV disputes that the distribution companies will be liable for additional costs arising from compliance with the Standard. In its correspondence of 27 November 2015, it asserts:
- a. Generally, the management plans of distribution companies already apply the principles of the Standard;
  - b. Compliance with the Standard, including avoidance of mechanical tools, is only required in circumstances where tree amenity is important to the owner of the tree;
  - c. Where tree amenity is not important to the owner of the tree, ESV “in principle has no issue” with continued use of mechanical tools;
  - d. The Standard uses “should” not “shall” in relation to inspection by qualified arborists and hence is not a mandatory requirement;
  - e. Use of mechanical tools by distribution companies in recent years is “believed to be consistent with ESV’s current and future expectations”.

*Our assessment*

26. We are instructed that whilst some of Jemena’s existing practices conform with cutting techniques set out in the Standard, the introduction of the Standard will require changes to existing practices and procedures used by Jemena’s contractors. In particular, Jemena identifies the need to contract appropriately qualified arborists for inspection and cutting of trees, the need to cease certain tree climbing techniques (including spikes) and the need to avoid use of mechanical equipment in cutting trees.
27. We disagree with ESV’s interpretation that the obligations created in relation to the Standard are optional, except in circumstances where tree amenity is important to the owner of the tree. In our opinion, compliance with the Standard is mandatory, except where Jemena can demonstrate compliance is not practicable. We note:
- a. Under the 2010 Regulations compliance with the Standard was at the total discretion of distribution companies and they could elect which, if

any, parts of the Standard they wished to comply with. We are instructed that some management practices adopted by the distribution companies complied with the Standard. However, distribution companies are now required to comply with the Standard ‘as far as practicable’.

- b. The phrase ‘as far as practicable’ is not defined in the 2015 Regulations or the ELC Code. However, relevant authorities have stated that the phrase bears its ordinary meaning, descriptive of the quality of being "capable of being carried out in action; feasible" (Shorter Oxford English Dictionary)<sup>7</sup>. The words ‘as far as’ are synonymous with ‘to the extent that’. The word ‘practicable’ connotes, relevantly, ‘that can be done or used’ or ‘possible in practice’.<sup>8</sup> In considering the practicability of retaining an appropriately qualified arborist, there are not, as far as we are aware any practical impediments to retention of the required personnel, other than financial considerations. It would not be reasonably open to a distribution company to seek to defend its failure to retain appropriately qualified arborists simply on the ground that it would cost more to do so. That is, it would in our opinion be entirely ‘practicable’ for distribution companies to retain appropriately qualified arborists to meet their obligations under the ELC Code. Similarly, it would not be sufficient for a distribution company to defend its use of spikes for tree climbing or its use of jarrafs and other mechanical cutting devices on the grounds that their use is lower in cost. Rather, the distribution company would need to establish that other methods of cutting (eg using elevated platforms) are not just higher in cost but also are not reasonably possible for practical reasons.
- c. The application of the Standard is not limited to particular categories of trees, for example trees affected by Vegetation Protection Overlays under the relevant Planning Scheme or identified on a Council’s tree register or trees identified by their owners as having amenity value. Whilst the Standard is titled “Pruning of amenity trees” and the scope of the

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<sup>7</sup> Attorney-General (NSW); Ex Rel. McKellar v The Commonwealth (1977) 139 CLR 527 per Stephen J at para [26].

<sup>8</sup> SJX v The State of Western Australia [2010] WASCA 243 at para [85].



Standard refers to its intended use “on amenity trees”, the definition of “amenity trees” in the Standard is very wide and excludes only trees used for “production purposes”: Standard, clause 3.1. The fact that a tree’s amenity may not be important to an individual land owner does not mean it lacks “recreational, functional, environmental, ecological, social, health or aesthetic value” within the meaning of the Standard. The subjective view of the owner is not determinative of the objective value of the tree.

- d. In our opinion, there is no basis in the 2015 Regulations, the ELC Code or the Standard itself to limit application of the Standard to trees which are identified by owners as having amenity value.
- e. The Standard specifies methods for pruning trees and gives guidance on correct and uniform practices: clause 1. It contemplates inspection and assessment of a tree before pruning: clause 4; identification of the reason for pruning: clause 7; selection of a pruning class: clause 7 and table 1; pruning procedures: clause 5; foliage distribution, having regard to growth habit, the minimum removal necessary to achieve the aim of pruning, weight distribution and crown distribution: clause 6; and it identifies unacceptable practices: clause 8. In relation to line clearance, the Standard notes that formative pruning should be used to establish a suitable framework and that the amount to be removed should consider the characteristics of the species, growth rate and response to pruning. The potential impact of the pruning on the health, structure and amenity of the tree should be considered: clause 7.3.6.

