

SETTLEMENT AGREEMENT

between

Paul Anthony Mercleca & Amella Jane Coombes ("plaintiffs")

- and -

SPI Electricity Pty Ltd (ACN 064 661 118) ("SPI")

- and -

**Eagle Travel Tower Services Pty Ltd
(ACN 070 093 766) ("Eagle")**

- and -

**Secretary to the Department of
Sustainability and Environment ("DSE Secretary")**

- and -

Parks Victoria ("Parks Victoria")

PARTIES CONSENT

The parties agree to execute the attached settlement deed.

Nevin Lenne & Gross

Nevin Lenne & Gross
Solicitors for the plaintiffs
and fourth and fifth defendants by
counterclaim

Freehills

Freehills
Solicitors for the first defendant
and plaintiff by counterclaim

McCabe Terrill

McCabe Terrill
Solicitors for the second defendant
and first defendant by counterclaim

Norton Rose Australia

Norton Rose Australia
Solicitors for the third and fourth
defendants and second and third
defendants by counterclaim

SETTLEMENT DEED

between

Paul Anthony Mercleca & Amella Jane Coombes ("plaintiffs")

- and -

SPI Electricity Pty Ltd (ACN 064 651 118) ("SPI")

- and -

**Eagle Travel Tower Services Pty Ltd
(ACN 070 093 766) ("Eagle")**

- and -

**Secretary to the Department of
Sustainability and Environment ("DSE Secretary")**

- and -

Parks Victoria ("Parks Victoria")

RECITALS

- A. The plaintiffs have brought proceedings against the defendants in the Supreme Court of Victoria ("the Court"), being proceeding S CI 2010 01978 ("the proceeding").
- B. The proceeding is a grouped proceeding under Part 4A of the *Supreme Court Act 1986* ("the Act").
- C. The group members to whom the proceeding relates are all those persons who suffered loss of or damage to property as a result of the fire which started on the eastern edge of the Buckland Gap Road, three kilometers south of Beechworth in the State of Victoria on 7 February 2009 ("the fire"), but not including any persons who opted out of the proceeding.
- D. The plaintiffs on their own behalf and on behalf of the group members make claims against the defendants as set out in the Further Amended Statement of Claim filed in the proceeding.
- E. SPI, Eagle, DSE Secretary and Parks Victoria (collectively "the defendants") while denying the claims made by the plaintiffs have variously made counterclaims against the plaintiffs and each other, and sought contribution from each other, by pleadings and notices filed in

the proceeding, and each defendant has denied liability upon any counterclaim or pursuant to any notice of contribution.

- F. The parties have agreed, strictly on a without prejudice basis, to seek from the Court its approval pursuant to Part 4A of the Act for a settlement of the proceeding upon the terms set out below ("Court Approval").

OPERATIVE PROVISIONS:

1. General

- 1.1 The agreement recorded in this Deed is conditional upon the subsequent:
- (a) grant of Court Approval for its terms pursuant to section 33V of the Act; and
 - (b) execution of a deed of release substantially in the form of the deed annexed as Schedule A to this deed (the **Deed of Release**),
- and if Court Approval is not granted or the Deed of Release is not executed by 20 March 2012 this agreement shall be treated as never having been made, save that the costs of negotiating the agreement and the costs of or incidental to the application for Court Approval shall be costs in the proceeding.
- 1.2 Subject only to clause 1.1 above, this Deed shall be enforceable by the parties as a contract according to the law of the State of Victoria.

2. Settlement

- 2.1 In full and final settlement of all claims made in the proceeding by the plaintiffs on their own behalf and on behalf of group members, and all claims made by the defendants *inter se*, the defendants severally agree to pay to the plaintiffs and Participating Group Members as defined below ("PGMs", which hereafter unless the context otherwise requires includes the plaintiffs), in the proportions set out in Schedule B ("agreed proportions"):
- (a) Settlement Payments in accordance with Section 3 below; and
 - (b) costs in accordance with Section 4 below;
- and any reference in this Deed to any payment by the defendants is a reference to their several obligations to pay the agreed proportion of the payment.

3. Settlement Payments

3.1 Subject to clause 3.2, the defendants will pay a Settlement Payment in respect of each PGM, calculated as forty per centum (40%) plus five per centum in interest (5%) totaling 45% ("**Settlement Percentage**") of the loss or injury suffered by each PGM, as assessed in accordance with this Deed ("**assessed loss**"), in the following proportions:

DSE Secretary / Parks Victoria	11.25% of the assessed loss
Eagle	6.75% of the assessed loss
SPI	<u>27% of the assessed loss</u>
Total	45% of the assessed loss

3.2 The defendants' liabilities under clause 3.1 shall be capped at:

(a) thirty-two million eight hundred and fifty thousand dollars (\$32.85m) ("**Settlement Sum**"), to be paid by the defendants as follows:

DSE Secretary / Parks Victoria	\$8.2125m
Eagle	\$4.9275m
SPI	<u>\$19.71m</u>
Total	\$32.85m

(b) plus any interest accruing on the Settlement Sum in the Beechworth Settlement Reserve Account;

save that if those funds total less than forty-three per centum (43%) of the total value of all assessed losses ("**Total Assessment**") the defendants shall make an additional payment of:

- (i) the shortfall up to 43% of the Total Assessment; or
- (ii) \$2m;

whichever is the lesser.

