



NOTICE OF DEFENCE

Case: S CI 2018 01113  
Filed on: 26/07/2018 03:45 PM  
S CI 2018 01113

IN THE SUPREME COURT OF VICTORIA  
AT WARRNAMBOOL  
COMMON LAW DIVISION  
MAJOR TORTS LIST

BETWEEN

**ANDREW JOHN FRANCIS**

**Plaintiff**

and

**POWERCOR AUSTRALIA LIMITED  
(ACN 064 651 109)**

**Defendant**

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Date of Document:	26 July 2018
Filed on Behalf of:	The Defendant
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In answer to the Plaintiff's Amended Statement of Claim dated 16 April 2018, the Defendant says as follows:

- 1 It admits paragraph 1.
- 2 It admits paragraph 2.
- 3 It makes no admissions to paragraph 3 save that it admits as a result of a recent permitted inspection there is fire damage to the Plaintiff's property.
- 4 It admits paragraph 4.
- 5 As to paragraph 5 it:
  - 5.1 does not admit paragraph 5;

5.2 it says it has no detail of each of the group members and their alleged loss and damage; and

5.3 says further that it relies on the provisions of Part VB and VBA of the **Wrongs Act 1958** (Vic) in respect of each group member who is alleged to have suffered personal injury.

6 It does not admit paragraph 6.

7 As to paragraph 7:

7.1 it admits 7(a).

7.2 in relation to 7(b):

(a) it admits it carried on business as a distributor of electricity to residential and business customers in the geographical area of central and western Victoria pursuant to a licence granted under the **Electricity Industry Act 2000** (Vic) (**EI Act**) (**Distribution Business**);

(b) otherwise denies the allegations contained therein.

7.3 in relation to 7(c) it admits that in carrying out the Distribution Business it was a "*major electricity company*" and an operator of a supply network within the meaning of s.3 of the **Electricity Safety Act 1998** (Vic) (**ES Act**);

7.4 it says further that in the course of and for the purposes of the Distribution Business, it owned and operated the network infrastructure that carries electricity from a transmission network to the point at which supply is passed to end users of electricity in the licenced area (**Distribution Network**).

7.5 it says further that as at 17 March 2018, the Distribution Network:

- (a) was the largest electricity distribution network in Victoria stretching across 145,650 square kilometres and servicing nearly 750,000 customers as well as Melbourne's western suburbs; and
- (b) contained more than 82,000 kilometres of power lines and half a million poles.

8 As to paragraph 8:

8.1 it admits paragraphs 8(a) and (b); and

8.2 says further that:

- (a) the line was part of a network constructed by the State Electricity Commission (**SEC**) in the 1960s which delivered power to rural Victoria as a social utility for the purposes of s.48(2)(d) of **Wrongs Act 1958** (Vic);
- (b) the Distribution Network services sparsely populated and lightly loaded rural areas. The nature of the construction using wooden poles and conductors above ground makes it efficient, economic and reliable in supplying communities in the areas and is reasonable and appropriate as a system in the circumstances; and
- (c) inherent in the design of any system delivering electricity is an element of risk of harm against which the Defendant has taken reasonable precautions as pleaded below.

9 Subject to full reference of the relevant statutory provisions, it admits paragraph 9.

10 As to paragraph 10 it:

10.1 denies the allegations therein;

10.2 further denies that s.98 of the ES Act created any private right or cause of action for the benefit of the Plaintiff, or any group member, or any particular class of persons; and

10.3 says further that if (which is denied) the statutory provisions on which the Plaintiff relies imposed on the Defendant an obligation for the protection of any particular class or persons, the scope of that obligation was limited by reference to the matters alleged in paragraph 17 of this Defence.