The Standard provides that prior to pruning, an inspection should be carried out “by a person competent in arboricultural assessment (minimum AQF Level 3 in arboriculture)”: clause 4. “Arborist” is defined in the Standard as “the person with training to AQF Level 3 in Arboriculture or above or equivalent and relevant experience that enables the person to perform the tasks required by this Standard”: clause 3.2. The Standard identifies a range of tasks to be performed which require knowledge and understanding of the species, health, age, condition, growth habit, structure, stability, location and growing environment of a tree, matters which are properly within the knowledge of an appropriately

qualified arborist. The Standard provides that tree work is inherently hazardous and should be carried out by a person suitably qualified and experience in arboriculture (minimum of AQF Level 2 in arboriculture): clause 4, note 2. “Tree worker” is defined as a worker who through related training (minimum AQF Level 2 in arboriculture) or equivalent recognized and relevant on-the-job experience, has demonstrated competence in pruning according to this Standard.

In our opinion, compliance with the Standard will require distribution companies to demonstrate that the value of the tree and its health, growth habit, structure, stability and growing environment have been properly understood and that pruning or cutting has been undertaken to avoid adverse impacts on a tree’s health, structure and amenity.

Accordingly, in our opinion, the assessments, procedures and judgements which are expected to be undertaken under the Standard warrant the involvement of suitably qualified arborists and tree workers. The most straightforward way for the distribution companies to demonstrate that the assessments, procedures and judgements expected by the Standard have been undertaken in accordance with the Standard is to engage suitably qualified personnel. Hence, although the Standard uses the term “should” rather than “shall” in relation to the qualifications of those who assess trees and carry out tree work, in our opinion compliance with the Standard justifies the engagement of arborists with level 3 qualifications to undertake assessments and tree workers with level 2 qualifications to undertake tree cutting, pruning or removal. To the extent that the Standard allows for those with the requisite qualifications or equivalent experience to undertake the work, it is our opinion that the distribution companies should not be required to satisfy themselves in each individual case as to the quantity and quality of experience of individual workers but should be able to require the prescribed qualifications to have been obtained.

- f. In relation to the use of spikes and mechanical cutting devices, it is plain that the intent of the Standard is directed to the protection of the health

and amenity of trees and that use of such equipment is directly contrary to the pruning procedures allowed by the Standard: clause 5.1(a).

- g. It is not open to distribution companies to elect to comply with the requirements of the Standard as they see fit. It is conceivable that a Council or land owner or other interest group might take issue with a distribution company cutting a tree too vigorously, thereby damaging its health or amenity and that an affected person might seek injunctive relief or damages. If such an action against a distribution company or its contractors were to occur, it would be of little assistance (and no defence) for the distribution companies to allege that ESV's interpretation was that compliance with the requirements of the Standard was not mandatory or that even though contrary to the Standard, the distribution company's conduct was "consistent with ESV's current and future expectations". In our opinion, the only way in which such a proceeding could be defended would be to establish that the distribution company and its contractors met the requirements of the Standard, including that the tree had been inspected and cut by an appropriately qualified arborist and had not been cut using mechanical tools contrary to the Standard.

It is not merely ESV who will refer to, and seek to enforce the provisions of the ELC Code. Other persons and entities that may seek to invoke the ELC Code's provisions include municipal councils, private landowners and other interest groups supporting the recreational, functional, environmental, ecological value of trees. They may seek to enforce the obligations imposed on distribution companies under the ELC Code including the requirements of the Standard. Again, assurances by ESV as to its interpretation of the relevant obligations will be of no assistance in refuting allegations of failure to comply with the obligations specified.

- h. Finally, we are influenced in forming our conclusions by the objective of the Standard, which is directed to minimizing the adverse or negative impact of pruning on trees: preface. It is apparent from the Regulatory Impact Statement dated September 2014 that the adoption of the Standard was intended to "address community expectations in relation to

the maintenance of amenity value of trees being pruned, as well as assisting in the preservation of the health of these trees following pruning”.<sup>9</sup> The adoption of the Standard indicates that a different balance is sought to be achieved between protecting the amenity value of trees and the protection of public safety as compared to the requirements of the 2010 Regulations which were the immediate response to the 2009 bushfires. Therefore in determining whether Jemena has, to the extent ‘practicable’ complied with the Standard, the underlying purpose of the Standard (and of the 2015 Regulations which have introduced that Standard) to protect amenity trees will be relevant.

