

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 30/10/2020 1:00:00 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	VID488/2020
File Title:	PAUL BRADSHAW & ANOR v BSA LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 30/10/2020 1:00:07 PM AEDT

A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17

Rule 8.05(1)(a)

## Defence

No. VID488 of 2020

Federal Court of Australia

District Registry: Victoria

Division: Fair Work Division

**Paul Bradshaw** and another

Applicants

**BSA Limited (ACN 088 412 748)**

Respondent

Except as otherwise indicated, the Respondent adopts the terms defined in the statement of claim filed 23 July 2020 (**Statement of Claim**).

BSA adopts the headings used in the Statement of Claim for convenience and without admission.

To answer the Statement of Claim the Respondent says as follows:

### Introduction

- 1 The Respondent does not plead to paragraph 1 as it contains no allegations of fact against it.
- 2 The Respondent:
  - (a) does not plead to paragraph 2 as it contains no allegations of fact against it; and
  - (b) says that, for the avoidance of doubt, to the extent that paragraph 2 makes reference to facts, the Respondent denies those statements of fact.

Filed on behalf of (name & role of party) BSA Limited (ACN 088 412 748)

Prepared by (name of person/lawyer) Paul Reidy

Law firm (if applicable) Johnson Winter & Slattery

Tel 02 8274 9544

Fax 02 8274 9500

Email paul.reidy@jws.com.au

**Address for service** Level 25, 20 Bond Street, Sydney NSW 2000  
(include state and postcode)

[Form approved 01/08/2011]

- 3 The Respondent does not know and cannot admit the allegations in paragraph 3.
- 4 The Respondent admits paragraph 4.
- 5 The Respondent denies paragraph 5 and says further that:
- (a) the agreement referred to in paragraph 15 of the Statement of Claim was entered into by the Respondent and Southern Electrical and Data Pty Ltd (ACN 090 860 549) (**Southern Electrical**) from July 2014 until around May 2018;
  - (b) the First Applicant was a director of Southern Electrical from 9 December 1999 to 7 November 2018; and
  - (c) Southern Electrical was deregistered on 7 November 2018.
- 6 The Respondent denies paragraph 6 and says further that:
- (a) each of the Second Applicant and Ms Emma-Jayne Uren (**Ms Uren**) were directors of Escom Communications Pty Ltd (ACN 618 520 433) (**Escom**) from 11 April 2017 to 2 September 2019;
  - (b) each of the Second Applicant and Ms Uren held 50% of the shares in Escom;
  - (c) Escom entered into an agreement with Marcomm Communications Pty Ltd (ACN 39 099 642 118) (**Marcomm**) from April 2017 until around January 2019 to provide services to customers of Marcomm including communications installations and the servicing of communication installations;
  - (d) the Respondent was a customer of Marcomm pursuant to an agreement dated 24 August 2016; and
  - (e) Escom was deregistered on 2 September 2019.

### Ordinary Group Members

- 7 The Respondent:
- (a) does not plead to paragraph 7 as it contains no allegations of fact against it and is a pleading of a sub-group definition; and
  - (b) says that, for the avoidance of doubt, to the extent that paragraph 7 makes reference to facts, the Respondent does not admit subparagraph 7(d) and otherwise denies the allegations.

- 8 The Respondent denies paragraph 8.

### Subprime Group Members

- 9 The Respondent:
- (a) does not plead to paragraph 9 as it contains no allegations of fact against it and is a pleading of a sub-group definition;

- (b) says that, for the avoidance of doubt, to the extent that paragraph 9 makes reference to facts, the Respondent denies the allegations.

10 The Respondent denies paragraph 10.

### **BSA Agreements**

11 In response to paragraph 11 the Respondent refers to and repeats paragraphs 2 and 7 above and says further that:

- (a) it entered into the Pleaded BSA Agreements with incorporated entities (**Subcontracting Companies**);
- (b) in the period 23 July 2014 to 23 July 2020 (**Relevant Period**) it also entered into the following agreements with Subcontracting Companies:
  - (i) Contractor Services Agreement (FSV) Version 1 December 2016 (**2016 December BSA Agreement**); and
  - (ii) BSA Master Services Agreement Version 3.0 October 2019 (**2019 BSA Agreement**); and(together, the **Further BSA Agreements**)
- (c) otherwise denies the paragraph.

11A Each of the Subcontracting Companies:

- (a) was incorporated pursuant to the *Corporations Act 2001* (Cth);
- (b) had and maintained an Australian Business Number (**ABN**);
- (c) was registered for the purposes of GST;
- (d) had, and maintained at its own cost, public liability insurance, workers' compensation insurance and vehicle insurance;
- (e) was required to ensure that its officers, employees and/or contractors were appropriately skilled and qualified to perform services under the relevant BSA Agreement on its behalf;
- (f) was responsible for the employment costs of employees engaged by them and for the remuneration of any contractors engaged by them; and
- (g) had at least one director.

11B The Subcontracting Companies who entered into the Pleaded BSA Agreements and the Further BSA Agreements (together, the **BSA Agreements**), engaged persons (including their directors and officers) (**Subcontracting Companies' Representatives**) to perform the work, as required, under the BSA Agreements.

11C The arrangements by which Subcontracting Companies performed work under the BSA Agreements:

- (a) was determined solely by each Subcontracting Company;
- (b) varied as between Subcontracting Companies, with the variations including:

- (i) sole director Subcontracting Companies where the sole director individually performed services for and on behalf of the Subcontracting Company;
- (ii) Subcontracting Companies with more than one director and/or officer where the directors and/or officers performed services for and on behalf of the Subcontracting Company;
- (iii) Subcontracting Companies which had in place arrangements as follows:
  - (A) the Subcontracting Companies engaged other companies as independent contractors (**Subprime Contracting Companies**); and
  - (B) the Subprime Contracting Companies in turn engaged persons (**Subprime Companies' Representatives**) to perform the work as required under the agreements between the Subprime Contracting Companies and the Subcontracting Companies;
- (iv) Subcontracting Companies who engaged their employees to perform services on behalf of the Subcontracting Company.

11D The BSA Agreements each included terms to the effect that:

- (a) the Subcontracting Companies were providing services as an independent contractor; and
- (b) nothing in the relevant BSA Agreement or the provision of the services under that agreement constituted or created a relationship of (among others forms of legal relationship) employer and employee as between the Respondent and:
  - (i) the Subcontracting Company or its officers, employees and agents;
  - (ii) any Subprime Contracting Companies or their officers, employees and agents.

#### Particulars

- i. 2008 BSA Agreement, clauses 2.2, 4.2(e), 4.2(f), and 4.2(g);
- ii. 2011 BSA Agreement, clauses 2.2, 4.1, 4.2, and 4.3;
- iii. 2013 January BSA Agreement, clauses 3.10, 3.11, and 3.15;
- iv. 2013 July BSA Agreement, clauses 2.2, 4.1, 4.2, and 4.3;
- v. 2014 BSA Agreement, clauses 4.2 (a), 4.2(b), and 4.2(i);
- vi. 2015 BSA Agreement, clauses 4.2(a), 4.2(b), 4.2(i);
- vii. 2015 April BSA Agreement, clauses 4.2(a), 4.2(b), 4.2(i);
- viii. 2016 BSA Agreement, clauses 2.2, 2.5(d), 4.1, 4.2, and 4.3;
- ix. 2016 December BSA Agreement, clauses 8.1 and 30.1; and
- x. 2019 BSA Agreement, clauses 4.2(a), 4.2(b), and 4.2(i).

11E The various versions of the BSA Agreements included differing terms as to matters which included, for example:

- (a) the warranties provided by the Subcontracting Companies;
  - (b) the acceptance of Work Orders;
  - (c) the Subcontracting Companies' service requirements;
  - (d) work health and safety obligations;
  - (e) the conduct of audits and the Respondent's auditing rights;
  - (f) subcontracting rights; and
  - (g) invoicing and payment.
- 11F Subcontracting Companies were able to provide services for reward to entities other than BSA and some Subcontracting Companies did so.
- 11G BSA entered into the BSA Agreements in order to meet obligations under agreements with the following clients in the Relevant Period:
- (a) Foxtel Management Pty Limited (**Foxtel**), the work for which was referred to within BSA as work on the **Foxtel Platform**;
  - (b) the Optus Group (**Optus**), including Optus Networks Pty Limited, Optus Satellite Network Pty Ltd, Optus Systems Pty Limited and Singapore Telecommunications Limited the work for which was referred to within BSA as work on the **Optus Platform**;
  - (c) NBN Co Limited (**NBN**), the work for which was referred to within BSA as work on the **NBN Platform**,  
(Optus, Foxtel and NBN, together the **Platform Clients**); and
  - (d) other clients, including Ericsson Australia Pty Ltd and Telstra Corporation Limited.
- 11H The agreements with the Platform Clients referred to in paragraph 11G above, during the Relevant Period and as varied from time to time included:
- (a) as between the Respondent and Foxtel:
    - (i) the Foxtel and BSA Service Provider Installation Agreement dated 2012 (**2012 Foxtel Service Agreement**); and
    - (ii) a deed of variation dated 28 October 2016, which amended and restated the 2012 Foxtel Service Agreement (**2016 Foxtel Service Agreement**); and  
(together, the **Foxtel Service Agreements**),
  - (b) as between the Respondent and Optus:
    - (i) the Optus Master Supply Agreement dated December 2013 (**2013 Optus MSA**);
    - (ii) Supply Contracts made pursuant to clause 7 of the 2013 Optus MSA;

- (iii) the Singtel Group Master Supply Agreement dated November 2018 (**2018 Singtel MSA**); and
  - (iv) Supply Contracts made pursuant to clause 3 of the 2018 Singtel MSA,
- (c) as between the Respondent and NBN:
- (i) the Operations and Maintenance Master Agreement dated 21 December 2015 (**2015 OMMA**); and
  - (ii) a Variation Agreement to the Operations and Maintenance Master Agreement – OMMA 2.0 dated June 2017 (**2017 OMMA**);
  - (iii) variations to the 2017 OMMA which were consolidated into an Operations and Maintenance Master Agreement dated 30 June 2018 (**2018 OMMA**); and
  - (iv) a variation to the Operations and Maintenance Master Agreement (Term Extension until 20 December 2020)(**2019 OMMA**).
- (together, the **Platform Agreements**).

