



SECOND AMENDED NOTICE OF DEFENCE
(Pursuant to Order of Honourable Justice John Dixon dated 15 February 2019)
(filed pursuant to the order of His Honour Justice Dixon on 29 July 2019)

Case Number: S CI 2018 01113
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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)

First Defendant

and

ELECTRIX PTY LIMITED
(ACN 067 232 393)

Second Defendant

Date of Document:	26 July 2018 <u>20 May 2019 9 August 2019</u>
Filed on Behalf of:	The <u>First</u> Defendant
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In answer to the Plaintiff's Second Amended Statement of Claim dated ~~16~~18 April 2018
2019, the First 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 First Defendant has taken reasonable precautions as pleaded below. The risk of harm could be eliminated by de-energising powerlines on days of extreme weather or undergrounding the lines. However, as consumers are reliant on the continuity of supply, de-energisation would cause other risks to the community. Governments and regulators have not adopted the extreme option of de-energisation and prefer to manage the risk through maintenance and inspection. The proposals by the VBRC to underground lines have not been adopted due to the cost to the community. No maintenance system is 100% effective.

(d) the Pole had been reinforced by the SECV using a protection reinforced design system, which remains in use today. It was developed and sold to the SECV as a timesaving, cost effective and appropriate alternative methodology to pole replacement. Utility and telecommunication companies have been implementing the reinforced design system (RFD) for over 30 years. Its current manufacturer, Utility Asset Management, indicates in its website that the RFD system has been installed successfully in over 415,000 installations.

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 First 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; it denies sub-paragraph (a) and further says that unintended discharges of electricity can occur also by reason of circumstances outside the control of the First Defendant including, without limitation, such as birds and motorists.~~

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 First Defendant's control;
- (c) the circumstances outside the control of the First 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 it had in place a detailed system of inspection and maintenance to deal with the risk of internal degradation of its wooden power poles in the Distribution Network as set out below at paragraph 20. 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. It operates a system of maintenance designed to monitor the condition of its wooden poles in order to manage its network assets which includes a program to prevent the unplanned collapse of wooden poles. Such risk cannot be eliminated but it can be managed and was managed successfully such that an in-service failure/collapse of an RFD staked pole due to rot above the stakes had not previously occurred prior to the failure of the Pole. The system maintenance based upon condition monitoring was designed and operated to monitor the level of rot or fungal attack or damage by termite activity. In fact the risk was successfully managed as there had been no in-service failure/collapse of an RFD staked pole due to rot about the stakes prior to failure of the pole.

- 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, Most pole failures do not result in a fire;
- 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, surrounding vegetation and the quality of flammable material available to fuel the fire;
- 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 The requirements of "good electricity practice" as set out in the National Electricity Rules which mandate that the party in the position of the First Defendant shall exercise that degree of skill, diligence, prudent and foresight and reasonably would be expected from a significant proportion of operators or 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.

17.4 at all relevant times the First 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)** (**2013 Regulations**);
- (d) the **Electricity Safety (Management) Regulations 2009 (Vic)**; and
- (e) the **Energy Safe Victoria Act 2005 (Vic)**;

17.5 pursuant to the Technical Regulatory Framework —

- (a) the First 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 First 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 GES 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);

17.6 at all relevant times the **First** Defendant had in place —

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

17.7 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 **First** Defendant will rely upon the judgment of the Court in ***Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*** [2003] VSC 27.

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

18 It does not admit paragraph 18 and repeats paragraph 17 of its Defence above.

18A It admits sub-paragraphs (a) and (b). It denies sub-paragraph (c) and repeats paragraphs 15.1 to 15.8 of its Defence above.

18B It admits paragraph 18B.

18C It denies the allegations in paragraph 18C.

18D As to paragraph 18D, it admits that the documents identified in paragraphs 18D(a) to (d) inclusive, including versions current prior to November 2017, set out its written policies and procedures with respect to the inspection and maintenance of wooden poles.

18E It admits paragraph 18E.

18F It admits paragraph 18F.

18G It admits the reproduction of sections from its *Network Asset Maintenance Policy for Permanent Reinforcement Systems on Wood Poles* [PCA.001.001.26911] and *Asset Inspection Manual* [PCA.001.001.2704], but says further that:

18G.1 The tests to be undertaken at each scheduled inspection is provided for also in the First Defendant's Network Asset Maintenance Policy for Inspection of Poles (05-C001.D-390) [PCA.001.001.2646], which directs that the 2.5-yearly cyclic inspection is subject to a "Class 1 work package", whereby the following tasks are to be undertaken during the inspection [PCA.001.001.2646 at 2649]:

- (a) Visual assessment of a pole's condition above ground line; and
- (b) Assessment of the surrounding area for safety issues.

