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

Not Restricted

S CI 2018 01833

WILLIAM ROBERT HAWKER — Plaintiff

v

POWERCOR AUSTRALIA LIMITED (ACN 064 651 109) — Defendant

JUDGE:	JOHN DIXON J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 October 2018 (further submissions 26 October 2018)
DATE OF RULING:	2 November 2018
CASE MAY BE CITED AS:	Hawker v Powercor Australia Ltd
MEDIUM NEUTRAL CITATION:	[2018] VSC 661

PRACTICE AND PROCEDURE – Group proceeding – Publication of misleading statements to group members via media – Opt-out procedure – Whether affected by statements – Whether correcting communication needed – *Supreme Court Act 1986* (Vic), ss 33J, 33X, 33ZF.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr T Tobin SC, with Ms G Berlic	Maddens Lawyers
For the Defendant	Mr D McWilliams	Wotton & Kearney
For QBE Insurance (Australia) Ltd and Allianz Australia Insurance Ltd	Mr P Solomon QC, with Mr D Carolan	Hall & Wilcox Lawyers

HIS HONOUR:

1 This proceeding is a class action for group members claiming to have suffered loss as a result of the bushfire on St Patrick's Day 2018 around the Gnotuk and Camperdown areas. A number of group members were insured by Allianz Australia Insurance Limited and QBE Insurance (Australia) Limited (the 'insurers'). The insurers have paid significant sums already to many group members in settlement of claims under insurance contracts, and they intend to opt out some of their insureds from the proceeding.

2 On 25 September 2018, the Warrnambool newspaper 'The Standard' published an article titled 'Leading bushfire lawyer says insurance companies cannot take control of bushfire claims'.

3 The plaintiff has proposed an opt-out notice and opt-out procedure for the proceeding. Hall & Wilcox, solicitors for the insurers, expressed concerns to the plaintiff's solicitor that statements made in the article were misleading, and proposed amendments to the opt-out notice to clarify those statements. The plaintiff's solicitors rejected the amendments as inappropriate and irrelevant to the opt-out procedure asserting that the insurers lacked standing to seek such amendments.

4 I granted the insurers leave to intervene to be heard in respect of the alleged misleading statements and the content of the proposed opt-out notice. They sought amendments to correct the statements attributed to the plaintiff's solicitor in the article about the role and nature of the insurers and their representatives.

5 The defendant did not seek to be heard on the insurers' application.

6 There are three related proceedings arising out of separate fires on St Patrick's Day 2018 in south-west Victoria. *Anthony James Lenehan v Powercor Australia Limited* S CI 2018 01290; *Nicholas Glen and Georgina Caroline Block v Powercor Australia Limited* S CI 2018 01833; *Andrew John Francis v Powercor Australia Limited* S CI 2018 0113. These reasons apply to the orders that I will make for the opt-out process in each of these

other proceedings.

The article

7 In the article, Mr Brendan Pendergast, principal of Maddens Lawyers, was reported to have relevantly stated:

> Maddens Lawyers principal Brendan Pendergast, one of Australia's leading bushfire lawyers, said insurance company lawyers were always going to act in the best interests of insurance companies. He said the insurance companies were the lawyers' clients, not fire victims.
>
> "That's their primary obligation, they do the best for their company," he said.
>
> "This should be all about members of our local community recovering the full measure of their losses.
>
> "I am concerned about that focus being blurred, significantly. Maddens will stand up for the people of south-west Victoria and resist this insidious incursion on their rights."
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> Mr Pendergast said he did not concede that the insurers had the power they purported to have - the ability to take control of a victim's claims.
>
> He said that question was previously the subject of action in the Supreme Court of NSW after the Springwood fire in 2013.
>
> More than 500 fire victims were opted out of a class action by their insurers but ultimately the Court ruled the insurers did not have that power.
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> "On the back of that decision, insurers have re-written their policies," he said.
>
> "I have spoken to the majority of people who have registered in St Patrick's Day fires class actions.
>
> "Not one insured person to whom I have spoken has ever understood that their insurer claims to be able to take over the conduct of their claims for uninsured losses.
>
> "Not one person - no one has understood that."
>
> Mr Pendergast said any changes to policies had not been brought to any victim's attention and they had not been given the opportunity to seek legal advice.
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> "It's been slipped into the body of Product Disclosure Statements," he said.
>
> "And now, following this catastrophic event, victims are being contacted by their insurers who are claiming to have the right to take over.
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> "People are receiving letters asking that they refrain from taking any steps to pursue recovery of their uninsured losses."