### **Enhanced notification and consultation requirements**

#### *Comparison of the 2010 Regulations and 2015 Regulations*

28. The 2010 Regulations required a responsible person to give notice of the intended cutting or removal of a tree on public land or within the boundary of private property to all affected persons: clause 5(2). The Regulations did not define ‘affected person’; allowed notification either in writing or by publication in a newspaper: clause 5(4); and unless the tree was of cultural or heritage significance did not require any details of the impact of cutting or removal and actions to minimise the impact: clause 5(3).
29. The 2015 Regulations introduce enhanced notification and consultation requirements. The 2015 Regulations require Jemena to, amongst other matters:

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<sup>9</sup> Regulatory Impact Statement, Electricity Safety (Electric Line Clearance) Regulations 2015, prepared for ESV by Jaguar Consulting Pty Ltd, page 5. The RIS provides that adoption of the Standard “addresses current community concerns in relation to losses of amenity value due to pruning which are potentially avoidable in some cases”: page 43. It further states that adoption of the Standard “is intended to yield amenity benefits... by ensuring that tree pruning is undertaken in a competent manner which preserves the health of the tree as well as minimising any harm to its aesthetic values. The proposal has been adopted in part due to widespread concerns expressed during previous consultations on this issue, with local government authorities in particular arguing that excessive and unsightly pruning practices are occurring and that these are not necessary corollaries of the achievement of the safety outcomes which underlie the Code”: page 69.

- a. notify the Council in writing and by publication in a newspaper where a tree to be removed is on public land managed by the Council: clause 15(3)(b) and clause 16(3);
- b. notify owners of contiguous land if a tree on adjacent private land is to be cut and that cutting may affect the use of that contiguous land during cutting or removal: clause 15(3)(c); and
- c. where notification is required to be given to the owner or occupier, to include in that notice a diagram that shows where the tree is intended to be cut: clause 15(5)(a)(iii).

### ***Notification of contiguous land owners***

#### *ESV's position*

30. We are instructed that it is the ESV's view that it is only necessary to notify the owner or occupier of the land of a contiguous property if use of, or access to, the property will be physically affected or interfered with by the cutting of the tree (i.e. by branch fall, dust etc) and that it does not extend to the giving of notice to a contiguous property which is affected in a less direct manner e.g. by noise, trucks in the street, saw dust etc.

#### *Our assessment*

31. The 2010 Regulations required notification in relation to tree cutting or removal on public land or private property. The requirement to give written notice to all affected persons was arguably limited to the owner and occupier of the private property on which the tree was related and did not extend to adjoining property. There was nothing in the 2010 Regulations which expressly required distribution companies to notify contiguous landowners where use of their land may have been affected.
32. The 2015 Regulations require distribution companies to give written notice not only to owners and occupiers of the land on which the tree is located, but also to owners and occupiers of contiguous properties where the use of their property may be affected: clause 15(3)(c).

33. We conclude that the 2015 Regulations will be a notable change from the previous regime regarding the notification of works to trees.
34. The word ‘contiguous’ is not defined in the 2015 Regulations. Therefore, the ordinary meaning as defined by the dictionary will prevail in these circumstances.<sup>10</sup> Dictionary definitions of ‘contiguous’ include ‘1. touching; in contact. 2. in close proximity without actually touching; near’.<sup>11</sup> Hence, there is ambiguity about whether contiguous is limited to land which directly touches the land on which the tree is located or can extend more widely.
35. In circumstances where the intention of the provision is to fuller disclosure and more open and transparent communication between responsible persons, the community in general and those occupying or managing the land on which trees are located,<sup>12</sup> we consider there is no warrant for limiting notification to properties which directly abut the land on which cutting or removal is proposed or to properties which will be physically affected by the works, for example by the dropping of a branch.
36. In our opinion:
- a. The use of land could be affected in many different ways and is not limited to situations where the tree is situated upon a particular property. For example, machinery or vehicles could block access to land by limiting access to a right of way, they could interfere with street parking or tree workers may rely on an adjoining property for access to a tree limb Use of land could also be affected by limbs dropping on a property, emission of noise or dust such that the amenity of a property (a component of most land uses) is deleteriously affected. Whilst it appears that ESV accepts that restrictions on access to a contiguous property or reliance on a contiguous property for access to a tree are examples where use of land is affected,<sup>13</sup> in our opinion the use of land may be affected beyond those examples and is not limited to directly abutting land.

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<sup>10</sup> See commentary in Pearce and Geddes, *Statutory Interpretation in Australia*, [3.30].

<sup>11</sup> Macquarie Dictionary, 5<sup>th</sup> edition.

<sup>12</sup> Regulatory Impact Statement, page 44.

<sup>13</sup> See letter of 27 November 2105 from ESV to Jemena, page 4.