3.3 The assessed loss of the group member known to the parties as HVP Plantations ("**Hancocks**"), being the timber plantation owner or operator conducting business near Myrtleford, shall be capped at \$10m. For the avoidance of doubt:

- (a) this cap does not obviate the application of Section 8 below; and
- (b) the final value of assessed loss for Hancocks remains compensable at the rate specified in clause 3.1 above.

3.4 The assessed loss of all telecommunications or utility providers shall be capped at \$5m (pro rated between them), and subject to that cap:

- (a) assessed in accordance with Section 8 below; and

- (b) compensated at the rate specified in clause 3.1 above.

4. Costs

- 4.1 The defendants in addition to the Settlement Payments will pay costs in accordance with this Section 4.
- 4.2 The defendants will pay the plaintiffs' party-party costs of the proceeding, to be taxed in default of agreement, including:
 - (a) plaintiffs' costs incurred prior to the substitution of the plaintiffs in the proceeding;
 - (b) plaintiffs' costs incurred in the "Hicks" proceeding (Supreme Court of Victoria SC 1 2010 01548); and
 - (c) the plaintiffs' party-party costs of the proceedings of the Victorian Bushfires Royal Commission ("VBRC") in respect of the Beechworth fire, fixed at \$160,000.00.
- 4.3 Subject to Sections 8 and 9 below, the defendants will pay the individual party-party costs of each PGM, to be agreed or taxed.
- 4.4 The parties agree not to seek leave of the Court for an assessment of costs other than by way of taxation.

5. Court orders

- 5.1 As soon as practicable following execution of this Deed:
 - (a) the parties will inform the trial judge that terms for a proposed settlement of the proceeding have been agreed between the parties, and will request vacation of the trial date for the proceeding; and
 - (b) the plaintiffs will apply to the Court, via one or more summons, for orders *inter alia*:
 - (i) permitting those group members who opted out of the proceeding but who wish to resume group membership to do so;
 - (ii) approving the form and content of a notice informing group members of the proposed settlement of the proceeding and of their rights in respect of the plaintiffs' application for Court Approval;
 - (iii) that or to the effect that:
 - A. municipal councils and other Commonwealth, State or Territory authorities or instrumentalities ("public authorities") are not group members and not entitled to participate in this settlement; alternatively

B. that the group definition be amended to exclude public authorities; (**“public authority exclusion orders”**);

- (iv) approving the proposed settlement pursuant to section 33V of the Act;
- (v) requiring that group members who wish to claim compensation in respect of the claims made on their behalf in the proceeding register their claims (**“Registration Form”**) with the plaintiffs’ solicitors (**“Participating Group Members”**) by a date to be fixed by the Court (**“Registration Date”**), failing which the group members shall remain group members and be bound by the compromise but not entitled to participate in the claims assessment procedure provided in this Deed unless agreed by the defendants or permitted by order of the Court (**“class closure orders”**);
- (vi) approving the form and content of a notice informing group members of any Court Approval and of their rights in respect of the settlement;
- (vii) that the PGMs contribute, from the Settlement Payments payable to them pursuant to this Deed, to the unrecovered costs of the plaintiffs in the proceeding (**“costs contribution orders”**); and
- (viii) following the completion of all other steps contemplated by this Deed – for the dismissal of the proceeding with no further order as to costs.

5.2 The parties acknowledge that:

- (a) if public authority exclusion orders or class closure orders are not made, this Deed shall be treated as never having been made save to the extent necessary to enforce clause 1.1 above;
- (b) any costs incurred in respect of an application for costs contribution orders (if the application requires a separate hearing) shall be solicitor-client costs not party-party costs.

5.3 The parties will take all necessary steps, and instruct their legal representatives and loss assessment experts to take all reasonable steps consistent with those persons’ professional obligations, promptly to obtain orders to the effect set out above, and if Court Approval is granted then to implement the provisions of this Deed.

6. Notification of PGM claims

6.1 The plaintiffs’ solicitors shall keep an accurate record of the fact and content of communications with group members:

- (a) occurring after the execution of this Deed; and

- (b) concerning the effect or potential effect of the agreement on group members, or concerning the class closure process.

- 6.2 In the event of any dispute arising as to whether a group member is or should be permitted to become a PGM:
- (a) the defendants shall have the right to inspect the record of the fact, but not the content, of the communication with the group member; and
 - (b) if application is made to the Court in relation to the dispute pursuant to Section 13 below, the plaintiffs' solicitors shall make the records referred to in clause 6.1 available to the Court for examination by it or by independent counsel agreed between the parties, without prejudice to any privilege which might attach to the records.

- 6.3 Within 7 days after the Registration Date the plaintiffs' solicitors will file as a confidential exhibit, and serve upon each defendant, a list of the PGMs.

7. Principles for property loss assessment – Guideline Assessments

- 7.1 The Independent Assessors agreed to be appointed for the purposes of this Deed are Stephen Monte of Crawfords & Company jointly with John Sykes of John Sykes Rural Consulting.
- 7.2 The Reserve Assessor agreed to be appointed for the purposes of this Deed is Nigel McGuckian, Rendell McGuckian.
- 7.3 If either of the Independent Assessors or the Reserve Assessor becomes unavailable for any task required by this Deed then the Independent Assessors shall jointly nominate a substitute to act in lieu of that person for that task.
- 7.4 The Independent Assessors (including any substitute appointed pursuant to clause 7.3) shall be instructed jointly on behalf of all parties to act independently in the fair administration of the claims assessment procedure, and not as the representative of any party's interest.
- 7.5 The parties acknowledge that the Independent Assessors will prepare, for the purposes of this Deed, a joint report identifying matters agreed and not agreed in respect of assessments undertaken by them of four (4) clients of the plaintiffs' solicitors whose

claims raise a wide range of the loss issues expected by the solicitors to arise among the group members ("Guideline Assessments").