111 The Respondent says further that:

- (a) each of the Platform Agreements contained terms to the effect that all persons performing services on, respectively, the Foxtel Platform, the Optus Platform and the NBN Platform (together, the **Platforms**) must have suitable training, skills and accreditations.

#### Particulars

- i. 2012 Foxtel Service Agreement, clauses 6.3.1(d), 6.3.1(i), 6.3.1(l), 6.4.1 (b) to (e), 6.5, 12.1.3, 12.1.4, Schedule 1B clauses 21.2 and 21.4, definition of "Personnel" in Schedule 9, and Schedule 13, clause 2.1(b)(ii);
  - ii. 2016 Foxtel Service Agreement, Definition of "Service Provider Requirements" and "Subcontractor or Technician" in clause 2.1, clause 7.3, clause 8.1(a)(x) and (xi), and Schedule 9: definition of "Personnel" in clause 1.1, clause 1.1, 1.2(a)(i) and (ii), and 1.3;
  - iii. 2013 Optus MSA, definition of "Personnel" in clause 1, clause 21.5(b), 21.9, 61.2(a), 76.2(b), 77.12, 80.2(c)(i) and (iv);
  - iv. 2018 Singtel MSA, clauses 12.1.8 and 21.23;
  - v. 2015 OMMA, section 1, clause 6.1(c)(i), section 2, clauses 3.1, 15.3(e)(iii), 15.4(c), 15.12, definitions of "Contractor Associate" and "Legislative Requirement" in section 2, clause 31.1, Section 4, clauses 3.1(a)(vii), 3.2(a)(xx), section 11, clauses 2 and 3;
  - vi. 2017 OMMA, section 1, clauses 6.1(c)(i), 13(b)(ii), section 2, clauses 3.1, 15.3(e)(iii), 15.4(c), 15.12, definitions of "Contractor Associate" and "Legislative Requirement" in section 2, clause 31.1, section 4, clauses 3.1(a)(vii), 3.2(a)(xx), section 11, clauses 2 and 3; and
  - vii. 2018 OMMA, as per example clauses in 2017 OMMA in particulars vi.
- (b) the terms referred to in subparagraph (a), above, reflected requirements arising under the *Telecommunications Act 1997 (Cth)* and the *Telecommunications Cabling Provider Rules 2014 (Cth)*, namely that:

- (i) in order to lawfully perform installation and maintenance services of the type required under the Platform Agreements and the BSA Agreements, a person is required to hold one or more licenses and/or permits, and be registered with a registrar approved by the Australian Communications & Media Authority (**ACMA**); and
- (ii) in order to be conferred with relevant licenses and/or permits, a person must complete specific training modules through a Registered Training Organisation approved by ACMA.
- (c) Registration with the ACMA approved registrar ensures persons are competent to perform cabling work consistent with the Australian Standard As/Ca s009:2013 – Installation Requirements for Customer Cabling Wiring Rules.

11J The manner in which installation and maintenance services were performed was at all material times informed by the *Telecommunications (Customer Service Guarantee) Standard 2011 (Cth)* (**CSG**), which (inter alia):

- (a) contains minimum performance requirements in relation to:
  - (i) making arrangements with customers for connection and fault rectification;
  - (ii) the time taken to connect or rectify a fault; and
  - (iii) the keeping of appointments to make such connections or to rectify faults; and
- (b) entitles customers to compensation if the time frames specified in the CSG are not met.

#### **Particulars**

The CSG is a legislative instrument made pursuant to the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth).

11K Further to paragraphs 11I and 11J, (inclusive), the Respondent says that there were terms of the Platform Agreements to the effect that:

- (a) In relation to Foxtel:
  - (i) the Respondent could enter into subcontracts in relation to the provision of services to Foxtel;
  - (ii) any subcontractor engaged by the Respondent to perform services for Foxtel was required to be permitted to further subcontract such work to its own contractors or employees;
  - (iii) the Respondent was required to ensure that any personnel it engaged to provide services to Foxtel complied with all obligations of the Respondent in the Foxtel Service Agreements; and
  - (iv) it was the intention of the Respondent and Foxtel that any subcontractor engaged by the Respondent to perform services for



Foxtel was not in an employment relationship with Foxtel by reason of the Foxtel Service Agreements.

(b) In relation to Optus:

- (i) the Respondent could enter into subcontracts in relation to the provision of services to Optus, subject to the approval of Optus;
- (ii) any subcontractor engaged by the Respondent to perform services for Optus was required to have and maintain an ABN;
- (iii) any subcontractor engaged by the Respondent to perform services for Optus was required to comply with Optus Group Policies or Singtel Group Supplier Code of Conduct (as applicable), Optus policies applicable to the relevant Site, the Optus' environmental management system and reasonable directions;
- (iv) any subcontractor engaged by the Respondent to perform services for Optus was required to assist any Optus Group Company to discharge and comply with any applicable obligations arising under WHS Laws; and
- (v) each subcontractor was required to be engaged by the Respondent to perform services for Optus through a written subcontract with particular compliance requirements consistent with all requirements necessary to provide for principal/contractor relationship.

(c) In relation to NBN:

- (i) the Respondent could enter into subcontracts in relation to the provision of services to NBN;
- (ii) any subcontractor engaged by the Respondent to perform services for NBN was required to have and maintain an ABN;
- (iii) any subcontractor engaged by the Respondent to perform services for NBN was permitted to further subcontract such work to its own contractors or employees, subject to conditions;
- (iv) any subcontractor engaged by the Respondent to perform services for NBN was required as part of their subcontract obligations to comply with the HSE Management System, co-operate and assist NBN in the conduct of any review of the Respondent's compliance with the OMMA 2015, OMMA 2017, OMMA 2018 or OMMA 2019 (as applicable) and to comply with the Respondent's obligations concerning health, safety and environment; and
- (v) each subcontractor was required to be engaged by the Respondent to perform services for NBN through a written subcontract, with particular compliance requirements as part of the principal/contractor relationship.

11L Each of the Platforms:

- (a) involved the performance of work requiring, for each Platform, differing skills and competence; and
  - (b) had processes and procedures required by the Platforms which:
    - (i) differed over time; and
    - (ii) were unique to each Platform.
- 11M By reason of the matters in paragraph 11L above, the Subcontracting Companies' Representatives:
  - (a) generally, worked on only one of the three Platforms;
  - (b) but, subject to having the necessary skills and competencies, could and did from time-to-time work for more than one Platform.
- 11N Of the BSA Agreements, during the Relevant Period:
  - (a) the Subcontracting Companies which provided services in relation to the Foxtel Platform usually entered into one of the:
    - (i) 2013 July BSA Agreement;
    - (ii) 2013 January BSA Agreement;
    - (iii) 2016 BSA Agreement; and
    - (iv) 2016 December BSA Agreement.
  - (b) the Subcontracting Companies which provided services in relation to the Optus Platform usually entered into one of the:
    - (i) 2014 BSA Agreement; or
    - (ii) 2019 BSA Agreement.
  - (c) the Subcontracting Companies which provided services in relation to the NBN Platform usually entered into the 2015 BSA Agreement.
- 12 In response to paragraph 12 and subject to reference to the full terms and effect of the 2014 BSA Agreement at trial, the Respondent admits that in accordance with clause 1 of the 2014 BSA Agreement "*Agreement*" is defined as including "*Statements of Work*" and says further that:
  - (a) "*Statements of Work*" is defined generally under the 2014 BSA Agreement to include a schedule, or exhibit, or other document so titled forming part of the Agreement as at the Effective Date of the Agreement or subsequently agreed between the parties which specifies the deliverables, services or combination of deliverables and services that the Respondent may order and purchase under a Services Contract (as defined) pursuant to the Agreement;
  - (b) the Optus Statement of Work dated January 2014 was executed by the First Applicant on behalf of Southern Electrical on or about 17 July 2014 and accordingly formed part of the agreement as between BSA and Southern Electrical; and

- (c) otherwise denies the paragraph.
- 13 The Respondent admits paragraph 13.
- 14 In answer to paragraph 14 the Respondent:
  - (a) admits subparagraph 14(a); and
  - (b) otherwise denies the paragraph.
- 15 The Respondent admits paragraph 15.