11 It denies the allegations in paragraph 11.

12 It denies the allegations in paragraph 12.

13 As to paragraph 13 it admits:

13.1 that from on or about 3 October 1994 it had the right to construct, modify, repair, inspect, maintain and operate the Powerline and its Installations, including the power poles;

13.2 that except to the extent that it conferred such rights on another party by contracting with another party, it held those rights to the exclusion of other private persons;

13.3 admits sub-paragraphs (b) and (c); and

13.4 otherwise denies the allegations therein.

14 As to paragraph 14:

- 14.1 it admits sub-paragraph (aa);
- 14.2 it admits sub-paragraph (a) and refers to paragraph 14.3 of the Defence below;
- 14.3 as to sub-paragraph (b):
- (a) it says that unintended discharges of electricity from the Powerline might be capable of causing death or serious injury to persons and damage to property by the means alleged;
  - (b) it says further that the prospect of the risk of injury to persons or damage to property from burning by fire ignited by the discharge of electricity materialising, and the magnitude of the risk if it did materialise, were dependent upon circumstances outside the Defendant's control;
  - (c) the circumstances outside the control of the Defendant referred to above included, without limitation, weather conditions at the time of the discharge of electricity, latent features of surrounding vegetation, the nature and quality of flammable material available in the vicinity of any point of discharge, the direction and speed at which the fire (if ignited) travelled, the extent and expedition of actions taken by fire agencies and other persons to suppress the fire and steps taken by persons to remove or protect themselves or their property from the powerful impact of the fire; and
  - (d) it specifically denies that the risk of injury to persons or damage to property from burning by fire ignited by the discharge of electricity from the Powerline was material.

14.4 it denies the allegations in sub-paragraph (c); and

14.5 it denies the allegations in sub-paragraph (d).

15 As to paragraph 15 it:

15.1 admits sub-paragraph (a). It says further that the emission of electricity, heat or molten metal particles is a phenomenon which is inherent to electricity and cannot be absolutely guarded against;

15.2 does not admit sub-paragraph (b). It admits that in certain circumstances, electricity, heat or sparks emitted from a point of discharge could cause electric shock or burns to persons or property in the vicinity of the point of discharge;

15.3 does not admit sub-paragraph (c). It admits that in certain circumstances, electricity, heat or sparks emitted from a point of discharge could cause the ignition of fire in combustible material exposed to the electricity, heat or sparks – such circumstances that include, without limitation, weather conditions at the time of the discharge of electricity, latent features of surrounding vegetation, the nature and quality of flammable material available in the vicinity of any point of discharge;

15.4 does not admit sub-paragraph (d). It admits that such fire once ignited might spread over a wide geographic area depending, among other things, on wind direction and velocity;

15.5 admits sub-paragraph (e);

- 15.6 it admits sub-paragraph (f) save that no admission is made in relation to the extent or nature of any economic loss consequent upon property damage in the affected areas;
- 15.7 denies sub-paragraph (g); and
- 15.8 does not admit sub-paragraph (h). It admits that the risks referred to in sub-paragraphs 15(c)-(f) were likely to be higher when the environment around the Powerlines was dry and hot and windy rather than when the environment was damp or cool or windless, but otherwise it denies that the risks referred to in sub-paragraphs 15(a) and (b) were likely to be higher in such conditions.
- 16 As to paragraph 16 it:
- 16.1 denies the allegations therein;
- 16.2 says that the Plaintiff and some or all of the group members were capable of protecting themselves including by effecting insurance cover in respect of the losses alleged; and
- 16.3 says further that the class of persons alleged in paragraph 16 is indeterminate, and was not at any relevant time capable of being reasonably determined.
- 17 As to paragraph 17:
- 17.1 it denies the allegations therein;
- 17.2 it says that if (which is denied) it owed a duty of care to a class of persons including the Plaintiff and group members or any of them, the scope of that duty and the reasonableness of the steps taken in discharge of that duty

are to be assessed by reference, among other things, to the facts and considerations set out in the subparagraphs below;

17.3 at all relevant times the Defendant was governed by a technical regulatory framework (the **Technical Regulatory Framework**) which as at 17 March 2018 relevantly comprised —