> The lawyer said solicitors are acting for insurance companies on both sides of these disputed claims.
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> He said in some instances the same insurer has insured both Powercor and the victim, which seems to be a conflict of interest.
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> "You have big companies' insurers on both sides of the ledger and the victim's needs and concerns are being made a secondary issue," he said.
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> "Our primary focus is the recovery of victims' losses."
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> …
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> "What we have here is insurance companies trying to take over and victims are being left bemused, confused, upset and angry by what is happening.
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> …
>
> "Insurance companies should step back, let the class actions proceed, allow recovery to the full extent of damage and then dealing with the insurance payouts will proceed at that time."
>
> The lawyer said insurers saying they were going to negotiate with Powercor's insurer simply did not pass the sniff test.
>
> …
>
> "Maddens are on the ground, experienced, competent, equipped and we are confident we will recover full losses," he said.
>
> …

8 The Standard is the largest newspaper distributed in South-West Victoria, and has provided significant and ongoing media coverage about the bushfire and proceedings. It is the newspaper in which the plaintiff proposes to advertise the opt-out notice. Mr Pendergast did not dispute the content of the article.

The application

9 The insurers rely on the court's general power under s 33ZF of the *Supreme Court Act 1986*. The court is empowered to impose constraints on communications between a party and group members if such constraints are necessary or appropriate to ensure that justice is done in the proceeding.[1] The court's powers include correcting

[1] *Lenehan v Powercor Australia Ltd* [2018] VSC 579 [25]–[30].

statements that are, or may be, misleading or unfair.[2]

10 The insurers primary submission was that the opt-out notice be amended to include a section 5, headed 'Clarifications', in these terms:

> Maddens Lawyers principal Brendan Pendergast made a number of statements which were published in the Warnambool Standard on 25 September 2018 in relation to the Gnotuk class action and the other three class actions arising from the fires in South West Victoria on 17 March 2018 (St Patrick's Day fires) which require clarification.

[2] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 187 [66].

Brendan Pendergast statements	Clarification
'insurance company lawyers were always going to act in the best interests of insurance companies' 'insurance companies were the lawyers client's, not fire victims' 'that's their primary obligation, they do the best for their company'	Lawyers appointed by insurance companies to pursue recovery of insured and uninsured losses arising from the St Patrick's Day fires do not only act as lawyers for the insurance companies. They also act as lawyers for the customers of the insurance companies who wish to claim uninsured losses. Lawyers appointed by insurance companies to pursue recovery of insured and uninsured losses arising from the St Patrick's Day fires have a professional and fiduciary duty to act in the best interest of both the insurer and the insurer's customers. It would be contrary to the professional and fiduciary duties of such lawyers to act in a way that favoured the interest of the insurer to the detriment of the insurer's customers.
'Maddens will stand up for the people of south-west Victoria and resist this insidious incursion of their rights [by insurance companies].'	Maddens Lawyers are not aware of any insurers acting in respect of the recovery of losses from the St Patrick's Day fires in a way which is contrary to the legal rights of their customers.
'Solicitors are acting for insurance companies on both sides of these disputed claims.'	No solicitors engaged by insurers seeking to pursue recovery of insured and uninsured losses arising from the St Patrick's Day fires also act for Powercor. No insurance company seeking to pursue recovery of insured and uninsured losses arising from the St Patrick's Day fires also insures Powercor.

'Insurers saying they were going to negotiate with Powercor's insurer simply didn't pass the sniff test'	There is nothing improper about insurers exercising their legal rights to pursue recovery of insured and uninsured losses from Powercor and choosing not to do so through class actions commenced by Maddens Lawyers.

11 The plaintiff submitted, as a preliminary point, that the statements cannot be misleading as the insurers, who intend to opt out certain of their insureds, were not

misled by the statements; nor were any of their rights affected. The statements in issue can only affect insured group members, and whether or not misleading, cannot detrimentally affect group members whose claims are not capable of being recovered by the insurers. The insurers themselves would not be misled by the statements and do not make that claim. Those insurers claim the right to opt out certain of their insureds pursuant to the relevant policies of insurance, and express an intention to do so.

12 Further, the plaintiff submitted that the insurers' concern that the statements may mislead group members who are considering their position in respect of opting out of the group proceeding was misconceived. The amendments sought to the opt-out notice will not be directed to any matter of relevance regarding the opt-out process. It was not appropriate that the insurers sought to intervene in respect of the opt-out notice. Their legal rights were not directly affected by the form of opt-out notice, nor the statements in The Standard. Their rights are determined by the applicable policies of insurance, and the insurers inappropriately sought to intervene before exercising those purported rights.