7.6 In any assessment pursuant to this Deed:

- (a) the assessment shall be conducted according to those principles agreed in the Guideline Assessments, to the extent that the principles are applicable to any loss claimed by a PGM and are and remain consistent with the law of Victoria as it stands at the time of each assessment ("Victorian assessment law");
- (b) trees (being vegetation more than four metres high, or any plantation tree) shall be assessed only as follows:
 - (i) trees in a garden shall not be individually valued, but may be taken into account in the assessment of a garden;
 - (ii) trees which directly produce economic benefit (for example but without limitation, plantation, firewood, or orchard trees) shall be valued as income producing assets; and
 - (iii) non-garden trees which do not directly produce income but which contribute to the preservation of land or soil quality (for example by mitigating erosion or salinity) shall be valued at their reinstatement cost, provided the trees:
 - A. were replaced prior to 2 February 2012; or
 - B. have not been replaced but are to be replaced as part of a windbreak, gully-line or similar complex of trees, which complex had commenced to be replaced prior to 2 February 2012; and
 - (iv) where non-garden trees which do not directly produce income but which contribute to the preservation of land or soil quality (for example by mitigating erosion or salinity) have not been replaced in accordance with (iii)A or B above, it is agreed that the strong inference is that the replacement was not necessary or reasonable however this inference may be rebutted by evidence that:
 - A. in the Independent Assessors' reasonable opinion the trees are necessary to be replaced for wind protection, gully preservation or like purposes; and
 - B. circumstances (such as financial hardship) prevented the PGM from replacing them prior to 2 February 2012;
- (c) if under Victorian assessment law work completed by the labour of a PGM or by volunteers is compensable, and is to be measured by an hourly labour rate, the rate is agreed at \$25.00 per hour, and the compensation shall only be payable upon delivery of a statutory declaration from the PGM verifying (as a best estimate where necessary) the hours applied in performance of the work.

- 7.7 If as a result of the Guideline Assessments, or any assessment pursuant to this Deed, the parties become aware of an issue of principle regarding loss assessment which is not agreed, the parties shall make reasonable efforts to agree the applicable principle, but absent agreement may refer the issue to the Court for determination.
- 7.8 Principles agreed in the Guideline Assessments, or determined pursuant to clause 7.7, shall be applied to all subsequent assessments undertaken pursuant to this Deed.

8. Claims assessment – property claims

Property claim assessments

- 8.1 As soon as practicable after Court Approval the plaintiffs' solicitors shall commence to deliver to SPI (which shall provide a copy to the defendants' solicitors) and the Independent Assessors, a schedule of claimed losses (in a form to be determined by the Independent Assessors in consultation with the plaintiffs' solicitors and the solicitors for SPI) together with the documentary material upon which each PGM relies to establish the quantum of the PGM's assessed loss ("Claim Book"), and:
- (a) the plaintiffs' solicitors shall make reasonable efforts to ensure the Claim Books are delivered in weekly batches of not more than 30 books per batch; and
 - (b) for the avoidance of doubt, this Deed does not require that any PGM engage the plaintiffs' solicitors or any other lawyer to compile the PGM's Claim Book or represent the PGM in the claim assessment procedure, provided however that clause 12.1 below applies to all PGMs.
- 8.2 Subject to clause 8.3, the Independent Assessors shall use their best endeavours to deliver to the PGM or its representative, and to the solicitors for each party, within 35 days after receipt of any Claim Book, a "Notice of Assessment" fully particularizing the Independent Assessors' loss assessment for the PGM.
- 8.3 In the event that the Independent Assessors, following receipt of a Claim Book, reasonably require further documentation, an interview with any party (which term includes, for the purposes of the claims assessment procedure, the relevant PGM) or access to any property then:
- (a) the Independent Assessors shall advise the party (or its solicitors where it is represented) of the requirement, copied to the solicitors for each party;

- (b) if any party's solicitor intends to be present at a meeting between an Independent Assessor and a PGM the solicitor shall, as early as practicable, in writing notify the solicitors for each other party;
- (c) if a party fails within 14 days to comply with a requirement notified under this clause, the Independent Assessors shall proceed to complete the assessment on the basis of the evidence and submissions already received; and
- (d) the time for delivery of the Notice of Assessment for the PGM shall be extended by a period of 28 days from compliance or the due date for compliance with the requirement, whichever is earlier.

8.4 The defendants will pay:

- (a) the reasonable fees and expenses of the Independent Assessors incurred in connection with each assessment, calculated in accordance with Schedule C; and
- (b) the PGM's individual costs of the proceeding incurred prior to 2 February 2012, on a party-party basis as agreed or taxed; and
- (c) the PGM's individual costs incurred after 2 February 2012 and for the purposes of the Independent Assessment (being the PGM's "independent assessment costs"), fixed at:
 - (i) \$1,500 for claims assessed by the Independent Assessors at less than \$150,000;
 - (ii) \$2,500 for claims assessed by the Independent Assessors at more than \$150,000 but less than \$500,000; and
 - (iii) \$4,000 for claims assessed by the Independent Assessors at more than \$500,000.

8.5 Any party wishing to dispute a Notice of Assessment, or any part of a Notice, must within 21 days after receipt of the Notice serve on each other party to the assessment a written notice giving particulars of the dispute, failing which all parties shall be deemed to accept the Notice of Assessment as fixing the assessed property loss of the PGM.