18G.2 The above ground visual test included a requirement for the inspector to carry out a hammer test.

18H It admits paragraph 18H.

18I In relation to paragraph 18I:

18I.1 It admits sub-paragraph (a); and

18I.2 It does not admit sub-paragraph (b).

18J It denies the allegations in paragraph 18J and repeats paragraph 17 of its Defence above.

18K It admits paragraph 18K.

18L It admits paragraph 18L.

18M It admits paragraph 18M.

19 It admits paragraph 19.

20 It denies each and every allegation in paragraph 20. It says further:

20.1 The First Defendant in accordance with good electricity industry practice undertook a programme of cyclic inspection of aboveground electric lines at intervals of no longer than 37 months in hazardous bushfire areas in accordance the Electricity Safety (Bushfire Mitigation) Regulations 2013. The objective of the proposed regulation, according to the explanatory memorandum prepared prior to introduction, was to reduce the risk of failure of assets in HBRA.

20.2 The system of the First Defendant for scheduled inspection of wooden poles within its distribution network was recorded in the following documents:

(a) Asset Management Plan of the poles (M0010);

(b) Network Asset Maintenance Policy for the inspection of poles (D-390);

(c) Network Asset Maintenance Policy for permanent reinforcement systems on wood poles; and

(d) Asset Inspection Manual (O5M540).

20.3 These documents were provided to and approved by ESV and are consistent with good electricity industry practice and the systems adopted by other distributors of electricity.

20.4 As part of its statutory obligations of compliance, ESV conducts an annual risk based audit to monitor and improve compliance with distributors including the First Defendant. The First Defendant will rely upon the 2017-2018 Bushfire Mitigation System Audit of the First Defendant by ESV. The audit specifically focused on pole inspection and was conducted against the procedures and criteria set out in the First Defendant's Bushfire Mitigation plan and procedures. A key focus of the audit was to assess system effectiveness for managing Bushfire Mitigation responsibilities with emphasis on asset assessment and reassessment. The objective was to confirm appropriate engineering analysis, risk assessment, procedures and processes and that there were followed in relation to asset condition assessment processes and reassessment processes. The systems audit included an overarching asset management strategy analysis as submitted

to the Australian Energy Regulator which contains asset lifecycle management and analysis of unassisted pole failures. The analysis concluded that unassisted pole failures had been managed effectively with the rate of failure well below 0.01% of the pole population per annum. This audit in short then concluded that the First Defendant's Asset Management Strategy and Practice was consistent in approach with past SECV practice and ESV expectations.

20.5 The tests to be undertaken at each scheduled inspection is provided for the in the First Defendant's Network Asset Maintenance Policy for inspection of poles (O5-C001.D-390). It directs that the 2.5 yearly cyclic inspection is subject to a "class 1 work package" whereby the following tasks are to be undertaken during inspection:

(a) Visual assessment of the pole's condition above ground line.

(b) The visual assessment included a requirement for the inspector to carry out a hammer test.

(c) Assessment of the surrounding area for safety issues.

20.6 At the 5 yearly above ground and below ground inspection, the inspector was required to conduct:

(a) an assessment of a pole's condition from ground line to 2 metres above;

(b) as assessment of a wood pole's condition from ground line to a minimum of 300mm below ground;

(c) a visual assessment of a pole's condition from 2 metres above ground line to the top of the pole;

(d) an inspection to identify wood destroying insects;

(e) an internal inspection with a 12mm auger bit to ascertain the depth of sound timber for staked poles of 400mm below the top of the reinforcement system; and

(f) add a preservative treatment.

20.7 The visual assessment required the inspector to inspect the external surfaces of the pole for deterioration, fungal attack, lightning strikes, significant cracking or bowing or termite inspection.

20.8 Further, Asset Inspection Manual (J5M54) outlines the tasks identified in the Network Asset Maintenance Policy in detail to be undertaken during the pole inspection process for the assessment of pole condition and serviceability, data collection and identification and reporting of defects.

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

20.10 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 First Defendant pursuant to the ES Act;

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

- 20.12 consistent with industry practice, the First 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. Maintenance of staked poles was the subject of a specific RCM analysis;
- 20.13 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, unless there are specific circumstances;
- 20.14 The First Defendant uses a defined system to assess the strength and condition of poles in service known as "Pole Calculator". Particulars of Pole Calculator have been provided as part of discovery. It is a system developed by Consulting and Power Pty Ltd, in report no. 200024, a copy of which is available on request. The Pole Calculator assesses the strength of poles conservatively using detailed engineering criteria to establish the ongoing serviceability of the pole based upon data entered by the inspector.
- 20.15 the First Defendant's maintenance program reasonably addressed failure modes in wooden poles, including the management of the risk of collapse due to the existence of a cavity and/or rot;
- 20.16 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;