- (a) the terms of the distribution licence;
- (b) the ES Act;
- (c) the **Electricity Safety (Bushfire Mitigation) Regulations 2013** (Vic);
- (d) the **Electricity Safety (Management) Regulations 2009** (Vic); and
- (e) the **Energy Safe Victoria Act 2005** (Vic);

17.4 pursuant to the Technical Regulatory Framework —

- (a) the Defendant was required to submit to Energy Safe Victoria (**ESV**) an electricity safety management scheme (**ESMS**) (ES Act, s 99);
- (b) ESV was required to accept the ESMS if it was satisfied that it was appropriate for the Distribution Network and complied with the ES Act and the regulations relating to electricity safety management schemes (ES Act, s 102(2));
- (c) the Defendant was required, each year, to prepare and submit to ESV for acceptance, a plan for its proposals for the mitigation of bushfire risk in relation to its network (bushfire mitigation plan) (ES Act, s 113A);



- (d) ESV was required to accept the bushfire mitigation plan if it was satisfied that it was appropriate for the supply network CES Act, s 83BE(2), s 113C);
- (e) an accepted bushfire mitigation plan applying to supply network was taken to form part of the ESMS (ES Act, s 113D);
- (f) it was a defence to prosecution of a person for an offence relating to breach of a duty or obligation imposed under s 98 of the ES Act that the person had complied with an accepted ESMS in relation to that duty or obligation (ES Act, s 113);

17.5 at all relevant times the Defendant had in place —

- (a) An ESMS that was approved by ESV; and
- (b) Bushfire mitigation plans that were approved by ESV.

17.6 it further expressly denies that there is any duty owed to those persons who at the time of the Garvoc Bushfire resided in, or had real or personal property in the Garvoc Bushfire area or in the immediate vicinity of the Garvoc Bushfire and who suffered economic loss, which loss was not consequent upon injury to that person or loss or damage to property as a result of the Garvoc Bushfire. In support of its denial of the duty alleged, the Defendant will rely upon the judgment of the Court in ***Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*** [2003] VSC 27.

18 It does not admit paragraph 18 and sub-paragraph 18(A) and repeats paragraph 17 of its Defence above.

19 It admits paragraph 19.

- 20 It denies each and every allegation in paragraph 20. It says further:
- 20.1 the transmission of electricity gives rise to a level of risk that can never be eliminated entirely but it can be managed;
- 20.2 additional risk is necessarily created by weather conditions giving rise to bushfire, the existence of which is recognised by the statutory framework within the ES Act and the program of mitigation implemented by all network operators including the Defendant pursuant to the ES Act;
- 20.3 no reasonable maintenance system can be 100% effective nor is it required to be for the purpose of the ES Act;
- 20.4 consistent with industry practice, the Defendant's maintenance regime was based upon Reliability Centred Maintenance (**RCM**), an industry accepted system for the maintenance of assets based upon condition monitoring rather than replacement of assets regardless of age;
- 20.5 it is industry practice in Australia to replace wood poles only on the basis of RCM having regard to condition and serviceability of the pole determined by scheduled inspections by an asset inspector. Network operators in Australia do not routinely replace wood poles on other criteria alone, such as age or time in service;
- 20.6 the Defendant's maintenance program reasonably addressed failure modes in wooden poles;
- 20.7 the use of reinforcement plates to "*stake*" a pole is a known and accepted method of reinforcement of wooden poles adopted as industry practice by network operators;

20.8 the location of the Garvoc pole is not in an area which would be considered environmentally unusual or to require special or different treatment to other poles in the Defendant's network;

20.9 the Garvoc pole was subject to scheduled asset inspections on:

- (a) 10 May 2010;
- (b) 5 December 2012;
- (c) 14 May 2015; and
- (d) 30 November 2017

and at all times was established as serviceable.