13 Finally, the plaintiff disputed that any of the statements were misleading.

14 The insurers submitted they have an interest in their insureds, as group members, receiving accurate and appropriate information regarding their rights and obligations in respect of the group proceeding. They conceded that they would not be misled by the statements, but submitted that the relevant question was whether the court was persuaded that it was appropriate that misrepresentations made to group members that might induce them to act inappropriately, or without proper regard to their rights and obligations, ought to be corrected.

15 The insurers identified four statements that were, or were capable of, misleading group members in relation to their rights and obligations in respect of the opt-out process, whether considered individually or cumulatively.

16 The first statement ('statement A') was:

> Maddens Lawyers principal Brendan Pendergast, one of Australia's leading bushfire lawyers, said insurance company lawyers were always going to act in the best interests of insurance companies. He said the insurance companies were the lawyers' clients, not fire victims.

17 The plaintiff submitted that the statement consisted of two propositions. First, that lawyers engaged by insurance companies act in the best interests of their clients, and second, that those clients are the insurance companies and not the fire victims. Both were accurate statements in fact and law. The statement did not relate to the obligations of insurance companies to their customers. I pause to note that the first proposition is self-evidently accurate. The misleading sting of the statement lay in the second of these propositions.

18 The plaintiff further submitted that if the insurers were to validly opt out insured group members, the insurers are assigned rights of recovery under the policy. No lawyer/client obligations would exist between the insured and the insurance companies' lawyers prior to the opt out or independent of the policy. A fiduciary duty may be owed subject to the policy terms and the *Insurance Contracts Act 1984* (Cth). *Johnston v Endeavour Energy*[3] established only that an insurer, not the insurer's lawyers, may owe obligations to the insured if the contract of insurance assigns recovery rights.

19 I do not accept this further submission. It cannot be evaluated on the material presently before the court but, to the extent that I can follow it, it appears misconceived.

20 Statement A is misleading because it implies that the insurers do not have obligations to their insureds, particularly when exercising subrogated or contractual recovery rights, which their solicitors would be bound to respect. The insurers owe a duty of good faith to insureds, pursuant to s 13 of the *Insurance Contracts Act 1984* (Cth). That section provides that there is implied into a contract of insurance a provision requiring each party to it to act towards the other party, in respect of any

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3 [2015] NSWSC 1117 ('*Johnston*').

matter arising under or in relation to it, with utmost good faith. If an insurer were to opt out an insured from a class action, it would likely owe a duty to that insured of good faith with respect to uninsured losses.[4] The precise content of that duty may be affected by the terms of the policy of insurance. That issue is not before the court but it need not be resolved to conclude that the statement is misleading.

21 Second, Mr Pendergast was quoted as stating ('statement B') that:

> "Maddens will stand up for the people of south-west Victoria and resist this insidious incursion on their rights."

22 The plaintiff submitted that Mr Pendergast was commenting on the conduct of insurers that, since *Johnston* in 2015, have amended policies to broaden their contractual rights to control the subrogated recovery of insured and uninsured losses. The insurers have not explained whether insurance policies have been changed and whether adequate notice to insureds was provided. Mr Pendergast's statement is therefore reasonably based opinion.

23 This asserted change or manner of variation of policy terms was not supported by evidence. Mr Pendergast deposed that he had been 'informed by group members' that they did not understand 'this' to be the effect of their policy, and were not aware that policy terms may have changed since *Johnston.* This statement, if accepted, does not provide a reasonable basis to lay a charge of insidious incursion but the statement, although its admissibility was not objected to, is devoid of probative value. The plaintiff's solicitor does not purport to have objectively established any relevant facts supporting the alleged insidious incursion.

24 The use of colourful, pejorative language directed to group members via the media ought to have been avoided. It brings the motive of the plaintiff's solicitor into question as the reference to an incursion upon rights is a reference to the circumstances that might govern the possible exercise of the power to opt out of the group proceeding. It is clear that Mr Pendergast was seeking to persuade insured

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4 Ibid [258].

group members to deal with his firm through the proceeding and not deal with their insurers. There is commercial competition underlying these manoeuvres for the right to pursue Powercor for compensation on behalf of group members. To remove insured group members from the group that may participate in the group proceeding, encouraged by Mr Pendergast's confidence of full recovery of both insured and underinsured losses, may affect the return to group members after deducting costs that are likely to be subject to uplifts and contingencies. Reducing the size of the group through significant opt out may not be in the financial interests of the plaintiff and his solicitors. On the other hand, the insurers seek to manage exposure to claims under their policies. However, the issues on this application need not be resolved by reference to such motives and I make no finding in this respect.