Property claims – assessment disputes

- 8.6 Where a party serves a written notice pursuant to clause 8.5, and the difference between the asserted value and the assessed value of the item(s) in dispute, when multiplied by the Settlement Percentage:
- (a) totals less than \$100,000 ("Class A Disputes), the dispute shall be referred forthwith for Review Assessment by a Review Panel comprising:
 - (i) the Reserve Assessor; and

- (ii) on an alternating basis, one of:
 - A. Tim Walker or Ian Percy of the Victorian Bar; alternating with
 - B. Gavin Burnis or Greg Ahern of the Victorian Bar;
 with Mr Robin Gorton QC of the Victorian Bar as casting vote in the event of deadlock;
 - (b) totals more than or equal to \$100,000 ("**Class B Disputes**"), the dispute shall be referred forthwith for Review Assessment by a **Senior Review Panel** comprising the Reserve Assessor, Dawna Wright of McGrathNicol, and Mr Gorton QC; provided that if the members of counsel referred to above are unavailable then substitute counsel shall be appointed, such counsel to be agreed between the parties or, absent agreement, nominated by the Chairperson of the Victorian Bar Council.
- 8.7 The Review Panel (which hereafter includes the Senior Review Panel) shall be instructed as set out in clause 7.4.
- 8.8 In any assessment pursuant to clause 8.6 ("**Review Assessment**"):
 - (a) the Review Panel shall not be informed of the original assessment of the disputed items, or of any offers made between the parties in respect of the disputed items;
 - (b) clauses 7.6, and clauses 8.1 to 8.3 inclusive shall be observed, as nearly as practicable, save that the outcome of the Review Assessment shall be fully particularized in a "**Notice of Review Assessment**"; and
 - (c) the disputed item(s) shall be valued according to the Notice of Review Assessment, save that where that value is less than 10% different from the value fixed by the Notice of Assessment the latter shall prevail.
- 8.9 The defendants will pay the fees of the Review Panel, and such fees shall form part of the defendants' party-party costs of the Review Assessment for the purposes of clause 8.10.
- 8.10 The party initiating a Review Assessment shall pay the other party's costs of the Review Assessment ("**review assessment costs**") agreed or taxed on a party-party basis, save that if the Review Assessment varies the total assessed loss in favour of the initiating party by 10% or \$30,000 (whichever is less) then the responding party shall pay the initiating party's review assessment costs on a party-party basis (and for the avoidance of doubt, only one set of representatives' costs shall be allowed as party-party costs, whether to the PGM or the defendants).

Special assessment – Hancocks

- 8.11 Any claim submitted by Hancocks pursuant to this Deed:
- (a) shall be particularized in a Claim Book, submitted by Hancocks to the plaintiffs' solicitors and to SPI (which shall forward a copy to the defendants' solicitors), within 30 days after the Registration Date;
 - (b) shall be treated as a Class B Dispute, save that:
 - (i) the particulars in Hancocks' Claim Book shall stand as the original Notice of Assessment, and shall be disclosed to the Senior Review Panel;
 - (ii) Hancocks may, by written notice given to all parties within 7 days after submitting its Claim Book, elect to have an assessor nominated by it sit on the Senior Review Panel in lieu of the Reserve Assessor, provided its nominee accepts appointment upon the terms in clause 7.4 above;
 - (iii) the Senior Review Panel may in its absolute discretion modify the procedures for assessing Class B Disputes (including any timing requirements) as it considers necessary having regard to the complexity and quantum of the Hancocks claim;
 - (c) shall be subject to the assessment cap fixed by clause 3.3 above; and
 - (d) shall be compensated at the Settlement Percentage rate agreed in clause 3.1 above.

No appeals

- 8.12 Save as provided in clause 7.7, the determination of a PGM's assessed loss pursuant to this Section 8 is final and binding on all parties (including for the avoidance of doubt the relevant PGM) and shall not be the subject of any appeal in relation to any error or alleged error of fact or law.

9. Claims assessment – Personal Injury ("PI") Claims

9.1 The PI Assessor:

- (a) will be Mr Richard Stanley QC of the Victorian Bar, or if he is not available then Mr Jeremy Ruskin QC of the Victorian Bar; and
- (b) shall be jointly instructed as set out in clause 7.4 above.

9.2 If a PGM in his or her Registration Form gives notice that the PGM makes a claim for personal injury ("PI Claim") then:

- (a) the plaintiffs' solicitors shall within 90 days after the Registration Date deliver to the solicitors for SPI (or otherwise nominated by the defendants) a PI Claim Book

containing the documentary material upon which the PGM seeks to rely in support of his or her PI Claim, which material will include a certificate of assessment as required by section 28LT of the *Wrongs Act 1958 (Vic)* ("the **Wrongs Act**");

- (b) within 21 days after receipt by the defendants' solicitor of a PI Claim Book, the defendants' solicitor will inform the PGM (or its representative where represented) whether:
- (i) a medico-legal examination is required, and if so shall use reasonable endeavours to arrange a medical examination within 30 days after receipt of the PI Claim Book;
 - (ii) a referral to the Medical Panel is to be made pursuant to section 28LW of the *Wrongs Act* or otherwise;
- (c) the defendants will meet the costs of the medico-legal examination, including reasonable costs of the PGM of attending the appointment;
- (d) the PGM's representatives and the defendants' representatives shall within a further 30 days after receipt of the medico-legal report, or if the PGM is referred to the Medical Panel then within 30 days of the Medical Panel's determination, confer for the purpose of negotiating a settlement of the PI Claim; but
- (e) if a settlement of the PI Claim is not agreed within 42 days after delivery of the defendants' medico-legal report, or the Medical Panel determination being received by the defendants (whichever is later), the claim shall stand referred to the PI Assessor; and
- (f) within 21 days after any referral (or such longer period as may reasonably be approved by the PI Assessor), the parties' representatives shall deliver to the PI Assessor, and disclose to each other, the documentary material upon which they seek to rely for the PI Assessment;

save however that the parties agree that the plaintiffs have satisfied the significant injury threshold for the purposes of the *Wrongs Act*.