#### Particulars

(e) A summary of the inspection dates and outcomes is set out in the table below:

Inspection date	Result/outcome	Type of inspection (visual or drill) and amount of sound wood
10 May 2010	No damage noted at / below ground level Serviceable	Visual/sound & drill Sound wood = 100mm
5 December 2012	No damage noted at / below ground level Serviceable	Above ground visual
14 May 2015	No damage noted at / below ground level Serviceable	Visual/sound & drill Sound wood = 50mm

30 November 2017	No damage noted at / below ground level Serviceable	Above ground visual
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20.10 the Defendant's network contains over half a million poles, of which there are 23,860 reinforced poles (**Reinforced Poles**). Of the population of Reinforced Poles, 19,183 are wood poles reinforced with the same system as the Garvoc pole (**RFD Reinforced Wood Poles**). In the period of the Defendant's recorded statistics (between 2006 to 2018) of defects and failures of all Reinforced Poles :

- (a) there have been 23 reported defects and failures of Reinforced Poles, of which:
  - (i) 21 instances of defects were identified and responded to by the Defendant before the subject pole failed/collapsed. None of these resulted in a fire start; and
  - (ii) only 2 Reinforced Poles failed/collapsed, neither of which were due to rot, nor caused a fire.
- (b) in relation to the number of defects attributable to rot in the population of 23 Reinforced Pole defects:
  - (i) a total of 5 (of 23) defects were determined to be caused by internal rot (an equivalent failure rate of 0.021%);
  - (ii) a total of 2 (of 23) defects were determined to be caused by external rot (an equivalent failure rate of 0.008%); and
  - (iii) the locations of all internal and external rot defects were below or at ground level.

20.11 Powercor has not previously encountered a Reinforced Pole or an RFD Reinforced Wood Pole failure due to rot above the level of the stakes.

21 It denies paragraph 21.

22 It denies paragraph 22.

23 It denies paragraph 23.

24 It denies paragraph 24.

25 It denies paragraph 25 and further it says that if by transmitting electricity on the powerlines the Defendant created a nuisance, which is expressly denied:

25.1 the transmission of electricity by the Defendant was authorised by the ES Act and the EI Act;

25.2 the ES Act and/or the EI Act imposed a duty and/or power on the Defendant to transmit electricity the performance or exercise of which created the nuisance as an inevitable consequence;

25.3 the transmission of electricity on the powerlines by the Defendant was expressly within the scope of the statutory authority given by the ES Act and the EI Act to the Defendant;

25.4 the Defendant acted with reasonable care in the exercise of the statutory power or duty imposed by the ES Act and the EI Act;

25.5 by reason of the matters pleaded in this paragraph, if, which is denied, the Plaintiff and the group members suffered a nuisance created by the Defendant, the Defendant has a complete defence in respect of the nuisance.

26 As to paragraph 26(A):

26.1 it denies the allegations contained therein;

26.2 as to the Plaintiff's alleged loss and damage, says that it has sought details of the particulars claimed and requested inspection of the Plaintiff's property;

26.3 has no detail of each of the group members and their alleged loss and damage but has also made requests for details of the of the particulars claimed and in due course will seek any requests for inspection of group member properties.

27 It admits paragraph 26 and further says that the questions of fact or law raised in this proceeding require the appointment of a sub-group member to consider:

27.1 whether the Statutory Duties and/or General Duties alleged were owed by Powercor to any person who resided in or had real or personal property in the Garvoc Bushfires area who suffered economic loss which loss was not consequent upon injury to that person or loss or damage to their property as a result of the Garvoc Bushfire; and

27.2 whether any person who allegedly suffered personal injury (whether physical injury or psychiatric injury) as result of the Garvoc Bushfire is able to recover damages for non-economic loss in accordance with section 28 of the **Wrongs Act (Vic) 1958**.

28 Save where admitted or not admitted, the Defendant denies that the Plaintiff or any group member is entitled to the relief claimed or at all.

Dated: 26 July 2018

*Wotton + Kearney*

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**WOTTON + KEARNEY**  
Solicitors for the Defendant