**Terms of the Pleaded BSA Agreements relevant to Ordinary Group Members**

- 16 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 16 the Respondent admits that the Pleaded BSA Agreements included terms stating that services were to be provided in accordance with the Respondent's procedures and says further that:
  - (a) the Respondent's procedures included procedures directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements; and
    - (ii) the Platform Clients' requirements under the Platform Agreements; and,
  - (b) it otherwise denies the paragraph.
- 17 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 17 the Respondent admits that the Pleaded BSA Agreements had terms that outlined standards of work and says further that:
  - (a) the Respondent's standards of work were directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements; and
    - (ii) the Platform Clients' requirements under the Platform Agreements; and
  - (b) otherwise denies the paragraph.
- 18 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 18, the Respondent admits that the Pleaded BSA Agreements included terms regarding service levels and says further that:
  - (a) the Respondent's service levels were directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements;

- (ii) the Platform Clients' requirements under the Platform Agreements and,
  - (b) otherwise denies the paragraph.
- 19 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 19, the Respondent admits that the Pleaded BSA Agreements included terms in respect of the appearance and presentation of Subcontracting Companies' Representatives and says further that:
- (a) those terms were directed at satisfying the Platform Clients' requirements under the Platform Agreements, and
  - (b) otherwise denies the paragraph.
- 20 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 20, admits that the Pleaded BSA Agreements included terms regarding the manner of tools and/or equipment to be used by Subcontracting Companies' Representatives and says further that:
- (a) the Respondent's terms regarding tools and equipment were directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements; and
    - (ii) the Platform Clients' requirements under the Platform Agreements.
  - (b) otherwise denies the paragraph
- 21 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 21, the Respondent admits that the Pleaded BSA Agreements had terms, in substance, that the Subcontracting Companies had no right to be provided by the Respondent with any, or any minimum, number of Work Orders (or any other direction or request to perform work).
- 22 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 22, the Respondent, admits that the Pleaded BSA Agreements included terms as to rates and says further that:
- (a) rates under the Pleaded BSA Agreements were informed by the rates paid to the Respondent by the Platform Clients; and
  - (b) otherwise denies the paragraph.
- 23 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 23, the Respondent admits that the Pleaded BSA Agreements included terms regarding the creation of invoices, in some cases those being RCTIs and says further that:
- (a) those terms were directed at complying with the Platform Clients' requirements as to charging and invoicing; and
  - (b) otherwise denies the paragraph.

- 24 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 24, the Respondent admits that the Pleaded BSA Agreements included terms regarding the timing of payment for services by BSA to Subcontracting Companies and says further that:
- (a) the Platform Agreements provided for payment to the Respondent by the Platform Clients within period of between 10 Business Days to approximately monthly; and
  - (b) otherwise denies the paragraph.
- 25 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 25, the Respondent admits that the Pleaded BSA Agreements included terms regarding the withholding and/or set-off of payments and says further that:
- (a) the Platform Agreements included terms to the effect that the Platform Clients were not obliged to pay the Respondent in certain circumstances; and
  - (b) otherwise denies the paragraph.
- 26 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 26, the Respondent admits that the Pleaded BSA Agreements included terms regarding the attendance by Subcontracting Companies' Representatives at training, but says further that:
- (a) those terms were directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements; and
    - (ii) the Platform Clients' requirements under the Platform Agreements which included terms to the effect that the services must be performed by provided persons with appropriate qualifications and training; and
  - (b) otherwise denies the paragraph.
- 27 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 27, the Respondent admits that the Pleaded BSA Agreements included terms regarding the maintenance of records by Subcontracting Companies and the conduct of audits by BSA, but says further that:
- (a) those terms were directed at enabling the safe provision of services by Subcontracting Companies and Subcontracting Companies' Representatives in accordance with:
    - (i) legislative and regulatory requirements; and
    - (ii) the Platform Clients' requirements under the Platform Agreements; and

- (b) otherwise denies the paragraph.
- 28 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, the Respondent admits paragraph 28.
- 29 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 29, the Respondent admits that the Pleaded BSA Agreements had terms that gave the Respondent the right, in certain circumstances (including a failure to rectify damage caused to a customer's property), to obtain refunds and other payments from Subcontracting Companies but says further that:
- (a) under the Platform Agreements, the Platform Clients had the right to obtain refunds and other payments from the Respondent for failing to meet KPIs and service levels; and
- (b) otherwise denies the paragraph.
- 30 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, the Respondent admits paragraph 30, but says that the practice in the Relevant Period in relation to the provision of availability by Subcontracting Companies' Representatives is set out at paragraphs 33(ee) and 33(ff) below.
- 31 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 31, the Respondent admits that the Pleaded BSA Agreements included terms regarding the provision of services by Subcontracting Companies on certain weekends and public holidays and otherwise denies the paragraph.
- 32 Subject to reference to the full terms and effect of the Pleaded BSA Agreements at trial, in answer to paragraph 32, the Respondent admits that the Pleaded BSA Agreements included terms as to the times Subcontracting Companies' Representatives were to be available but otherwise denies the paragraph.

### **Work practices**

- 33 In answer to paragraph 33, the Respondent:

#### ***Procedures and manuals***

- (a) says in answer to paragraph 33(a) that, in the Relevant Period, Subcontracting Companies' Representatives and Subprime Companies' Representatives on the Foxtel Platform (**Foxtel Platform Representatives**), on the Optus Platform (**Optus Platform Representatives**) and on the NBN Platform (**NBN Platform Representatives**) were provided with hard copy and electronic procedure manuals which included:

##### *Foxtel Platform Representatives*

- (i) on the Foxtel Platform, manuals which varied over the Relevant Period and which included the Domestic Installation Manual, and:
- (A) up until about 2016, the Operational Procedures Handbook; and

- (B) after about October 2016, the BSA and Foxtel Installation Services Operations Manual,

*Optus Platform Representatives*

- (ii) Optus Platform Representatives were provided with installation manuals including the HFC Installation Manual, the NBN Installation Manual and the ULL Installation Manual which were available in electronic format for part of the Relevant Period;

*NBN Platform Representatives*

- (iii) NBN Platform Representatives were provided with manuals which included, among others:

- (A) Safe Work Method Statements and Safe Work Instructions;
- (B) assurance and connection guides which included, by way of example:

- (1) the HFC Testing & Installation Manual; and
- (2) from about mid-2018, the HFC Activation and Field Guide, for qualified NBN Platform Representatives.

- (iv) with electronic versions available for part of the Relevant Period, and otherwise denies paragraph 33(a).

- (b) says in answer to paragraph 33(b) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) there was no requirement that Foxtel Platform Representatives have hard copy procedure manuals in their vehicles;

*Optus Platform Representatives*

- (ii) until about April 2019, Optus Platform Representatives were required to keep a folder of hard-copy installation manuals in their vehicles;
- (iii) after about April 2019, Optus Platform Representatives were not required to keep hard-copy manuals in their vehicles;

*NBN Platform Representatives*

- (iv) until about mid-2018, NBN Platform Representatives were required to keep hard-copy manuals in their vehicles which were directed at work health safety;
- (v) after mid-2018, NBN Platform Representatives were not required to keep hard-copy manuals in their vehicles,

and otherwise denies paragraph 33(b).

- (c) says in answer to paragraph 33(c) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) repeats paragraph 11J above and says that any work performed on Foxtel's network and associated infrastructure and equipment was required to be performed in accordance with the applicable procedure manuals;

*Optus Platform Representatives*

- (ii) repeats paragraph 11J above and says that any work performed on Optus' network and associated infrastructure and equipment was required to be performed in accordance with the applicable procedure manuals;

*NBN Platform Representatives*

- (iii) repeats paragraph 11J above and says that any work performed on NBN's network and associated infrastructure and equipment was required to be performed in accordance with the applicable procedure manuals;

and otherwise denies paragraph 33(c).

***Supervision and Audit***

- (d) says in answer to paragraph 33(d) that, in the Relevant Period, the Respondent:

*Foxtel Platform Representatives*

- (i) engaged persons as contractors or as employees who from time to time who attended to the task of checking whether Work Orders arising from work required by Foxtel had been completed, provided assistance (if needed) to the Foxtel Platform Representatives and managed any issues that arose in the performance of the Work Orders;

*Optus Platform Representatives*

- (ii) engaged persons as contractors or as employees who from time to time who attended to the task of checking whether Work Orders arising from work required by Optus had been completed, provided assistance (if needed) to the Optus Platform Representatives and managed any issues that arose in the performance of the Work Orders;

*NBN Platform Representatives*

- (iii) engaged persons as contractors or as employees who from time to time who attended to the task of checking whether Work Orders arising from work required by NBN had been completed, provided assistance (if needed) to the NBN Platform Representatives and



managed any issues that arose in the performance of the Work Orders;

and otherwise denies paragraph 33(d).

(e) says in answer to paragraph 33(e) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) the persons referred to in (d)(i) above were from time to time a point of contact for, in particular, new or inexperienced Foxtel Platform Representatives in respect of any questions or issues arising from Work Orders relating to the work required by Foxtel;

*Optus Platform Representatives*

- (ii) the persons referred to in (d)(ii) above were from time to time a point of contact for, in particular, new or inexperienced Optus Platform Representatives in respect of any questions or issues arising from Work Orders relating to the work required by Optus;

*NBN Platform Representatives*

- (iii) the persons referred to in (d)(iii) above were from time to time a point of contact for, in particular, new or inexperienced NBN Platform Representatives in respect of any questions or issues arising from Work Orders relating to the work required by NBN;

and otherwise denies paragraph 33(e).