25 The ability of the insurers to opt out group members is fact specific, and dependent on the wording and effect of any policy. The fact that insurers notified insured group members that they were considering opting out group members is neither insidious nor an incursion on legal rights. The statement is misleading because it is capable of inducing an insured group member to misunderstand contractual rights and duties in respect of their insurance policy. The process is subject to court supervision, but it is premature to speculate on the validity of any opt-out notice from this perspective.

26 The third statement ('statement C') was:

> The lawyer said solicitors are acting for insurance companies on both sides of these disputed claims.
>
> He said in some instances the same insurer has insured both Powercor and the victim, which seems to be a conflict of interest.

27 The plaintiff submitted that the statement that 'the same insurer has insured both Powercor and the victim' was accurate insofar as it related to QBE Insurance (Australia), which is said to be a subsidiary of the international conglomerate QBE Insurance Group. It cannot be said that this limitation would be evident to the ordinary reader of The Standard. The plaintiff's submission continued that Hall & Wilcox stated they were instructed by 'QBE Insurance (incorporating Elders Insurance)…' without drawing a distinction between the subsidiary and the

international group, and stated in at least three letters that the firm acted for 'QBE Insurance'. The insurers had not explained QBE Insurance (Australia)'s position within the QBE Insurance Group. In other words, I was invited to infer that the reference to QBE Insurance was not to the Australian subsidiary offering retail insurance products in south-west Victoria, but rather to the international conglomerate. I decline that invitation.

28 There is no evidence that either QBE Insurance (Australia) or Allianz also insured the defendant. Statement C is factually incorrect. The plaintiff submitted it was reasonably based on a belief formed by Mr Pendergast in reliance on a statement made to him by the defendant's 'Head of Legal Mr Laurence Mandie' in a conversation. The information conveyed to Mr Pendergast in that conversation as he described it, in conjunction with his independent inquiries, fell well short of establishing, in a proper sense for the assertion of a conflict of interest, that QBE Insurance (Australia) Limited was the defendant's insurer.

29 The solicitor for the insurers, having taken instructions from QBE Insurance (Australia) Limited, informed the court that it did not provide insurance cover to Powercor. The denial by reputable solicitors, on the basis of instructions, that there is any conflict of interest is not displaced by reference to an inconsistent hearsay statement. Mr Pendergast may have honestly held that belief, but there was no reasonable basis for it. The baseless assertion of the appearance of a conflict of interest has a capacity to be misleading.

30 The fourth statement ('statement D') about which the insurers take issue is:

> The lawyer said insurers saying they were going to negotiate with Powercor's insurer simply did not pass the sniff test.

31 The plaintiff submitted that the statement was an opinion with a reasonable basis, which was Mr Pendergast's understanding of 'QBE' insuring both the defendant and some victims and the accuracy of the other statements made.

32 The 'sniff test' is a meaningless and facile expression that appears to have been

borrowed from current political parlance. Whatever it may mean, a group member reading the article would identify the sting of statement D to be a negative aspersion on the insurers' lawyers capacity to appropriately represent group members in settlement negotiations, which aspersion could not be directed at the plaintiff's lawyers.

33 The insurers, by notifying insured group members of their intention to opt them out and pursue independent recovery proceedings, did not engage in inappropriate conduct. Nor did they do so by entering into discussions with the defendant to ascertain whether the issues in dispute could be narrowed. Both steps were consistent with their obligations under the *Civil Procedure Act 2010*. Further, it is presently unclear whether the insurer's conduct was governed by specific contractual rights. As I have noted, the insurers and their solicitors owe duties to the insured customers in this context and there was no basis to assert that they would not recognise and honour such duties.

34 Unless corrected, the insurers contended that group members will read the opt-out notice in The Standard when published in due course in the context of their recall of these misleading statements previously published in the same newspaper. The insurers have redrafted the opt-out notice to speak to the insureds and their relationship with the insurer and correct the possible negative effect of the misstatements.

35 In respect of the proposed corrections in the opt-out notice, the plaintiff submitted that, should the court be minded to order a further correcting communication, any correction required is most appropriately made separately to the opt-out notice. Further, such communication should be deferred until the court has determined the insurers' rights to opt out insured group members and pursue recovery action, independently of the group proceedings.

36 Separately, the plaintiff took issue with a draft letter prepared by Hall & Wilcox, on the basis that the letter is inaccurate and misleading. The letter is to be sent to

insured group members to explain why the insurer has decided to opt clients out of the proceeding. The solicitors have corresponded over the issue and the insurers have clarified that:

(a) the correspondence is to be sent to customers of Allianz, not to group members insured with QBE Insurance (Australia); and

(b) the plaintiff's contention that the draft letter is potentially misleading or inaccurate is disputed.