20.17 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 First Defendant's network;

20.18 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

- (a) A summary of the inspection dates and outcomes is set out in the table below, in compliance with the First Defendant's Asset Management Plan for Poles, Network Asset Maintenance Policy for Inspection of Poles, Network Asset Maintenance Policy for Permanent Reinforcement Systems on Wood Poles:

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

20.19 The **First** Defendant's network contains over half a million poles, of which there are 23,860 reinforced **wood** poles (**Reinforced Wood Poles**). Of the population of Reinforced **Wood** Poles, 19,183 are wood poles reinforced with the same system as the Garvoc pole (**RFD Reinforced Wood Poles**). In the period of the **First** Defendant's recorded statistics (between 2006 to 2018) of defects and failures of all Reinforced **Wood** Poles:

(a) there have been **2330** reported defects and failures of Reinforced **Wood** Poles, of which:

(i) **2124** instances of defects were identified and responded to by the **First** Defendant before the subject pole failed/collapsed. None of these resulted in a fire start; and

- (ii) only 26 Reinforced Wood Poles failed/collapsed, neither none of which were due to rot above ground, nor caused a fire.
- (b) in relation to the number of defects attributable to rot in the population of 2324 Reinforced Wood Pole defects:
- (i) a total of 54 (of 2324) defects were determined to be caused by internal rot (an equivalent failure rate of 0.021%0.017%);
 - (ii) a total of 23 (of 2324) defects were determined to be caused by external rot (an equivalent failure rate of 0.008%0.013%); and
 - (iii) the locations of all 3 internal and external rot defects were below or at ground level and 4 were above ground.
 - (iv) All of the 24 Reinforced Wood Pole Defects were identified and rectified by Powercor in accordance its maintenance and inspection system prior to (and thereby preventing) failure/collapse of the asset.

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

20.11A Further and additionally, wooden pole failures in the First Defendant's Distribution network was consistently below the industry benchmark over the period 2013 to 2017.

Particulars

<u>Year</u>	<u>No. wood poles 5.2 age profile</u>	<u>No. of failures 2.2 REPEX</u>	<u>Failures per 1,000 poles</u>
<u>2013</u>	<u>362,412</u>	<u>15</u>	<u>0.04</u>
<u>2014</u>	<u>362,465</u>	<u>12</u>	<u>0.03</u>
<u>2015</u>	<u>361,239</u>	<u>11</u>	<u>0.03</u>
<u>2016</u>	<u>360,213</u>	<u>25</u>	<u>0.07</u>
<u>2017</u>	<u>358,841</u>	<u>14</u>	<u>0.04</u>

(table of statistics reproduced from data extracted from Regulatory Information Notices reported to AER, available at <https://www.aer.gov.au/>)

20.21 In its report issued May 2019 "The Condition of Power Poles in South West Victoria", ESV, in consequence of investigations undertaken subsequent to the fire, have determined that:

(a) The First Defendant's pole inspection and maintenance process is fit for purpose and there is no immediate systemic risk of pole failures in the South West.

(b) 98% of poles in the South West exceeded the required residual strength necessary to remain in service with an acceptable safety margin.

(c) 2% of poles that are classified as limited life or scheduled for replacement, will be safely managed.

(d) As part of the inspection review, ESV found that the hammer test delivered conservative results when undertaken by a skilled asset inspector.

(e) ESV assessed and reviewed the First Defendant's 2019 non-routine inspection of 19,000 poles in the South West. 98% of power poles passed the First Defendant's inspection and testing process.

(f) The First Defendant's inspection and testing process correctly identified 1.3% of power poles would require replacement within a year in accordance with the First Defendant's protocols for maintenance.

(g) ESV's independent inspection of 1,200 poles in the South West (half of which included poles that were part of the First Defendant's 2019 non-routine inspection) supported the First Defendant's resulting including that the First Defendant's inspection and testing process correctly identified the condition of a pole.

(h) To determine if poles that looked defective were safe ESV observed breaking point tests on 13 poles removed. These tests were undertaken at an independent test facility in NSW which found that 12 of the 13 poles exceeded the then safety factor of 1.25 to remain in service. The testing confirmed that ratings obtained through the First Defendant's maintenance and inspection process by inspectors and using "Pole Calculator" were more conservative than the destructive testing results.

(i) Currently the average annual number of unassisted pole failures across Australia is 0.007 per hundred poles with Victoria averaging 0.003 per hundred poles.