(f) says in answer to paragraph 33(f) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) the persons referred to in (d)(i) above conducted audits from time to time relating to safety, the use of appropriate tools and personal protective equipment (**PPE**) and work quality;
- (ii) the frequency of the audits referred to in f(i) above varied over the Relevant Period and differed for regional and metropolitan based Foxtel Platform Representatives;
- (iii) the methods used to undertake the audits referred to in f(i) above varied over the Relevant Period;

*Optus Platform Representatives*

- (iv) the persons referred to in (d)(ii) above conducted audits from time to time relating to safety, the use of appropriate tools and PPE and work quality;
- (v) the methods used to undertake the audits referred to in f(iv) above varied over the Relevant Period.

- (vi) the frequency of the audits referred to in f(iv) above varied over the Relevant Period and differed for regional and metropolitan based Optus Platform Representatives;

*NBN Platform Representatives*

- (vii) the persons referred to in (d)(iii) above conducted audits from time to time relating to safety, the use of appropriate tools and PPE and work quality;
- (viii) the methods used to undertake the audits referred to in f(vii) above varied over the Relevant Period; and
- (ix) the frequency of the audits referred to in f(iv) above varied over the Relevant Period and differed for regional and metropolitan based Optus Platform Representatives;

and otherwise denies paragraph 33(f).

**Work Orders**

- (g) says in answer to paragraph 33(g) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) in the period up until about October 2016, Work Orders were electronically offered to Foxtel Platform Representatives through a system known as My Work Manager;
- (ii) in the period from about October 2016, Work Orders were electronically offered to Foxtel Platform Representatives through a system known as Marvel;

*Optus Platform Representatives*

- (iii) in the period up until about July 2017, Work Orders were electronically offered to Optus Platform Representatives through a system known as Optus Advantex;
- (iv) in the period from about July 2017, Work Orders were electronically offered to Optus Platform Representatives through a system known as Optus Click;

*NBN Platform Representatives*

- (v) NBN Platform Representatives were offered Work Orders through an electronic system known as My Work Manager;

and otherwise denies paragraph 33(g).

- (h) says in answer to paragraph 33(h) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Foxtel Platform Representatives supplied their own portable electronic device to log-in to an electronic system to access Work Orders offered to them, and says further that:
  - (A) up until about October 2016, the relevant electronic system was My Work Manager;
  - (B) in the period from about October 2016, the relevant electronic system was Marvel;

*Optus Platform Representatives*

- (ii) Optus Platform Representatives supplied their own portable electronic device to log-in to an electronic system to access Work Orders offered to them, and says further that:
  - (A) up until about July 2017, the relevant electronic system was Optus Advantex;
  - (B) in the period from about July 2017, the relevant electronic system was Optus Click;

*NBN Platform Representatives*

- (iii) NBN Platform Representatives supplied their own portable electronic device to log-in to My Work Manager to access Work Orders;

and otherwise denies paragraph 33(h).

- (i) Says in answer to paragraph 33(i) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Work Orders were offered to Foxtel Platform Representatives based in metropolitan areas (other than in WA) between 6pm to 7pm on the previous day, by approximately 2pm for those located in WA, and several days beforehand for those located in regional areas;

*Optus Platform Representatives*

- (ii) Work Orders were offered to Optus Platform Representatives based in metropolitan areas by 7am on the day of the offered work and earlier to those Optus Platform Representatives located in regional areas;

*NBN Platform Representatives*

- (iii) Work Orders were typically offered to NBN Platform Representatives between 6pm to 7pm on the previous day, other than urgent Work Orders,

and otherwise denies paragraph 33(i).

- (j) Says in answer to paragraph 33(j) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Apart from amending the scheduled timeslot, Work Orders allocated to Foxtel Platform Representatives were generally not modified, but could be cancelled or re-allocated;

*Optus Platform Representatives*

- (ii) Apart from amending the scheduled timeslot, Work Orders allocated to Optus Platform Representatives were generally not modified, but could be cancelled or re-allocated;

*NBN Platform Representatives*

- (iii) Apart from amending the scheduled timeslot, Work Orders allocated to NBN Platform Representatives were generally not modified, but could be cancelled or re-allocated;

and otherwise denies paragraph 33(j).

- (k) Says in answer to paragraph 33(k) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Work Orders were offered to Foxtel Platform Representatives based upon factors including their availability, location and capabilities but they had the ability to reject the offer;

*Optus Platform Representatives*

- (ii) Work Orders were offered to Optus Platform Representatives based upon factors including their availability, location and capabilities; but they had the ability to reject the offers;

*NBN Platform Representatives*

- (iii) Work Orders were offered to NBN Platform Representatives based upon factors including their availability, location and capabilities; but they had the ability to reject the offers;

and otherwise denies paragraph 33(k).

- (l) says in answer to paragraph 33(l) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) the number Work Orders offered to Foxtel Platform Representatives and accepted by them varied from day to day for reasons which included demand from Foxtel customers and the Foxtel Platform Representatives' availability, location and willingness to travel;

*Optus Platform Representatives*

- (ii) the number Work Orders offered to Optus Platform Representatives and accepted by them varied from day to day for reasons which

included demand from Optus customers and the Optus Platform Representatives' availability, location and willingness to travel;

*NBN Platform Representatives*

- (iii) the number Work Orders offered to NBN Platform Representatives and accepted by them varied from day to day for reasons which included demand from NBN customers and the NBN Platform Representatives' availability, location and willingness to travel;

and otherwise denies paragraph 33(l).

- (m) says in answer to paragraph 33(m) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) there was no minimum number of Work Orders that Foxtel Platform Representatives were offered, but says that the number of Work Orders allocated to Foxtel Platform Contractors was based on a range of factors including those set out at paragraph l(i) above;

*Optus Platform Representatives*

- (ii) there was no minimum number of Work Orders that Optus Platform Representatives were offered, but says that the number of Work Orders allocated to Optus Platform Contractors was based on a range of factors including those set out at paragraph l(ii) above;

*NBN Platform Representatives*

- (iii) there was no minimum number of Work Orders that NBN Platform Representatives were offered, but says that the number of Work Orders allocated to NBN Platform Contractors was based on a range of factors including those set out at paragraph l(iii) above;

and otherwise denies paragraph 33(m).

- (n) says in answer to paragraph 33(n) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Foxtel Platform Representatives had the ability to set a "home radius", being a geographic area within which they were willing to work, and Work Orders outside that geographic area would not be allocated without the further subsequent confirmation of the Foxtel Platform Representative;

*Optus Platform Representatives*

- (ii) Optus Platform Representatives had the ability to set a "home radius", being a geographic area within which they were willing to work, and Work Orders outside that geographic area would not be allocated without the further subsequent confirmation of the Optus Platform Representative;

*NBN Platform Representatives*

- (iii) NBN Platform Representatives had the ability to set a “home pin”, being a geographic area within which they were willing to work, which would influence the Work Orders allocated to them;

and otherwise denies paragraph 33(n).

- (o) says in answer to paragraph 33(o) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Foxtel Platform Representatives had the ability to control the type of Work Orders offered to and accepted by them;

*Optus Platform Representatives*

- (ii) Optus Platform Representatives had the ability to control the type of Work Orders offered to and accepted by them;

*NBN Platform Representatives*

- (iii) NBN Platform Representatives had the ability to control the type of Work Orders offered to and accepted by them;

and otherwise denies paragraph 33(o).

- (p) says in answer to paragraph 33(p) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) the duration of Work Orders performed by Foxtel Platform Representatives was dependent on the skill, experience and efficiency of the personnel performing the work, the type of work, whether they employed or engaged an assistant or worked with a co-director, and other factors such as weather;

*Optus Platform Representatives*

- (ii) the duration of Work Orders performed by Optus Platform Representatives was dependent on the skill, experience and efficiency of the personnel performing the work, the type of work, whether they employed or engaged an assistant or worked with a co-director, and other factors such as weather;

*NBN Platform Representatives*

- (iii) the duration of Work Orders performed by NBN Platform Representatives was dependent on the skill, experience and efficiency of the personnel performing the work, the type of work, whether they employed or engaged an assistant or worked with a co-director, and other factors such as weather;

and otherwise denies paragraph 33(p).

- (q) says in answer to paragraph 33(q) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) upon Work Orders being offered to them, Foxtel Platform Representatives could decline the offer and could choose not to proceed to complete a Work Order even after it was accepted;

*Optus Platform Representatives*

- (ii) upon Work Orders being offered to them, Optus Platform Representatives could decline the offer and could choose not to proceed to complete a Work Order even after it was accepted;

*NBN Platform Representatives*

- (iii) upon Work Orders being offered to them, NBN Platform Representatives could decline the offer and could choose not to proceed to complete a Work Order even after it was accepted;

and otherwise denies paragraph 33(q).

- (r) says in answer to paragraph 33(r) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) in the period prior to October 2016, the location of Foxtel Platform Representatives could not be tracked;
- (ii) in the period following October 2016, the location of Foxtel Platform Representatives could be tracked by Foxtel and its customers but was not tracked by the Respondent;

*Optus Platform Representatives*

- (iii) the Optus Click electronic system had an inbuilt tracking system that could track the Optus Platform Representatives and this was a requirement of Optus and not of the Respondent;

*NBN Platform Representatives*

- (iv) the Respondent did not track NBN Platform Representatives; and
- and otherwise denies paragraph 33(r).

