



AMENDED NOTICE OF DEFENCE
(filed pursuant to the orders of His Honour Justice Dixon dated 29 July 2019)

Case Number: S CI 2018 01290
Filed On: 09/08/2019 03:21 PM
S CI 2018 01290

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

BETWEEN

ANTHONY JAMES LENEHAN

Plaintiff

-and-

POWERCOR AUSTRALIA LIMITED
(ACN 064 651 109)

Defendant

Date of Document:	30 July 2018 <u>9 August 2019</u>
Filed on Behalf of:	The Defendant
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In answer to the Plaintiff's Amended Statement of Claim dated ~~10 April 2018~~ 21 June 2019,
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 says it has no detail of each of the group members and their alleged loss and damage;
- 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) it:
- (a) 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) (**Distribution Business**); and
- (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) (**the 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**); and

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, it:

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

8.2 says further that:

- (a) the powerlines were 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**;
- (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;

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:

13.1 admits that, from on or about 3 October 1994 when it acquired the assets of the SEC, it had the right to construct, modify, repair, inspect, maintain and operate the powerlines;

13.2 admits 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 (a);
- 14.2 ~~it admits sub-paragraph (b) and refers to paragraph 14.3 of the Defence below~~ it denies sub-paragraph (b) and says further that unintended discharges of electricity can occur also by reason of circumstances outside the control of the Defendant including, without limitation, birds and motorists;
- 14.3 as to sub-paragraph (c):
- (a) it says that unintended discharges of electricity from the powerlines 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 powerlines was material.

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

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

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, a discharge of electricity from the powerline could cause ignition of flammable material in the vicinity of the point of discharge – 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.

Most line clashes do not result in a fire;

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

15.4 ~~admits sub-paragraph (d)~~ admits sub-paragraph (d) save that it makes no admissions as to the nature of the losses which could be caused;

- 15.5 ~~admits sub-paragraph (e) 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~~ it does not admit sub-paragraph (e);
- 15.6 denies sub-paragraph (f); and
- 15.7 does not admit sub-paragraph (g). It admits that the risks referred to in sub-paragraphs 15(b)-(e) 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-paragraph 15(a) was likely to be higher in such conditions.
- 16 As to paragraph 16 it denies the allegations there in and says further that:
- 16.1 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
- 16.2 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 The requirements of “good electricity practice” as set out in the National Electricity Rules which mandate that the party in the position of the Defendant shall exercise that degree of skill, diligence, prudence and foresight as reasonable would be expected from a significant proportion of operators of facilities forming part of the power system for the generation, transmission or supply of electricity under conditions comparable to those applicable to the relevant facility consistent with applicable regulatory instruments, reliability, safety and environmental protection;

~~17.3~~17.4 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~~17.5 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, section 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, section 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, section 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, section 83BE(2), section 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 section 98 of the ES Act that the person had complied with an accepted ESMS in relation to that duty or obligation (ES Act, section 113);

~~17.5~~17.6 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~~17.7 it further expressly denies that there is any duty owed to those persons who at the time of the Terang Bushfire resided in, or had real or personal property in the Terang Bushfire area or in the immediate vicinity of the Terang 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 Terang 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 repeats paragraph 17 of its Defence.

19 It does not admit paragraph 19 and repeats paragraph 17 of its Defence.

20 It in relation to paragraph 20:

20.1 it denies paragraph 20(a) – (d);

20.2 it admits that at approximately 9:30pm on 17 March 2018, gale-force winds caused the red phase conductor of the middle tee-on span (**Middle Tee-on Span**) and the blue phase conductor on the lower cross-arm span (**Lower Span**) on TRG-WBL No.2 Pole 3 (**Pole 3**) to come into contact with or sufficient close proximity to each other to cause a discharge or 'arc' of electric current between them;

20.3 it admits that electricity, heat or sparks were ejected from the points of contact between the conductors on Pole 3 described in the preceding paragraph and/or the arc on the powerlines and blown by the wind to the southern verge of the Princess Highway igniting a fire in grass and/or other flammable material on the verge causing the Terang Bushfire.

21 It denies paragraph 21 and the particulars thereto. It says further:

21.1 the transmission of electricity gives rise to a level of risk that can never be eliminated entirely but can be managed;

21.2 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 distributors including the Defendant pursuant to the ES Act;

21.3 no reasonable maintenance or monitoring system can be 100% effective nor is it required to be for the purpose of the ES Act;

21.4 consistent with industry practice, the Defendant identified the risk of clashing between electrical conductors and spans at risk of clashing and had reasonable systems in place to address the risk.

Particulars

(a) the relay equipment on the TRG004 Feeder, being a 351S relay manufactured by Schweitzer, operated by the Defendant, was "state of the art" and industry standard;

~~(a)~~(b) The Defendant's asset maintenance regime was based upon RCM, the industry standard for the maintenance of assets based upon condition monitoring.

~~(b)~~(c) The Defendant also had a regime and resources dedicated to monitoring the reliability and continuity of supply in the network, including feeders such as the TRG 004 Feeder.