9.3 In assessing a PI Claim the PI Assessor:

- (a) may request a conference with a PGM, which may be attended by the solicitors for the PGM and the solicitors for the defendants;
- (b) shall proceed as he considers appropriate, subject to the principles of natural justice;
- (c) shall not have disclosed to him the existence or amount of any settlement offers made in respect of the PI Claim;
- (d) may request any party to a PI Assessment to provide further evidence or make submissions and, failing compliance by the party within 14 days (or such longer period as may reasonably be approved by the PI Assessor), shall proceed on the basis of the evidence and submissions already received;

- (e) shall assess the PI claim, and deliver to all parties a "Notice of Personal Injury Loss Assessment", within 60 days after receipt of the referral material (or where a direction has been given under "d" above, within 30 days after the time for compliance with the direction).
- 9.4 The fees of the PI Assessor shall be paid by the defendants, but shall form part of the party-party costs of the assessment for the purposes of clause 9.5.
- 9.5 The party-party costs of a PI Assessment shall be paid by the defendants, save that where the PI Claim is finally assessed at a value less than 90% of the amount of any offer made by the defendants (both excluding interest entitlements for this comparison) the PGM shall pay the defendants' party-party costs incurred after 7 days following the date of the offer (and for the avoidance of doubt, only one set of representatives' costs shall be allowed as *inter partes* costs whether to the PGM or the defendants.)

No appeals

- 9.6 The determination of a PGM's assessed loss pursuant to this Section 9 is final and binding on all parties (including for the avoidance of doubt the relevant PGM) and shall not be the subject of any appeal in relation to any error or alleged error of fact or law.

10. **Payment sequence**

Settlement Payments

- 10.1 The parties will use all reasonable endeavours to achieve completion of the claims assessment procedure within eight (8) calendar months from the date of Court Approval.
- 10.2 Within 21 days after the date of Court Approval the defendants will pay the Settlement Sum into an interest-bearing account at the ANZ Bank (Myrtleford Branch) ("**Beechworth Settlement Reserve Account**"), and one partner of the plaintiffs' solicitors and one partner of SPI's solicitors shall be joint signatories to the account.
- 10.3 When in the plaintiffs' solicitors' reasonable estimation not less than 60% of the PGMs' claims (by value) have been finally assessed, or 10 months have elapsed since the date of Court Approval:
- (a) the plaintiffs' solicitors shall serve on the defendants' solicitors an **Interim Assessment Summary** identifying claims then resolved ("**resolved claims**") and the total value of Settlement Payments due in respect of those claims and

- (b) within 7 days after service of the Interim Assessment Summary the sums identified in the Summary shall be released from the Beechworth Settlement Reserve Account into an interest-bearing trust account nominated by the plaintiffs' solicitors ("**Beechworth trust account**"); and
 - (c) the plaintiffs' solicitors shall thereafter use reasonable endeavours to distribute among the resolved claims such proportion (not exceeding 60%) of the monies then available in the Beechworth trust account as the solicitors in their absolute discretion consider appropriate, as an interim distribution pending resolution of the balance of PGM claims and final calculation of any deductions payable by PGMs pursuant to any costs agreement or costs contribution order.
- 10.4 Notwithstanding anything in clause 10.3 the plaintiffs' solicitors may make, at any time following resolution of the claim (if any) submitted by Hancocks, an interim distribution to Hancocks of not more than 60% of the Settlement Payment due in respect of that claim.
- 10.5 Upon completion of the claims assessment procedure:
- (a) the plaintiffs' solicitors shall serve on the defendants' solicitors a **Final Assessment Summary** identifying all resolved claims, the balance of Settlement Payments owing (giving credit for any interim payment pursuant to clause 10.3 or clause 10.4)
 - (b) unless otherwise agreed, or ordered by the Court:
 - (i) the defendants within 14 days after service of the Final Assessment Summary shall pay into the Beechworth Settlement Reserve Account any further sum due under clause 3.2 above; and
 - (ii) within 7 days after service of the Final Assessment Summary, or payment under (b)(i) above, whichever is later, the sums identified in the Final Assessment Summary shall be released into the Beechworth trust account.
- 10.6 If following the payments required by clause 10.5 above any sum remains in the Beechworth Settlement Reserve Account the sum shall forthwith be paid to the defendants in the agreed proportions.

Costs inter partes

- 10.7 As soon as practicable after Court Approval the plaintiffs shall deliver to the defendants an affidavit made by an independent costs consultant ("**Costs Affidavit**") estimating the allowable party-party costs of the plaintiffs in the proceedings, not including costs relating exclusively to the plaintiffs' individual issues ("**recoverable common issues costs**").