**Payment**

- (s) says in answer to paragraph 33(s) that in the Relevant Period:

- (i) the payment by the Respondent to Subcontracting Companies for work done was governed by the BSA Agreements;
- (ii) the Respondent had no involvement in the setting of amounts payable by:
  - (A) Subcontracting Companies to Subcontracting Companies' Representatives;

(B) Subcontracting Companies to Subprime Contracting Companies; and

(C) Subprime Contracting Companies to Subprime Companies' Representatives;

and otherwise denies paragraph 33(s).

(t) says in answer to paragraph 33(t) that in the Relevant Period:

*Foxtel Platform Representatives*

(i) it repeats (s) above and further says that on the Foxtel Platform, Subcontracting Companies from time to time also negotiated additional compensation from the Respondent for travel rates and expenses;

*Optus Platform Representatives*

(ii) it repeats (s) above and further says that on the Optus Platform, Subcontracting Companies which provided services to the Respondent in metropolitan areas from time to time also negotiated additional compensation for additional work and Subcontracting Companies which were based in certain regional areas invoiced for work at their own determined and negotiated rates;

*NBN Platform Representatives*

(iii) it repeats (s) above and further says that on the NBN Platform, Subcontracting Companies from time to time also negotiated travel rates and expenses;

and otherwise denies paragraph 33(t).

***Hours of work and timing of jobs***

(u) says in answer to paragraph 33(u) that in the Relevant Period:

*Foxtel Platform Representatives*

(i) Work Orders were offered based on Foxtel and its customers' requirements for time slots of 7am to 10am, 10am to 2pm and 2pm to 5pm, but the hours could fluctuate;

*Optus Platform Representatives*

(ii) Work Orders were offered based on Optus and its customers' requirements for time slots of 8am to 12pm and 12pm to 5pm and, from the beginning of the Relevant Period until about early 2020, 4-6pm, but these hours could fluctuate;

*NBN Platform Representatives*

(iii) Work Orders were offered based on NBN and its customers' requirements for time slots between 8am to 12pm and 12pm to 5pm, but these hours could fluctuate;



and otherwise denies paragraph 33(u).

- (v) says in answer to paragraph 33(v) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) in the period to October 2016, there was no timer associated with work offered to and performed by Foxtel Platform Representatives;
- (ii) in the period post October 2016, the Marvel system allocated a set time for each Work Order that was offered to Foxtel Platform Representatives, but says that the time could be extended by Foxtel Platform Representatives without adverse consequence;

*Optus Platform Representatives*

- (iii) the Respondent did not use timers for work offered to and performed by Optus Platform Representatives;

*NBN Platform Representatives*

- (iv) the Respondent did not use timers for work offered to and performed by NBN Platform Representatives;

and otherwise denies paragraph 33(v).

- (w) says in answer to paragraph 33(w) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) It repeats (v)(i)-(ii) above and says that in the period after October 2016 it used timers to record the time spent on each Work Order that was accepted by a Foxtel Platform Representative;

*Optus Platform Representatives*

- (ii) it repeats (v)(iii) above;

*NBN Platform Representatives*

- (iii) it repeats (v)(iv) above;

and otherwise denies paragraph 33(w).

- (x) says in answer to paragraph 33(x) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) It repeats (v)(i)-(ii) above and says that in the period after October 2016 Foxtel Platform Representatives were not subject to disciplinary action for extending time on a Work Order;

*Optus Platform Representatives*

- (ii) it repeats (v)(iii) above;

*NBN Platform Representatives*

- (iii) it repeats (v)(iv) above;  
and otherwise denies paragraph 33(x).

### ***Service Levels***

- (y) says in answer to paragraph 33(y) that in the Relevant Period, formal disciplinary measures were utilised rarely and usually for safety-related procedural breaches or ongoing failures to complete Work Orders to the standards set out in manuals, policies, and the BSA Agreements, and that the Respondent was entitled to, and from time to time did:
- i. issue breach notices;
  - ii. issue fewer Work Orders for a period;
  - iii. suspend a Subcontracting Company's Representative or a Subprime Companies Representative from receiving Work Orders for a period of time; and/or
  - iv. in very rare instances exercise its right to withhold payments or seek repayment, for example in cases of fraud;
- and otherwise denies paragraph 33(y).
- (z) says in answer to paragraph 33(z) that it repeats subparagraph (y) above, and otherwise denies the paragraph;

### ***Training and meetings***

- (aa) says in answer to paragraph 33(aa) that in the Relevant Period:

#### ***Foxtel Platform Representatives***

- (i) Foxtel Platform Representatives from time to time were invited to and did attend meetings relating to safety and for the purpose of obtaining technical and other information and instruction as to the Respondent and Foxtel's systems and processes;

#### ***Optus Platform Representatives***

- (ii) Optus Platform Representatives from time to time were invited to and did attend meetings relating to safety and for the purpose of obtaining technical and other information and instruction as to the Respondent and Optus' systems and processes;

#### ***NBN Platform Representatives***

- (iii) NBN Platform Representatives from time to time were invited to and did attend meetings relating to safety and for the purpose of obtaining technical and other information and instruction as to the Respondent and NBN's systems and processes;

and otherwise denies paragraph 33(aa).

***Branding, uniform and tools***

(bb) says in answer to paragraph 33(bb) that in the Relevant Period:

*Foxtel Platform Representatives*

- (i) Foxtel Platform Representatives carried identification with the branding of both the Respondent and Foxtel, that:
  - (A) stated that they were an "Authorised Foxtel Contractor";
  - (B) contained emergency contact information, and which was provided to customers in case of an accident or injury;

*Optus Platform Representatives*

- (ii) Optus Platform Representatives carried:
  - (A) identification with Optus branding to identify themselves to Optus customers as an Optus authorised contractor;
  - (B) BSA branded identification which contained emergency contact information, and which was provided to customers in case of an accident or injury;
- (iii) Optus Platform Representatives working in metropolitan areas have worn shirts with both Optus and BSA branding and, at times, with Optus branding alone;
- (iv) Optus Platform Representatives working in regional areas wear their own branded clothing;
- (v) Optus Platform Representatives do not drive vehicles with BSA livery;

*NBN Platform Representatives*

- (vi) NBN Platform Representatives carried:
  - (A) identification with NBN branding to identify themselves to NBN customers as an NBN authorised contractor;
  - (B) 'BSA' branded identification which contained emergency contact information, and which was provided to customers in case of an accident or injury;
- (vii) NBN Platform Representatives did not wear any 'BSA' branded clothing and from time to time wore high visibility vests bearing NBN branding,

and otherwise denies paragraph 33(bb).

- (cc) in answer to paragraph 33(cc), the Respondent repeats (bb)(i) above and says that, in the Relevant Period, Foxtel Platform Representatives wore Foxtel branded shirts and otherwise denies the paragraph.

(dd) says in answer to paragraph 33(dd) that in the Relevant Period:

*Foxtel Platform Representatives*

(i) Foxtel Platform Representatives supplied their own tools;

*Optus Platform Representatives*

(ii) Optus Platform Representatives supplied their own tools;

*NBN Platform Representatives*

(iii) NBN Platform Representatives supplied their own tools,

and otherwise denies paragraph 33(dd).

***Availability***

(ee) says in answer to paragraph 33(ee) that in the Relevant Period:

*Foxtel Platform Representatives*

(i) Foxtel Platform Representatives working in metropolitan areas indicated their availability to accept Work Orders up to 3 months to 10 days in advance, and could amend their availability within the 10 days prior to Work Orders being allocated, and could, in any event accept or decline Work Orders;

*Optus Platform Representatives*

(ii) Optus Platform Representatives working in metropolitan areas indicated their availability to accept Work Orders up to 3 months to 10 days in advance and could amend their availability within the 10 days prior to Work Orders being allocated and could, in any event accept or decline Work Orders;

*NBN Platform Representatives*

(iii) NBN Platform SCRs working indicated their availability to accept Work Orders up to 3 months to 10 days in advance and could amend their availability within the 10 days prior to Work Orders being allocated, and could, in any event accept or decline Work Orders;

and otherwise denies paragraph 33(ee).

(ff) says in answer to paragraph 33(ff) that in the Relevant Period:

*Foxtel Platform Representatives*

(i) it repeats (ee)(i) and says that Foxtel Platform Representatives could indicate that they were unavailable to accept offers of Work Orders at any time including at short notice;

*Optus Platform Representatives*

- (ii) it repeats (ee)(ii) and says that Optus Platform Representatives could indicate that they were unavailable to accept offers of Work Orders at any time including at short notice;

*NBN Platform Representatives*

- (iii) it repeats (ee)(iii) and says that NBN Platform Representatives could indicate that they were unavailable to accept offers of Work Orders at any time including at short notice,

and otherwise denies paragraph 33(ff).

***Unpaid entitlements***

- (gg) says in answer to paragraph 33(gg) that it admits that it did not make any payments in respect of "minimum wage" (as pleaded), but denies that it had any obligation to make such payments;
- (hh) says in answer to paragraph 33(hh) that it admits that it did not make any payments in respect of "Annual Leave" (as pleaded), but denies that it had any obligation to make such payments;
- (ii) says in answer to paragraph 33(ii) that it admits that it did not make any payments in respect of "Overtime" (as pleaded), but denies that it had any obligation to make such payments;
- (jj) says in answer to paragraph 33(jj) that it admits that it did not make any payments in respect of "Long Service Leave" (as pleaded), but denies that it had any obligation to make such payments;
- (kk) says in answer to paragraph 33(kk) that it admits that it did not make any payments in respect of "allowances" (as pleaded), but denies that it had any obligation to make such payments;
- (ll) says in answer to paragraph 33(ll) that it admits that it did not make any payments in respect of "Superannuation" (as pleaded), but denies that it had any obligation to make such payments.