(j) Further, in response to submissions made to the report issued in May 2019, ESV on the question of inspection methods and approaches has confirmed that the "dig and drill" inspection method has been used around the world for approximately 40 years and, with appropriate safety factors applied, has resulted in very low failure rates of poles in Australia. Whilst technology is evolving rapidly and there are alternative techniques in development for pole inspection around the world, ESV indicated that it was unaware of any single technology that was a viable alternative to directly replace the dig and drill method.

20.22 The First Defendant engaged the Second Defendant as an independent contractor to provide maintenance services, pursuant to which:

- (a) The Second Defendant was under a contractual obligation to carry out those maintenance services with due skill, care and diligence and in accordance with sound professional and business practices.
- (b) By Schedule 1 of the Conditions of Contract in Order No. 7017406, executed on 9 October 2015, the Second Defendant was required to undertake scheduled asset inspections of wood poles, including the performance of structural integrity testing of wooden poles in accordance with the *Asset Inspection Manual (05-M450)*.

20.23 It was reasonable for the First Defendant to rely upon the Second Defendant to carry out its contractual obligations set out in paragraph 20.12 above.

20A As to paragraph 20A.:

20A.1 it admits sub-paragraphs (c) and (d);

20A.2 otherwise denies the allegations in paragraph 20A.

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 First Defendant created a nuisance, which is expressly denied:

25.1 the transmission of electricity by the First 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 First 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 First Defendant was expressly within the scope of the statutory authority given by the ES Act and the EI Act to the First Defendant;

25.4 the First 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 First Defendant, the First Defendant has a complete defence in respect of the nuisance.

~~26~~25A As to paragraph ~~26(A)~~25A:

25.6 it denies the allegations contained therein;

25.7 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;

25.8 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.

25B It does not plead to paragraphs 25B to 25S as they do not contain any allegations against it.

26 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:

26.1 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

26.2 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**.

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

Electrix Pty Ltd (ABN 44 067 232 393)

28 **Electrix Pty Ltd (Electrix):**

28.1 is and has been registered as a corporation for the purposes of the Corporations Act 2001 (Cth) and capable of being sued;

28.2 carries on business as a provider of engineering, construction, inspection and maintenance services to asset owners in the utility, industrial, commercial, resources and infrastructure sectors.

29 Electrix was required to provide inspection services to the First Defendant as an independent contractor pursuant to Conditions of Contract Order No. 7017406 executed on 9 October 2015. The inspection services provided by Electrix related to inspection of the First Defendant's assets, including the Garvoc pole.

Particulars

29.1 a copy of the Conditions of Contract is available at the offices of the First Defendant's solicitors.

30 By Condition 4(c), Electrix was required to provide inspection services using all due skill, care and diligence and in accordance with sound professional and business practices (clause 4.1(c)).

31 By Schedule 1 of the Conditions of Contract, the inspection services required to be undertaken by Electrix included undertaking scheduled asset inspections of wood poles including the performance of structural integrity testing of wooden poles in accordance with Asset Inspection Manual 05-M540 (Schedule 1, Clause 1.1.3).

Particulars

31.1 a copy of the Asset Inspection Manual 05-M540 is available at the offices of the First Defendant's solicitors.

32 Electrix carried out an inspections of the Pole in May 2015 and November 2017, (which inspection included a sounding test) and allegedly failed to carry out those tests as set out in paragraphs 25L to 25Q of the Plaintiff's Second Amended Statement of Claim.

33 On 27 July 2018, ESV issued a technical investigation report of the fire (ESV Report), in which ESV concluded that a competent inspection of the pole in 2017 by Electrix undertaking a sounding test as required would likely have found sufficient evidence of internal degradation to identify the pole as being no longer fit for service.

Particulars

33.1 a copy of the ESV Report is available at the offices of the First Defendant's solicitors.

34 If the allegations by the Plaintiff of a failure to inspect the Garvoc pole are correct and if the allegations of ESV are correct (both of which the First Defendant denies), Electrix did not meet the performance requirements of the Conditions of Contract.

Apportionment

35 If the Plaintiff's allegations as to adequacy of inspection are correct, which allegations are expressly denied, then:

35.1 Electrix is a concurrent wrongdoer within the meaning of the term in section 24AH of the **Wrongs Act 1958 (Vic)** because its acts and omissions as alleged caused the loss and damage claimed by the Plaintiff in this proceeding;

35.2 pursuant to s.24A(1) of the **Wrongs Act 1958 (Vic)**, any liability of the First Defendant (which liability is expressly denied to the Plaintiff for any of the loss or damage claimed in this proceeding) is limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just, having regard to the extent of "responsibility" for the loss and damage and any judgment must not be given against the First Defendant for more than that amount in relation to the claim.

Dated: 26 July 2018- 20 May 2019 9 August 2019



WOTTON + KEARNEY
Solicitors for the **First** Defendant