- 10.8 Within 30 days after receipt of the Costs Affidavit the defendants shall pay into the Beechworth trust account, as an instalment pending final agreement or taxation of the plaintiffs' recoverable common issues costs, 60% of the amount of the estimate in the Costs Affidavit, which may be applied by the plaintiffs' solicitors (including, for the avoidance of doubt, Maddens Lawyers) toward payment of costs and disbursements payable to them.
- 10.9 The parties shall use reasonable endeavours to develop an expeditious and efficient mechanism for agreeing or taxing:
- (a) the recoverable common issues costs of the proceeding; and
 - (b) any individual party-party costs payable to any PGM pursuant to clause 8.4(b) above.
- 10.10 Costs of taxing the plaintiffs' or any PGM's costs not recoverable from the defendants pursuant to this Deed shall be solicitor-client costs.
- 11. Mutual releases, no admissions**
- 11.1 Each party makes this Deed without admission and fully maintaining its claim or defence as the case may be in the proceeding.
- 11.2 Upon completion of either of the steps in clause 10.5(b) above:
- (a) each of the defendants, their officers, servants, agents and related entities shall stand released by each PGM, and by each other defendant; and
 - (b) each PGM, its officers, servants, agents and related entities shall stand released by each defendant;
- from all claims, suits, demands or liabilities arising out of the subject matter or conduct of the proceeding.
- 11.3 Without prejudice to the ability of the persons referred to in paragraph 11.2 to enforce this Deed directly for his, her or its own benefit:
- (a) each party to this Deed holds the benefit of each release, discharge, indemnity and covenant not to sue contained in this Deed, to the extent that it is expressed to apply in favour of its officers, servants or agents (or in the case of the plaintiffs, to the extent it is expressed to apply in favour of PGMs or their officers, servants or agents) upon trust for the said officers, servants or agents; and
 - (b) no party may, without the prior written consent of the beneficiaries of the trust referred to in (a), agree to vary the terms of any such release, discharge, indemnity

or covenant not to sue, to the extent that it is expressed to apply in favour of the said beneficiaries.

12. Plaintiffs' reimbursement

12.1 The defendants acknowledge that the plaintiffs have or may have rights to require that a portion of any Settlement Payment payable to a PGM pursuant to this Deed be applied in reimbursement of the plaintiffs' unrecovered costs of the proceeding, and the defendants accordingly will not, without leave of the Court, make or permit to be made any payment in respect of any claim which is now or was at any time after the opt-out date a subject of this proceeding, other than the payments which this Deed contemplates will or might be made into the Beechworth Settlement Reserve Account.

13. Supervision by the Court

13.1 The solicitors for any party may refer any issues arising in relation to the administration of this Deed to the Court for determination, and for the purposes of administration of this Deed the plaintiffs' solicitors shall act in the interests of the fair administration of the settlement for the group as a whole and not as the representatives of any individual group member.

13.2 Within 14 days after completion of all other steps contemplated by this Deed (including payments of costs) the parties will take all necessary steps to obtain from the Court orders dismissing the proceeding, with no further order as to costs.

14. No assistance to other parties

14.1 The plaintiffs will not assist any other person (excluding PGMs) to commence, facilitate or pursue a claim against any other party in connection with the Beechworth fire and by entering this deed instruct their solicitors accordingly.

15. Public announcements and claim data confidentiality

15.1 No party shall make any public announcement which is disparaging of the conduct of any other party (or its legal or other representatives) in making or responding to the claims which are now or were ever a subject of this proceeding.

15.2 Following Court Approval, and subject to any legislative provision requiring disclosure, the parties, their representatives and the group members shall keep confidential any information obtained in connection with the proceedings or in implementation of this Deed, and which by its content reasonably indicates a confidential character.

16. Waiver

16.1 No right under this Deed is waived or deemed to be waived except by notice in writing by the party waiving the right. In particular, a party does not waive its rights under this Deed because it grants an extension of time or other forbearance to any other party.

16.2 A waiver by a party under clause 16.1 does not prejudice the party's rights in respect of any subsequent breach of this Deed.

17. Entire agreement

17.1 Except as expressly provided in this Deed, this Deed constitutes the sole and entire agreement between the parties in respect of the subject matter of this Deed and no warranties, representation, guarantees, or other terms and conditions not contained, recorded or expressly referred to in this Deed shall be of any force or effect.

17.2 Without limiting the generality of the preceding clause, each party warrants that in entering into this Deed it has not relied upon, or otherwise been caused to act by, any act or omission, representation, statement or other conduct of the other party or agent of or adviser to any other party apart from any matter expressly recorded in this Deed.

18. Counterparts

18.1 This Deed may be executed in any number of counterparts, and all counterparts taken together shall constitute one instrument.

19. Variation

19.1 This Deed may only be amended or supplemented by agreement in writing signed by the parties.

20. Governing law

20.1 This Deed is governed by the law of Victoria, and each party submits to the jurisdiction of the courts of that State.

21. Taxation

21.1 The parties acknowledge that the consideration provided under this Deed includes any GST payable by the party making a taxable supply under or in connection with this Deed.

21.2 If for any reason any supply made under or in connection with this Deed is a taxable supply, including by reason of a determination by the Commissioner of Taxation, a court or a tribunal, the parties acknowledge that the consideration provided under this Deed includes any GST payable by the party making a taxable supply in connection with this Deed.

21.3 The party who has made the taxable supply must deliver a valid tax invoice, within 14 days of a demand for a tax invoice by the party who is the recipient of the taxable supply.

21.4 To the extent that a party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

21.5 The parties and the PGMs will be responsible for their own taxation obligations arising from the transactions contemplated by this Deed.