34 In answer to paragraph 34, the Respondent:

- (a) admits paragraph 34(a);
- (b) denies paragraph 34(b);
- (c) says that in certain circumstances, including in respect of claims for travel expenses, Subcontracting Companies issued their own invoices, but otherwise admits paragraph 34(c); and
- (d) admits that where RCTIs were prepared by the Respondent, the Respondent made payments to Subcontracting Companies in accordance with them and otherwise denies paragraph 34(d).

### **Inferred contract between Subprime Group Members and BSA**

35 In answer to paragraph 35 the Respondent repeats paragraph 6(a) and 6(e) above and:

- (a) denies the Second Applicant was ever the sole director of Escom;
- (b) says further that pursuant to the Subprime/Marcomm Agreement, Escom acknowledged, *inter alia*, that:
  - (i) the “Principal” Marcomm conducted a business involving contracting with a Customer to provide communications installations and servicing of communications installations;
  - (ii) Marcomm engaged Escom to provide Services (as defined in the Subprime/ Marcomm Agreement) to Marcomm;
  - (iii) the relationship between Marcomm and Escom was one wherein Escom was engaged as an independent contractor and not one of employment;

#### **Particulars**

Subprime/ Marcomm Agreement.

- (c) says that Ms Uren also provided services to Escom in relation to the performance of the Subprime / Marcomm Agreement; and

#### **Particulars**

Ms Uren was registered as an “employee (field supervised)” on the Respondent’s compliance portal with her own login ID issued by the Respondent and she completed a range of trainings and accreditations. Ms Uren was accordingly permitted to attend jobs on-site with and provide assistance to the Second Applicant, under the Supervision of the Second Applicant.

- (d) otherwise denies the paragraph.

36 The Respondent admits paragraph 36.

37 In answer to paragraph 37 the Respondent:

- (a) says that subject to reference to the full terms and effect of the agreement at trial, the Subprime/Marcomm Agreement provided that Escom would commence providing “Services” (as defined) in April 2017;
- (b) says that Escom in fact provided services to Marcomm during the period 24 May 2017 and 2 January 2019; and
- (c) otherwise denies the paragraph.

38 In answer to paragraph 38 the Respondent:

- (a) says that subject to reference to the full terms and effect of the agreement at trial, that the term of Subprime/Marcomm Agreement was 4 years and provided that Escom would provide the Services (as defined) until the Subprime/Marcomm Agreement was terminated; and

- (b) otherwise denies the paragraph.

39 In answer to paragraph 39 the Respondent:

- (a) admits that Escom must comply with the conditions outlined in clause 16(h) of the Subprime/Marcomm Agreement;
- (b) says further that pursuant to the Subprime/Marcomm Agreement, Escom was obliged to comply with conditions imposed by Marcomm in addition to those outlined by Marcomm's "Customer" and,

**Particulars**

Subprime/Marcomm Agreement, clauses 16(f)-(g) and clauses 16(i)-(ii).

- (c) otherwise denies the paragraph.

40 In answer to paragraph 40, the Respondent:

- (a) says that the amount payable to Escom was a Fixed Fee in relation to the Services fulfilled by Escom '*which is specified by the Customer according to "Marcomm Standard Contractor Rates"*'; and
- (b) otherwise denies the paragraph.

41 In answer to paragraph 41, the Respondent:

- (a) admits the paragraph;
- (b) says further that:
  - (i) pursuant to the Subprime/Marcomm Agreement, Escom agreed to indemnify Marcomm for any loss, damage, liability and any backcharges issued against Marcomm by any Third Party or "The Customer"; and
  - (ii) the right to deduct referred to in paragraph 41 refers to this indemnity.

**Particulars**

Subprime/ Marcomm Agreement, clauses 15 and 28(l).

- (c) otherwise denies the paragraph.

42 In answer to paragraph 42, the Respondent:

- (a) says that Escom completed Work Orders issued by the Respondent; and
- (b) otherwise denies the paragraph.

43 In answer to paragraph 43, the Respondent:

- (a) says that the Work Orders completed by Escom were undertaken in performance of obligations of Marcomm to the Respondent under a BSA Master Services Agreement between Marcomm and the Respondent dated 24 August 2016 (**BSA/Marcomm Agreement**), which Marcomm had sub-contracted to Escom pursuant to the Subprime/Marcomm Agreement; and

- (b) otherwise denies the paragraph.
- 44 In answer to paragraph 44, the Respondent:
- (a) refers to and repeats paragraph 39 above;
  - (b) says further clause 11 of the Subprime/Marcomm Agreement provided that the Second Applicant undertook to comply with all of the specific requirements as set out in the Services (set out in item 1, schedule 1 to the Subprime/Marcomm Agreement) and as agreed between Marcomm and the Second Applicant from time to time, including:
    - (i) to perform the Services pursuant to reasonable schedules provided by Marcomm, between such operating hours and days as agreed between Marcomm and the Second Applicant, either pursuant to the details set out in the Services or agreed between the parties from time to time;
    - (ii) to complete the Services within such reasonable timeframe as agreed between the parties; and
  - (c) otherwise denies the paragraph.
- 45 The Respondent:
- (a) does not know and cannot admit paragraph 45(a);
  - (b) does not know and cannot admit paragraph 45(b);
  - (c) denies paragraph 45(c);
  - (d) does not know and cannot admit paragraph 45(d);
  - (e) denies paragraph 45(e);
  - (f) denies paragraph 45(f);
  - (g) denies paragraph 45(g); and
  - (h) denies paragraph 45(h).
- 46 The Respondent denies paragraph 46.
- 47 The Respondent denies paragraph 47.
- 48 The Respondent denies paragraph 48.
- 49 The Respondent denies paragraph 49.
- 50 The Respondent denies paragraph 50.
- 51 The Respondent denies paragraph 51.
- 52 The Respondent denies paragraph 52.
- 53 The Respondent denies paragraph 53.
- 54 The Respondent denies paragraph 54.



55 The Respondent denies paragraph 55.

**Characterisation of relationship between the Applicants and BSA**

56 In answer to paragraph 56 the Respondent:

- (a) in respect of subparagraphs (a) to (e), it:
  - (i) refers to and repeats paragraphs 33(a) to (r) and 33(y) above;
  - (ii) admits that it was required to exercise some control and direction over the operational procedures followed by Subcontracting Companies, the Subprime Contracting Companies, the Subcontracting Companies' Representatives and/or the Subprime Companies' Representatives by reason of the nature of the services provided, the regulatory requirements, the mandatory and other operational procedures which applied to each Platform or that was required to be followed by each Platform, its requirements under the Platform Agreements and its obligations and the obligations of the Platforms under legislative health and safety requirements;
  - (iii) says that in completing Work Orders, the Subcontracting Companies, the Subcontracting Companies' Representatives, the Subprime Contracting Companies and the Subprime Companies' Representatives had control over, and exercised their own skill and judgment in relation to, the manner in which they completed the work;
  - (iv) says that the Subcontracting Companies and the Subprime Contracting Companies had control over the number of their personnel who attended a job to complete each Work Order; and
  - (v) otherwise denies subparagraph 56(a) to (e);
- (b) in respect of subparagraphs (f) and (g), it repeats subparagraph (a) and paragraph 33(m) and (ee)-(ff), and otherwise denies the subparagraph;
- (c) in respect of subparagraphs (h) and (i), it repeats subparagraph (a) and paragraph 33(aa), and otherwise denies the subparagraph;
- (d) in respect of subparagraph (j), it says that it did not have any contracts with the alleged workers and otherwise denies the subparagraph;
- (e) in respect of subparagraph (k), it repeats subparagraph (a) and paragraphs 33(d) to (f) and (y) to (z) above, and otherwise denies the subparagraph;
- (f) in respect of subparagraph (l), it repeats subparagraph (a) and paragraphs 33(dd) above, and otherwise denies the subparagraph;
- (g) in respect of subparagraph (m), it repeats subparagraph (a) and paragraphs 33(bb)-(cc) above, and otherwise denies the subparagraph;
- (h) in respect of subparagraph (n), it repeats paragraph 57 below and otherwise denies the subparagraph;

- (i) in respect of subparagraph (o), it repeats paragraphs 29 and 33(y)-(z) above and otherwise denies the subparagraph; and
- (j) in respect of subparagraph (p), it repeats subparagraph (a) and otherwise denies the subparagraph.

57 In answer to paragraph 57, the Respondent:

- (a) repeats paragraph 33(s) above, and otherwise denies subparagraph 57(a);
- (b) says that:
  - (i) the timing of payments by the Respondent to Subcontracting Companies was governed by the BSA Agreements;
  - (ii) the Respondent had no involvement in the timing of payments made by:
    - (A) Subcontracting Companies to Subcontracting Companies' Representatives;
    - (B) Subcontracting Contracting Companies to Subprime Contracting Companies; and
    - (C) Subprime Contracting Companies to Subprime Companies' Representatives;
 and otherwise denies subparagraph 57(b);
- (c) repeats paragraph 33(t) above, and denies subparagraph 57(c);
- (d) says that in certain circumstances, including in respect of claims for travel expenses, Subcontracting Companies issued their own invoices, but otherwise admits paragraph 57(d);
- (e) admits that in certain circumstances the Respondent had the right under the BSA Agreements to withhold and/or set-off payments to Subcontracting Companies, repeats paragraph 29 and otherwise denies paragraph 57(e); and
- (f) admits that in certain circumstances the Respondent had the right under the BSA Agreements to require Subcontracting Companies to pay money to the Respondent, repeats paragraph 29 and 33(y)-(z) and otherwise denies paragraph 57(f).