These was no application before the court for specific relief in respect of this proposed letter and I say no more about it.

37 I accept the insurers submission that it is also necessary to assess the impact of the newspaper article as a whole and in the context of the correspondence between the solicitors for the parties in respect of it. That analysis leads me to conclude that Mr Pendergast, in his interview with The Standard, was seeking to maximise the number of group members seeking representation by his firm, and in doing so was employing misleading statements. Such statements were being made in the specific context of a group members right to opt out of a group proceeding.

38 In *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd*[5] the Federal Court recognised the need to protect the integrity of the opt-out process by ensuring the accuracy of public representations made during the period of that process.[6] Any assessment of communications that might threaten the integrity of the opt-out process will be fact sensitive. In *Jarra Creek*, the court was satisfied that there was a need to publish a correction of the misstatements that had been made together with a consequential extension of the opt-out period.

39 More recently, in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd,*[7] Middleton J recognised

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5 [2008] FCA 575 [11] ('*Jarra Creek*').

6 Citing *Johnstone v HIH Ltd* [2004] FCA 190 [105]; *Williams v FAI Home Security Pty Ltd [No 3]* [2000] FCA 1438 [24].

7 [2018] FCA 984.

that misleading communications can undermine the integrity of Part IVA proceedings by inducing a misunderstanding on the part of recipients as to the nature and operation of the representative proceeding, and the rights and liabilities of the recipients in respect of the proceeding. For that reason, the court has an important and continuing role in managing representative proceedings in the public interest. The court's powers extend to encompass all procedures necessary to bring the proceeding to a fair hearing on a just basis, which will include an order that a correcting notice be issued to remedy any misstatements that may be made during the course of a proceeding.[8]

40 There was force in the plaintiff's submission that, assuming the misleading nature of the statements, the newspaper article could not influence the position of insured group members in an unfair or unjust way because the decision to opt out of the proceeding would be made by the insurer. Whether or not the insurer acted on advice from its solicitors, as appears likely, or otherwise, I should assume that any misleading statement would have no operative effect to induce an unfair or inappropriate decision.

41 The difficulty with this contention is that the insurers are not stating that they intend to opt out all of their insured group members from the proceeding. I am unable to be satisfied that all unrepresented group members will be protected from adverse consequences by this process. Those who are not protected by the participation of the insurers or their solicitors, need, in the present circumstances, the protection of the court.

42 I consider there are at least two reasons to publish a correction of Mr Pendergast's misstatements. First, the true extent of interference with the integrity of the opt-out process is unlikely to emerge until it is completed. If the foreshadowed challenges to the authority of insurers to opt out insured group members eventuates, there will be some retrospective analysis of the opt-out process. It is preferable to now adopt a

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8 Ibid [29].

conservative and preventative approach rather than later reach a conclusion that the process was compromised. Secondly, the use of intemperate and inflammatory language has a greater prospect of inducing an inappropriate or unfair decision on the part of a group member lacking the protection of legal advice. The use of such language attributed to a person described as 'one of Australia's leading bushfire lawyers' could reinforce the impression that the misleading statements were either factually correct or statements for which there was a reasonable basis.

43 The most convenient method for publication of a corrections notice is inclusion in the opt-out notice. That is because the correction will be specifically addressed to those who have an interest in receiving it. For these reasons, I will require a clarifying statement to be incorporated into the opt-out notice that I will approve for use in these proceedings. The last sentences of section 4 of the notice will read —

> Any steps taken by you or your insurer on your behalf may impact on your legal rights and obligations. You may benefit from seeking independent legal advice in respect of this issue.

and section 4 of the notice will then continue by stating:

> A number of statements made by Mr Brendan Pendergast of Maddens Lawyers published in the Warnambool Standard on 25 September 2018 in relation to the St Patrick's Day fires in south-west Victoria were considered by the Supreme Court of Victoria to be misleading and to require clarification.
>
> Lawyers appointed by insurance companies to pursue recovery of insured and uninsured losses arising from the St Patrick's Day fires have duties to act in the best interests of both the insurer and the insurer's customers (insured group members). It would be contrary to such duties for such lawyers to act in a way that favoured the interests of the insurer to the detriment of the group member.
>
> There is nothing improper about insurers with the legal right to pursue recovery of insured and uninsured losses from Powercor choosing not to do so through class actions commenced by Maddens Lawyers. Further, the insurance companies that provide cover to group members do not insure Powercor, and neither do their solicitors provide legal advice to Powercor.