Executed as a deed

Signed sealed and delivered by
Paul Anthony Mercieca

sign here ▶ _____

print name Paul Anthony Mercieca

In the presence of

sign here ▶ _____
Witness

print name _____

Signed sealed and delivered by
Amelia Jane Coombes

sign here ▶ _____

print name Amelia Jane Coombes

in the presence of

sign here ▶ _____
Witness

print name _____

Signed sealed and delivered by
SPI Electricity Pty Ltd (ACN 064 651 118)
By

sign here ▶ _____
Director

print name _____

sign here ▶ _____
Director

print name _____

in the presence of

sign here ▶ _____
Witness

print name _____

Signed sealed and delivered by
Eagle Travel Tower Services Pty Ltd (ACN 070 093 766)
By

sign here ▶ _____
Director

print name _____

sign here ▶ _____
Director

print name _____

in the presence of

sign here ▶ _____
Witness

print name _____

Signed sealed and delivered by
Secretary to the Department of Sustainability and Environment
By

sign here ▶ *Greg Wilson*

print name Greg Wilson

in the presence of

sign here ▶ *S. Diamantopoulos*
Witness

print name SIMONE DIAMANTOPOULOS

Signed sealed and delivered by
Parks Victoria
By

sign here ▶ _____

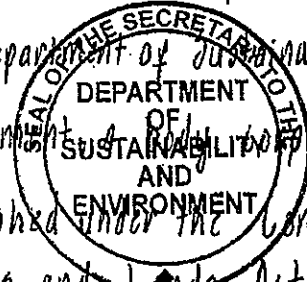
print name _____

in the presence of

sign here ▶ _____
Witness

print name _____

The Official Seal of the Secretary to
the Department of Sustainability and
Environment of the State of Victoria
established under the Conservation
Forests and Lands Act 1987 was
affixed on
by



Greg Wilson
Secretary.

Schedule A
(Settlement Agreement cl.1.1(b))

Deed of Release

Deed

6 March 2012

Deed of release

Victorian Managed Insurance Authority

SPI Electricity Pty Ltd

Eagle Travel Tower Services Pty Ltd

Freehills

101 Collins Street Melbourne Vic 3000 Australia
GPO Box 128A Melbourne Vic 3001 Australia
Sydney Melbourne Perth Brisbane Singapore

Telephone +61 3 9288 1234 Facsimile +61 3 9288 1567
www.freehills.com DX 240 Melbourne

Associated offices in Jakarta Beijing Shanghai Hanoi Ho Chi Minh City

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Deed of release

Date ▶

Between the parties

Victorian Managed Insurance Authority
of Level 30
35 Collins Street
Melbourne VIC 3000
(VMIA)

SPI Electricity Pty Ltd
ACN 064 651 118 of Level 31
2 Southbank Boulevard
Southbank VIC 3006
(SP AusNet)

Eagle Travel Tower Services Pty Ltd
ACN 070 093 766 of Rowe & Associates Pty Ltd
28C Carrier Street
Benalla VIC 3672
(Eagle)

Recitals

- A. SP AusNet is the first defendant in the Proceeding.
 - B. Eagle is the second defendant in the Proceeding.
 - C. The Parties are currently engaged in settlement discussions.
 - D. If the Parties reach agreement as to the terms upon which the Proceeding is to be compromised, the VMIA will warrant on behalf of the State Entities, not to sue SP AusNet or Eagle to recover the Beechworth fire losses.
-

This deed witnesses as follows:

1 Condition precedent

Clauses 2 and 3 of this deed are conditional upon the:

- (a) execution by the Parties of a settlement deed in, or substantially in, the form of the Settlement Deed; and
- (b) grant of approval by the Court in accordance with *Supreme Court Act 1986 (Vic)* s33V of the Settlement Deed.

2 Representations by VMIA

VMIA represents as follows:

- (a) VMIA insures the State Entities.
- (b) VMIA has considered the State Entities' insured losses from the Beechworth fire with a view to the exercise or otherwise of its Subrogation Rights.
- (c) When considering the State Entities' insured losses the VMIA made enquiries of the State Entities about the State Entities' Beechworth fire uninsured losses with a view to seeking recovery of these losses on their behalf.
- (d) The total of the State Entities insured and uninsured losses revealed by these enquiries was insignificant.
- (e) The VMIA determined that it would not pursue any recovery action on behalf of itself or the State Entities to recover the insured and uninsured losses from the Beechworth fire.
- (f) To the best of the VMIA's knowledge the State Entities do not intend now or at any time in the future to pursue recovery of their Beechworth fire losses.
- (g) The VMIA does not intend to exercise its Subrogation Rights to recover Beechworth fire losses.

3 Warranty by VMIA

- (a) The VMIA is a body corporate established under section 5 of the *Victorian Managed Insurance Authority Act 1996 (Vic)*.
- (b) The VMIA provides insurance to participating bodies identified in section 4 of the *Victorian Managed Insurance Authority Act 1996* and in particular those entities defined as State Entities herein.
- (c) The VMIA warrants on behalf of the State Entities that it has authority to covenant and does covenant for itself and each of the State Entities not to commence, continue, maintain or permit any action or demand against SP. AusNet or Eagle for loss or damages consequent upon or in connection with the Beechworth fire in the exercise of its Subrogation Rights.

4 Definitions and interpretation

4.1 Definitions

The meanings of the terms used in this deed are set out below.