58 The Respondent denies paragraph 58.

59 The Respondent denies paragraph 59.

60 The Respondent denies paragraph 60.

61 The Respondent denies paragraph 61.

62 The Respondent denies paragraph 62.

63 The Respondent denies paragraph 63.

- 64 The Respondent denies paragraph 64 and further says that having regard to the totality of the relationship between the Respondent and the Subcontracting Companies, the Subcontracting Companies and Subcontracting Companies' Representatives, Subcontracting Companies and the Subprime Contracting Companies and the Subprime Contracting Companies and the Subprime Companies' Representatives, there was no contractual relationship or relationship of employment between the Respondent and the alleged workers.

### **National Employment Standards**

- 65 The Respondent admits paragraph 65.
- 66 In answer to paragraph 66, the Respondent:
- (a) admits that it was a National Systems Employer in respect of its employees; and
  - (b) denies that the Ordinary Group Members and Subprime Group Members were its employees.
- 67 In answer to paragraph 67, the Respondent:
- (a) does not know and cannot admit if the Applicants were national system employees of Southern Electrical or Escom;
  - (b) does not know and cannot admit if the alleged "workers" were national system employees of a Subcontracting Company or a Subprime Contracting Company; and
  - (c) denies that the Applicants or any of the alleged "workers" were national system employees of the Respondent.
- 68 The Respondent denies paragraph 68.
- 69 In answer to paragraph 69, the Respondent:
- (a) does not know and cannot admit if the Applicants were casual employees within the meaning of section 86 of the *Fair Work Act 2009* in respect of either Southern Electrical or Escom;
  - (b) does not know and cannot admit if the alleged "workers" were casual employees of a Subcontracting Company or a Subprime Contracting Company;
  - (c) denies that the Applicants were casual employees within the meaning of section 86 of the *Fair Work Act 2009* of the Respondent;
  - (d) alternatively, says that, if the Applicants and alleged "workers" are found to have been employees of the Respondent (which is denied), then:
    - (i) they were casual employees within the meaning of section 86 of the *Fair Work Act 2009*; alternatively
    - (ii) some were casual employees within the meaning of section 86 of the *Fair Work Act 2009*;

### **Particulars**

Subcontracting Companies, Subcontracting Companies' Representatives, Subprime Contracting Companies and/or Subprime Companies' Representatives:

- i. did not, or did not necessarily, work a regular pattern of hours;
- ii. nominated their own availability and hours;
- iii. could elect not to accept work;
- iv. did not provide a firm advance obligation to provide ongoing services;
- v. had capacity for rest and recreation based on their ability to nominate their own availability; and
- vi. did not have any certainty as to the period over which Work Orders would be offered.

70 The Respondent denies paragraph 70.

71 The Respondent admits paragraph 71.

72 The Respondent denies paragraph 72.

73 The Respondent denies paragraph 73.

### **Telecommunications Services Award 2010**

74 The Respondent does not know and cannot admit paragraph 74.

75 In answer to paragraph 75, the Respondent:

- (a) denies the First Applicant was engaged by the Respondent on a full-time basis or at all; and
- (b) says further that the First Applicant worked for Southern Electrical only an average of 4.8 days per week, and 33.6 hours per week; and
- (c) otherwise denies the paragraph.

76 The Respondent does not presently know and therefore cannot admit paragraph 76.

77 In answer to paragraph 77, the Respondent:

- (a) denies the Second Applicant was engaged by the Respondent on a full-time, basis or at all; and
- (b) says further that the Second Applicant worked only an average of 4.4 days per week, and 31.2 hours per week; and
- (c) otherwise denies the paragraph.

78 The Respondent does not presently know and therefore cannot admit paragraph 78.

79 The Respondent denies paragraph 79.

80 The Respondent denies paragraph 80.

81 The Respondent denies paragraph 81.

82 The Respondent denies paragraph 82.

83 The Respondent denies paragraph 83.

- 84 The Respondent denies paragraph 84.
- 85 The Respondent denies paragraph 85.
- 86 The Respondent admits paragraph 86.
- 87 The Respondent denies paragraph 87.
- 88 The Respondent denies paragraph 88.
- 89 The Respondent denies paragraph 89.
- 90 In answer to paragraph 90, the Respondent;
- (a) says in respect of subparagraph (a):
- (i) payments were made by the Respondent (typically on a fortnightly basis) to:
- (A) Southern Electrical; and
- (B) Marcomm.
- (ii) alternatively, if the Applicants are found to employees of the Respondent (which is denied), the payments made by the Respondent to:
- (A) Southern Electrical; and,
- (B) Marcomm (in respect of work completed by Escom),
- satisfied an employee's entitlements under the Award rates; and
- (iii) otherwise denies the paragraph.
- (b) Further, the Respondent says:
- (i) the amounts received by Southern Electrical and Escom were based on the nature and number of Work Orders completed by, respectively, their Subcontracting Company Representatives and their Subprime Companies' Representatives; and
- (ii) each of Southern Electrical, as a Subcontracting Company, and Escom as a Subprime Contracting Company had the capacity to be paid amounts that considerably exceeded any minimum statutory or award entitlements which Representatives completing Work Orders on their behalf would have been entitled to receive; and
- (iii) each of Southern Electrical and Escom were in fact paid amounts which considerably exceeded any minimum statutory or award entitlements which Representatives completing Work Orders on their behalf would have been entitled to receive.

#### **Particulars**

- i. Southern Electrical was paid by the Respondent approximately \$340,000 (excluding GST) in circumstances where:

1. adopting the actual hours the First Applicant worked, it would have been paid approximately \$166,000 (excluding GST); and
  2. even assuming the First Applicant worked a minimum of 38 hours per week, it would have been paid approximately \$194,000 (excluding GST)
- ii. Assuming Marcomm retained 20% of the moneys paid to it in respect of work undertaken by Escom, Escom was paid approximately \$109,000 (excluding GST) in circumstances where:
1. adopting the actual hours the Second Applicant worked, it would have been paid approximately \$78,000 (excluding GST); and
  2. even assuming the Second Applicant worked a minimum of 38 hours per week, it would have been paid approximately \$98,000 (excluding GST).

91 The Respondent denies paragraph 91.

92 The Respondent admits sections 44(1) and 45 (other than in relation to a contravention or proposed contravention of an outworker term) of the *Fair Work Act 2009* are civil penalty provisions under section 539(1) of the *Fair Work Act 2009* and otherwise denies paragraph 92.

93 The Respondent denies paragraph 93.

#### **Section 357 of the Fair Work Act**

94 In answer to paragraph 94, the Respondent:

- (a) says that the contracts to which the Subcontracting Companies were engaged stated that they were contracts for services under which the Subcontracting Companies would perform work as independent contractors; and
- (b) otherwise denies the paragraph.

95 The Respondent denies paragraph 95.

96 The Respondent admits section 537(1) of the *Fair Work Act 2009* is a civil penalty provision under section 539(1) of the *Fair Work Act 2009* and otherwise denies paragraph 92.

#### **Penalty under the Fair Work Act**

97 The Respondent denies paragraph 97.

#### **Independent Contractors Act 2006**

98 In answer to paragraph 98 the Respondent says:

- (a) section 12(2) of the *Independent Contractors Act 2006* provides that an application under section 12(1) may only be made by a party to a services contract (as defined in the Act).
- (b) Insofar as the First Applicant contends that either the Pleaded BSA Agreements and/or the 2014 BSA Agreement is a services contract as defined in the *Independent Contractors Act 2006*:

- (i) the First Applicant is not a party to the Pledged BSA Agreements; and
  - (ii) the First Applicant is not a party to the 2014 BSA Agreement.
  - (c) by reason of (a) and (b) above the First Applicant has no standing to make any application under section 12(1) in respect of the Pledged BSA Agreements or the 2014 BSA Agreement and the paragraph is liable to be struck out;
  - (d) insofar as the Second Applicant contends that the Inferred Subprime Contract is a services contract as defined in the *Independent Contractors Act 2006*:
    - (i) the Respondent denies the existence of the Inferred Subprime Contract; and
    - (ii) it follows that the Second Applicant is not a party to the Inferred Subprime Contract;
  - (e) by reason of (a) and (d) above the Second Applicant has no standing to make any application under section 12(1) in respect of the Inferred Subprime Agreement and the paragraph is liable to be struck out; and
  - (f) otherwise denies the paragraph.
- 99 In answer to paragraph 99, the Respondent repeats paragraph 98 above and otherwise denies the paragraph.
- 100 In answer to paragraph 100, the Respondent repeats paragraph 98 above and otherwise denies the paragraph.
- 101 In answer to paragraph 101, the Respondent repeats paragraph 98 above and otherwise denies the paragraph.