- b. The purpose of the 2015 Regulations is an important consideration. The clear intent of the Regulations is to ensure owners and occupiers of properties affected by work are duly notified of works which will affect them.
  - c. The focus on the use of the land indicates that the obligation to notify is wider than was the case under the 2010 Regulations.
37. For these reasons, we conclude that the requirement contained in the 2015 Regulations to notify owners and occupiers of contiguous land whose use of land may be affected by proposed tree works may, according to the particular circumstances, necessitate notice to a wider class of landowners than those whose land directly abuts land on which a tree is proposed to be cut. The requirement to provide notice will extend to all nearby landowners whose use of land may be affected (for example by hindered access), even though that land does not directly abut the land of the tree in question. The costs associated with the more onerous notice requirements are necessary to comply with the changes in the 2015 Regulations.

***Contact details for the responsible person***

38. The written notice required to be provided to owners and occupiers of property whose use may be affected during cutting or removal of a tree must specify ‘the contact details of the responsible person, including the contact details for all enquiries regarding the vegetation and the intended cutting or removal’: clause 15(4) of Schedule 1.
39. We are instructed that this provision has been interpreted by Jemena as requiring it to disclose in the notice the specific details of the particular person who will be undertaking the works so that an affected person can contact the tree worker to discuss the intended cutting or removal. Past practice has been to provide a general telephone number in any notice and the details of the relevant tree worker would be provided if a person wished to discuss a particular tree.

*Our assessment*

40. In our opinion it will be sufficient to comply with the requirements of the ELC Code for the contact details of the company or contractor which will be undertaking the cutting or removal to be supplied as part of the notice. We do not consider that it is necessary for the notice to provide the specific details of the particular individual who will be undertaking the work at the time that notice is provided. On the basis that the company or contractor will be able to supply in due course details of the particular individual who will undertake the work, we consider that the requirement to supply contact details for “all inquiries” will be satisfied.

***Image or diagram of the tree in notice of works***

41. We are instructed that under the existing procedures used by Jemena and its contractors a generic diagram of a tree is utilised when giving notice of proposed tree cutting.

*ESV's position*

42. ESV has contended that a degree of specificity in relation to the particular tree in question is *not* required, and that a generic diagram is suitable for the purpose of the notice to be provided to landowners. It has advised that a representation of the tree is acceptable and a photograph is not necessary.<sup>14</sup>

*Our assessment*

43. On the basis that the 2015 Regulations require contractors either to take a photo or record in some way the tree proposed to be cut and the location of the proposed cuts, we are instructed that recording of the details of the tree and the type of works proposed will affect the scheduling of works. Instead of an instantaneous delivery of pro forma notices the contractors will now be required to inspect the tree, record all relevant details so as to provide appropriate notice, formulate the required notice including relevant diagrams or photographs for

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<sup>14</sup> See letter of 27 November 2105 from ESV to Jemena, page 4.



each person to be notified, deliver the notice and allow time for inquiries in relation to the proposed cutting. This is estimated to reduce the number of notices that could be generated per day from approximately 100 to approximately 30 per day.

44. We disagree with ESV's interpretation of the regulatory requirement. We are influenced in our interpretation by the intent behind the 2015 Regulations. As we understand it, the intent behind the 2015 Regulations is to provide notice to affected persons of proposed vegetation management. We consider that it would be of no benefit to affected owners notified of proposed works to receive a generic diagram and a generic description of proposed works. The information must show the tree to be cut, the location of the electric line in relation to the tree and the place where the tree will be cut; in each instance, the definite article "the" is used, indicating an intention to restrict or particularise the noun "tree"; the information involves details unique to the tree in question; and the information is of limited utility without the particular details of the specific tree.
45. In our opinion, the costs associated with undertaking the more rigorous notification processes, including specific and descriptive notices addressed to affected owners are necessary to comply with the increased level of regulation in the 2015 Regulations.

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**Overall conclusions on ESV's interpretation as to the effect of obligations contained in the 2015 Regulations.**

55. The less onerous interpretation by ESV of the obligations imposed by the 2015 Regulations provides limited comfort and assurance to the distribution companies. We consider that ESV's interpretation as communicated in meetings and in correspondence cannot be relied upon by the distribution companies to refute any allegation that they have failed to meet the requirements of the 2015 Regulations. That is particularly the case in the absence of any published practice note or official guidance from ESV regarding the obligations imposed by the 2015 Regulations and ELC Code.
56. ESV has asserted that its interpretation of the obligations contained in the 2015 Regulations and ELC Code results in lesser obligations (and therefore costs) on the distribution companies. However, the correspondence from ESV amounts to no more than the interpretation of one ESV officer regarding his or her understanding of the requirements of the 2015 Regulations. This officer's

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<sup>15</sup> See Part IV of the *Wrongs Act* 1958

interpretation is not definitive, is in various respects mistaken in our view, and could not be confidently relied upon by the distribution companies if they were prosecuted for failure to comply with obligations contained in the 2015

Regulations,

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16 December 2015