(Systems)

21.5 the records of momentary interruptions and outages recorded on the TRG004 Feeder relay do not disclose a history of conductor clashing or a profile of electrical events on the relay that were indicative of phase to phase conductor clashing to put the Defendant on notice of a risk of phase to phase conductor clashing between conductors at Pole 3;

~~21.5~~21.6 the Defendant's Systems reasonably addressed the risk of conductor clashing, which:

- (a) is an extremely infrequent occurrence of outages and/or momentary interruptions in supply, constituting an average of 0.28% of supply outages in the Distribution Network over the past 10 years, of which only 30% constitutes conductor clashing associated with high voltage lines (attached in **Appendix A** below is a copy of the set of statistics);
- (b) can be caused by various means including mechanical interference (for example a car or other object contacting the conductors, or other poles);
- (c) is very difficult to diagnose, identify and ascertain the location of suspected conductor clashing from outage/fault data and in the context of the Distribution Network comprising 82,000 kilometres of powerlines;
- (d) accordingly, a response to clashing can only be reasonably undertaken on a reactive rather than proactive basis as an issue is not evident until conductor clashing occurs or it is obvious during asset inspection.

~~21.6~~21.7 the risk of conductor clashing at or around Pole 3 was not reasonably capable of ascertainment using reasonable care.

~~21.7~~21.8 As at 2009 when the lower 22kv cross-arm on Pole 3 was replaced, the applicable guidelines for phase to phase clearances were as follows:

- (a) At the Pole 3 structure, the phase clearance guideline (At Pole Phase Clearance Guideline) was 1200mm (by EJ215

[PCA.002.001.5480] or 900mm (by Energy Networks Association Guidelines for design and maintenance of overhead distribution and transmission lines C(b)1 – 2006 (CB1 2006)); and

- (b) In span, the phase to phase clearance guideline (In Span Phase Clearance Guideline) was 530mm or 730mm (by clause 10.3 of CB1 2006, applying a "K" factor of 0.4 and 0.6 in formula (a), respectively).

21.821.9 As at 2009 when the lower 22kv cross-arm on Pole 3 was replaced, the applicable clearance to ground for the Upper 22kv conductors over carriageways or roads was 6700mm (by table 13.2 of the Electricity Safety (Network Assets) Regulations 1999 and table 8.1 of CB1 2006) (Ground Clearance Requirement) and 6800mm (by the Defendant's asset inspection manual) (Ground Clearance Guideline).

21.921.10 Pole 3 and the Anchor pole was were designed and maintained to ensure a safe distance between the conductors on the powerlines to prevent clashing. The Defendant says further that at all the times since construction of of the last works prior to the fire on Pole 3 in December 2009, it maintained the At Pole Phase Clearance Guideline and the In Span Phase Clearance Guideline as set out above. ~~the conductor clearance between the Middle Tee-on Span and the Lower Span has been maintained (and at best, possibly improved) during the following maintenance works on Pole 3:~~

- ~~(a) Replacement of the original wooden Middle Tee-on Span crossarm with a new steel crossarm around October 1997. The new steel Middle Tee-on Span crossarm was positioned approximately 100mm – 200mm higher than the original wooden crossarm; and~~

~~(b) Replacement of the original wooden Lower Span crossarm with a new steel crossarm around December 2009.~~

~~21.10~~21.11 Pole 3 was subject to cyclic asset inspections on:

- (a) 21 December 2011;
- (b) 7 July 2014; and
- (c) 3 January 2017,

with no reported defects (including non-compliant conductor clearances nor signs of conductor clashing) being noted by the attending asset inspector.

~~21.11~~21.12 Consistent with good Australian electricity distribution industry practice, the Defendant maintained equipment at TRG-004 manufactured and supplied by Schweitzer;

~~21.12~~21.13 The momentary interruption and fault records for the TRG-004 Feeder did not disclose any evidence of phase to phase clashing prior to the fire;

~~21.13~~21.14 The conductor clash which caused the fire was the consequence of loss of foundation strength of the Anchor Pole after 2010, the consequence of which was that by March 2018, the Anchor Pole was leaning into the span. This caused the clearance between the red phase conductor and the blue phase conductor to reduce the distance it was ultimately established to be as at 17 March 2018;

~~21.14~~21.15 On completion of a like-for-like asset replacement it is not good electricity practice as operated by a significant proportion of operators of facilities for the supply of electricity to undertake a survey in the post

construction period subsequent to works being completed and confirmed as
being compliant with the clearances in an overhead line.

22 It denies paragraph 22.

23 It denies paragraph 23.

24 It denies paragraph 24.

25 It denies paragraph 25.

26 It denies paragraph 26.

27 It denies paragraph 27.

28 It denies paragraph 28 and says further that if by transmitting electricity on the powerlines the Defendant created a nuisance, which is expressly denied:

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

28.2 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;

28.3 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;

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

28.5 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.

29 As to paragraph 29:

29.1 it denies the allegations contained therein;

29.2 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;

29.3 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.

30 It admits paragraph 30 and further says that the questions of fact or law raised in this proceeding require the appointment of a sub-group member to consider:

30.1 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 Terang 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 Terang Bushfire; and

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

Dated: ~~30 July 2018~~ 9 August 2019

Wotton + Kearney

WOTTON + KEARNEY
Solicitors for the Defendant

APPENDIX A

% Trouble Orders - Conductor Clashing Sub Cause	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Grand Total
Conductor Clashing	0.33%	0.16%	0.18%	0.23%	0.24%	0.44%	0.44%	0.18%	0.29%	0.33%	0.28%
% Trouble Orders - Conductor Clashing By Outage Level	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Grand Total
LV	77%	70%	72%	81%	69%	56%	73%	89%	55%	74%	70%
HV	23%	30%	28%	19%	31%	44%	27%	11%	45%	26%	30%