## Estoppel

### ***The First Applicant***

- 102 Further to the matters pleaded herein, the Respondent says that the First Applicant:
- (a) executed the 2014 BSA Agreement on behalf of Southern Electrical;
  - (b) agreed on behalf of Southern Electrical, that Southern Electrical would provide services to the Respondent as an independent contractor; and
  - (c) throughout the period of provision of services by Southern Electrical under the BSA Agreement (**SE Engagement Period**), as the sole director and controller of Southern Electrical, had Southern Electrical accept payments made by the Respondent to Southern Electrical and, further or alternatively, did so without demur or at any time communicating to the Respondent that the services were not being provided by Southern Electrical, as an independent contractor.
- (First Applicant's conduct).**

### Particulars

The Respondent refers to and repeats the matters in paragraphs 7 to 10 and 23 (inclusive) of its Cross-Claim against the First Applicant and Southern Electrical.

- 103 The First Applicant's conduct encouraged or induced the Respondent to adopt an assumption, further or alternatively gave rise to a common assumption as between the First Applicant and the Respondent, further or alternatively constituted a representation by the First Applicant to the Respondent, that:
- (a) Southern Electrical was providing, and would continue to provide, services to the Respondent as an independent contractor; and
  - (b) services provided to the Respondent were being, and would continue to be, provided by Southern Electrical in the capacity of an independent contractor, and not by the First Applicant:
    - (i) in the capacity of an employee; or
    - (ii) personally, as an independent contractor,
- (the **Bradshaw Assumption** and/or the **Bradshaw Representation**).
- 104 The Respondent acted in reliance on the Bradshaw Assumption, further or alternatively on the Bradshaw Representation, throughout the SE Engagement Period, and the First Applicant knew that it was doing so.

### Particulars

- i. the Respondent entered into the 2014 BSA Agreement with Southern Electrical;
  - ii. the Respondent engaged Southern Electricals' purported services during the period of service pursuant to the 2014 BSA Agreement;
  - iii. at the First Applicant's direction, the Respondent made payments to Southern Electrical for the services it purportedly provided, on the basis that it was an independent contractor.
- 105 If:
- (a) the services provided to the Respondent during the SE Engagement Period were provided by the First Applicant in the capacity of an employee, or as an independent contractor directly engaged by the Respondent (which is denied), rather than by Southern Electrical as an independent contractor; and
  - (b) the Respondent is ordered to pay any compensation to the First Applicant, then, the Respondent's actions in reliance on the Bradshaw Assumption, further or alternatively the Bradshaw Representation, were to its detriment.

### Particulars

The Respondent's detriment comprises loss of the whole amount that it paid Southern Electrical, or, if any compensation awarded to the First Applicant is limited to the difference between the amounts he would have received as an employee (or as an independent contractor engaged directly by the Respondent), and the amounts paid to Southern



Electrical, the Respondent's detriment will be limited to that difference, and (on either basis) its legal costs of the proceeding.

106 By reason of the matters in paragraphs 102 to 105 hereof, it would be unconscionable for the First Applicant to assert that the services provided to the Respondent during the SE Engagement were provided by the First Applicant in the capacity of an employee, or an independent contractor engaged directly by the Respondent, rather than by Southern Electrical as an independent contractor, and the First Applicant should be estopped from so doing.

107 In the premises, the First Applicant should be prevented from claiming any entitlements for the services provided to the Respondent during the SE Engagement Period on the basis that they were provided by him in the capacity of an employee, or an independent contractor engaged directly by the Respondent.

### The Second Applicant

108 Further the Respondent says that the Second Applicant:

- (a) executed the Subprime/Marcomm Agreement on behalf of Escom;
- (b) agreed on behalf of Escom, that Escom would services to Marcomm as an independent contractor; and
- (c) throughout the period of provision of services by Escom under the Subprime/Marcomm Agreement (**Escom Engagement Period**), as a director of Escom, had Escom accept payments made by Marcomm to Escom and, further or alternatively, did so without demur or at any time communicating to the Respondent or Marcomm that the services were not being provided by Escom, as an independent contractor,

(**Second Applicant's conduct**).

#### Particulars

The Respondent refers to and repeats the matters in paragraphs 10 to 14 and 21 (inclusive) of its Cross-Claim against the Second Applicant and Escom.

109 The Second Applicant's conduct encouraged or induced the Respondent to adopt an assumption, further or alternatively gave rise to a common assumption as between the Second Applicant and the Respondent, further or alternatively constituted a representation by the Second Applicant to the Respondent, that:

- (a) Escom was providing, and would continue to provide, services to Marcomm as an independent contractor; and
- (b) services provided to Marcomm were being, and would continue to be, provided by Escom in the capacity of an independent contractor, and not by the Second Applicant:
  - (i) in the capacity of an employee; or
  - (ii) personally, as an independent contractor,

(the **Uren Assumption** and/or the **Uren Representation**).

- 110 The Respondent acted in reliance on the Uren Assumption, further or alternatively on the Uren Representation, throughout the Escom Engagement Period, and the Second Applicant knew that it was doing so.

**Particulars**

- i. the Respondent facilitated the allocation of Work Orders to Uren
- ii. the Respondent made payments to Marcomm for services Escom purportedly provided to the Respondent on behalf of Marcomm, on the basis that Escom was an independent contractor.

- 111 If:

- (a) the services provided to the Respondent during the Escom Engagement Period were provided by the Second Applicant in the capacity of an employee, or as an independent contractor directly engaged by the Respondent (which is denied), rather than by Escom as an independent contractor engaged by Marcomm; and
- (b) the Respondent is ordered to pay any compensation to the Second Applicant,
- (c) then, the Respondent's actions in reliance on the Uren Assumption, further or alternatively the Uren Representation, were to its detriment.

**Particulars**

The Respondent's detriment comprises loss of the whole amount that it paid Marcomm for work undertaken by Escom, or, if any compensation awarded to the Second Applicant is limited to the difference between the amounts he would have received as an employee (or as an independent contractor engaged directly by the Respondent), and the amounts paid to Marcomm for work undertaken by Escom, the Respondent's detriment will be limited to that difference, and (on either basis) its legal costs of the proceeding.

- 112 By reason of the matters in paragraphs 108 to 111 hereof, it would be unconscionable for the Second Applicant to assert that the services provided to the Respondent during the Escom Engagement Period were provided by the Second Applicant in the capacity of an employee, or an independent contractor engaged directly by the Respondent, rather than by Escom as an independent contractor engaged by Marcomm, and the Second Applicant should be estopped from so doing.
- 113 In the premises, the Second Applicant should be prevented from claiming any entitlements for the services provided to the Respondent during the Escom Engagement Period on the basis that they were provided by him in the capacity of an employee, or an independent contractor engaged directly by the Respondent.

**Set-off**

- 114 Further and in the alternative to the matters pleaded herein, if services were provided by the Applicants in the capacity of employees, rather than, in the case of the First Applicant, by Southern Electrical and, in the case of the Second Applicant by Escom, as independent contractors (which is denied), then:

- (a) the Respondent refers to and repeats the contents of its Cross-Claims against the Applicants; and
- (b) the Respondent claims an entitlement to set off the following against any loss or damage suffered by the Applicant, or any compensation awarded to the Applicant:
- (c) any amounts paid to either Southern Electrical and/or to Marcomm (in respect of work undertaken by Escom); and
- (d) any amounts paid to either Southern Electrical and/or to Marcomm (in respect of work undertaken by Escom for GST).

### Limitations defence

115 In response to the whole of the Statement of Claim, the Respondent says that to the extent it is found that the Applicants or Group Members have suffered any loss and damage as alleged in the SOC (which is denied):

- (a) by reason of the operation of sections 544 and 545 of the *Fair Work Act 2009*, any action for a contravention of sections 44 and 45, and/or 357 must be commenced within 6 years of the day on which the alleged contravention occurred and/or within 6 years of the alleged underpayment and accordingly, any alleged contravention or alleged underpayment which occurred prior to 23 July 2014 is not actionable; and
- (b) it repeats paragraph 98 above and says further under cover of that objection that:
  - (i) by reason of the operation of section 13 of the *Independent Contractors Act 2006* and Regulation 7 of the *Independent Contractors Regulations 2016* the time limit for making an application under section 12(1) of the *Independent Contractors Act 2006* for an order under section 16 of the *Independent Contractors Act 2006* is 12 months after the relevant services contract ends, unless a Court makes an order under regulation 7 of the *Independent Contractors Regulations 2016*;
  - (ii) the Court has not made any order under regulation 7 of the *Independent Contractors Regulations 2016* with respect to the Applicants or Group Members; and
  - (iii) by reason of the matters in (i) and (ii), above, any application by the Applicants' and those Group Members whose contract with the Respondent ended before 23 July 2019 for orders under section 16 of the *Independent Contractors Act 2006* is statute-barred.

Date: 30 October 2020



---

Signed by Paul Reidy

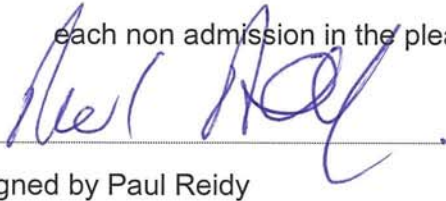
Lawyer for the Respondent.

This pleading was prepared by Johnson Winter & Slattery and settled by Robert Craig and Yaseen Shariff of senior counsel.

### **Certificate of lawyer**

I, Paul Reidy, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.



---

Signed by Paul Reidy

Lawyer for the Respondent

Date: 30 October 2020