Term	Meaning
Beechworth fire	the fire which ignited on Buckland Gap Road, approximately 3 kilometres south of Beechworth, Victoria on 7 February 2009
Beechworth fire losses	all loss and damage suffered by any of the State Entities as a result of the Beechworth fire
Parties	the plaintiffs and defendants to the Proceeding
Proceeding	Supreme Court of Victoria Proceeding No 1978 of 2010.
Settlement Deed	the document currently proposed to be executed to settle the Proceeding
State Entities	All entities the VMIA insures including: <ul style="list-style-type: none"> • VicRoads • Country Fire Authority • Victoria Police • Department of Sustainability and Environment • Parks Victoria • Department of Human Services • Department of Education and Early Childhood Development
Subrogation Rights	any right held by the VMIA to make a demand or commence a proceeding to recover monies paid to any of the State Entities under a policy of insurance in relation to the Beechworth fire losses

4.2 Interpretation

In this deed:

- (a) Headings and bold type are for convenience only and do not affect the interpretation of this deed.
- (b) The singular includes the plural and the plural includes the singular.
- (c) Words of any gender include all genders.

- (d) Other parts of speech and grammatical forms of a word or phrase defined in this deed have a corresponding meaning.
- (e) An expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual.
- (f) A reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, this deed and a reference to this deed includes any schedule, attachment and exhibit.
- (g) A reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them.
- (h) A reference to a document includes all amendments or supplements to, or replacements or novations of, that document.
- (i) A reference to a party to a document includes that party's successors and permitted assignees.
- (j) A promise on the part of 2 or more persons binds them jointly and severally.
- (k) A reference to an deed other than this deed includes a deed and any legally enforceable undertaking, deed, arrangement or understanding, whether or not in writing.
- (l) A reference to liquidation or insolvency includes appointment of an administrator, compromise, arrangement, merger, amalgamation, reconstruction, winding-up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors, insolvency, bankruptcy, or any similar procedure or, where applicable, changes in the constitution of any partnership or person, or death.
- (m) No provision of this deed will be construed adversely to a party because that party was responsible for the preparation of this deed or that provision.
- (n) A reference to a body, other than a party to this deed (including an institute, association or authority), whether statutory or not:
 - (1) which ceases to exist; or
 - (2) whose powers or functions are transferred to another body,is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

4.3 Interpretation of inclusive expressions

Specifying anything in this deed after the words 'include' or 'for example' or similar expressions does not limit what else is included.

5 General

5.1 Governing law and jurisdiction

- (a) This deed is governed by the law in force in Victoria.
- (b) Each party irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Victoria and courts of appeal from them in respect of any proceedings arising out of or in connection with this deed. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

5.2 Invalidity and enforceability

- (a) If any provision of this deed is invalid under the law of any jurisdiction the provision is enforceable in that jurisdiction to the extent that it is not invalid, whether it is in severable terms or not.
- (b) Clause 5.2(a) does not apply where enforcement of the provision of this deed in accordance with clause 5.2(a) would materially affect the nature or effect of the parties' obligations under this deed.

5.3 Waiver

No party to this deed may rely on the words or conduct of any other party as a Waiver of any Right unless the Waiver is in writing and signed by the party granting the Waiver.

The meanings of the terms used in this clause 5.3 are set out below.

Term	Meaning
conduct	includes delay in the exercise of a right.
right	any right arising under or in connection with this deed and includes the right to rely on this clause.
waiver	includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

5.4 Variation

A variation of any term of this deed must be in writing, signed by the parties and approved by the Court.

5.5 Assignment of rights

- (a) Rights arising out of or under this deed are not assignable by a party without the prior written consent of the other parties.
- (b) A breach of clause 5.5(a) by a party entitles the other parties to terminate this deed.
- (c) Clause 5.5(b) does not affect the construction of any other part of this deed.

5.6 Entire agreement

This deed states all the express terms of the deed between the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and deeds in respect of its subject matter.

5.7 Time of the essence

Time is of the essence of this deed.

5.8 Exercise of discretions

- (a) Unless expressly required by the terms of this deed, a party is not required to act reasonably in giving or withholding any consent or approval or exercising any other right, power, authority, discretion or remedy, under or in connection with this deed.
- (b) A party may (without any requirement to act reasonably) impose conditions on the grant by it of any consent or approval, or any waiver of any right, power, authority, discretion or remedy, under or in connection with this deed. Any conditions must be complied with by the party relying on the consent, approval or waiver.

Executed as a deed

Signed sealed and delivered for
Victorian Managed Insurance Authority
by their attorney

sign here ▶ _____
Attorney

print name _____

in the presence of

sign here ▶ _____
Witness

print name _____

Signed sealed and delivered by
SPI Electricity Pty Ltd
by

sign here ▶ _____
Company Secretary/Director

print name _____

sign here ▶ _____
Director

print name _____

Signed sealed and delivered by
Eagle Travel Tower Services Pty Ltd
by

sign here ▶ _____
Company Secretary/Director

print name _____

sign here ▶ _____
Director

print name _____

Schedule B
(Settlement Agreement cl.2.1)

Defendants' Agreed Proportions
(applicable to all payments due pursuant to Settlement Agreement)

Defendant	Proportionate contribution to Settlement Payment or payable costs
First Defendant (SPI)	60%
Second Defendant (Eagle)	15%
Third & Fourth Defendants (DSE Secretary & PV) (jointly)	<u>25%</u>
TOTAL	100%

Schedule C
(Settlement Agreement cl.8.4(a))

SCALE OF FEES AND EXPENSES
OF INDEPENDENT ASSESSORS

	Rate (excluding GST)
Adjuster: investigation, travelling time, dictation	\$150 per hour
Secretarial: typing, preparing reports	\$50 per hour
Mileage	\$0.90 per kilometre

