

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



Case: S CI 2018 01290

Filed on: 21/06/2019 12:20 PM

No. S CI 2018 01290

B E T W E E N

ANTHONY JAMES LENEHAN

Plaintiff

-and-

POWERCOR AUSTRALIA LIMITED  
(ACN 064 651 109)

Defendant

**AMENDED STATEMENT OF CLAIM**  
(filed pursuant to Orders of Associate Justice Daly dated 18 June 2019)

Date of Document: ~~10 April 2018~~ 21 June 2019  
Filed on behalf of: The Plaintiff  
Prepared by:  
Maddens Lawyers  
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*Preliminary*

1. On 17 March 2018, a fire started near the intersection of the Princes Highway and Peterborough Road, Terang, Victoria (**Terang bushfire**).
2. The Terang bushfire travelled in a south – easterly direction and burnt over the area highlighted on the map annexed to this Statement of Claim (**Terang bushfire area**), including areas of peat at Lake Cobrico and Lake Elingamite which were still burning as at 10 April 2018 (**peat fires**).

*The Plaintiff*

3. The plaintiff:
  - (a) is and was at all relevant times, the owner of property at 102 Browns Road, Elingamite, Victoria, located within the Terang bushfire area; and

(b) was the owner of personal property destroyed in the Terang bushfire.

4. The plaintiff brings this proceeding on his own behalf and on behalf of the group members.

#### *Group Members*

5. The group members to whom this proceeding relates are:

(a) all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of the Terang bushfire (including without limitation, any injury suffered as a result of burns, inhalation of smoke, attempts to escape the Terang bushfire or other emergency action taken by the person in response to the Terang bushfire);

where “psychiatric injury” in this group means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to 1 March 2019; and

(b) all those persons who suffered loss or damage to property as a result of the Terang bushfire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Terang bushfire); and

(c) all those persons who at the time of the Terang bushfire resided in, or had real or personal property in the Terang bushfire area alternatively in the immediate vicinity of the Terang bushfire area and 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;

(d) the legal personal representatives of the estates of any deceased persons who came within paragraphs (a), (b) and/or (c) at the time of the Terang bushfire

**(group members).**

6. As at the time of the commencement of this proceeding there are seven or more group members.

#### *The Defendant*

7. The defendant (**Powercor**) at all relevant times:

(a) was and is a corporation capable of being sued;

(b) carried on business as a distributor of electricity to residential and business consumers in Victoria (**Business**);

(c) in carrying on the Business was:

- (i) a major electricity company; and
- (ii) an operator of a supply network;

within the meaning of section 3 of *Electricity Safety Act 1998* (Victoria) (**ES Act**).

8. In the course of and for the purpose of the Business, Powercor at all relevant times:
- (a) owned, further or alternatively had the use and management of, the poles, pole caps, cross arms, insulators, fasteners, electrical conductors and other pole top assets comprising:
    - (i) a 22kV three-phase distribution line which in part runs in an approximate west-south-west to east-north-east direction adjacent to the south side of the Princes Highway, near the intersection of the Princes Highway and Peterborough Road, Terang, Victoria (**Princes Highway Line**); and
    - (ii) a 22kV three-phase supply line running in an approximate northerly direction from pole number 409916 on the Princes Highway Line (**Pole**), supplying a number of properties on the north side of the Princes Highway (**Northern Line**);

#### Particulars

The electrical assets as configured on the Pole on 17 March 2018 included:

- (a) an upper metal cross arm with three insulators supporting a 66kV three-phase line running along the south side of the Princes Highway; and
- (b) a lower metal cross arm with three insulators supporting the Princes Highway Line;
- (c) a centre metal cross arm, located in between the lower and upper metal cross arms, with three insulators supporting –
  - (i) the eastern and western phase conductors of the Northern Line; and
  - (ii) a bridging conductor from the Princes Highway Line to the eastern phase conductor of the Northern Line.
- (d) the centre phase conductor of the Northern Line attached to the Pole above the centre metal cross arm;
- (e) two further bridging conductors from the Princes Highway Line to the centre and western phase conductors of the Northern Line.

The upper and lower cross arms are oriented in an approximate north-north-west to west-south-west direction. The centre metal cross arm is oriented in an approximate east-west direction.

- (b) caused or allowed the transmission of electricity on the Princes Highway Line and the Northern Line (together the **powerlines**) for the purposes of, *inter alia*, supply to residential and business consumers.

### *Statutory Duties*

9. Since 1 January 2012, section 98 of the ES Act required Powercor to design, construct, operate and maintain its supply network to minimize as far as practicable:
- (a) the hazards and risks to the safety of any person arising from the supply network;
  - (b) the hazards and risks of damage to the property of any person arising from the supply network; and
  - (c) the bushfire danger arising from the supply network.
- (the **Statutory Duties**).
10. The Statutory Duties imposed on Powercor obligations for the protection of a particular class of persons, being persons who from time to time, by themselves or their property:
- (a) approached or came into contact with parts of Powercor's network, or
  - (b) might be injured or damaged by a discharge of electricity from any part of the said network or by the consequences of any such discharge, including but not limited to fire
- (**Statutory Class**).

#### **Particulars**

The object of protecting the Statutory Class is to be inferred from the ES Act as a matter of the proper construction of the Act.

11. At all relevant times, the plaintiff and each of the group members were:
- (a) persons within the Statutory Class; or
  - (b) the legal personal representatives of the estates of persons who were within the Statutory Class at the time of the Terang bushfire.

#### **Particulars**

The plaintiff resides at 102 Browns Road, Elingamite, in Victoria, being an area susceptible to bushfire ignited by a discharge of electricity from Powercor's supply network.

Particulars relating to individual group members may be provided following the trial of common questions.

12. In the premises set out in the preceding paragraph, at all relevant times, Powercor owed the Statutory Duties to:
- (a) the plaintiff
  - (b) each of the group members referred to in paragraphs 5(a) to 5(c) hereof; and
  - (c) each of the deceased persons referred to in paragraph 5(d) hereof.

### *General Duty of Care*

13. At all relevant times Powercor:
- (a) had the right, to the exclusion of other private persons:
    - (i) to construct, repair, modify, inspect, maintain and operate the powerlines; or
    - (ii) give directions as to their installation, modification, repair, inspection and operation;
  - (b) exercised the said right; and
  - (c) in the premises, had control over the powerlines.
14. At all relevant times:
- (a) Powercor used the powerlines to transmit electricity at high voltage;
  - (b) the transmission of high-voltage electricity along the powerlines created a risk of unintended discharges of electricity from the powerlines;
  - (c) an unintended discharges of electricity from the powerlines was highly dangerous in that it was capable of causing death or serious injury to persons, and damage to or loss of property, by:
    - (i) electric shock;
    - (ii) burning by electric current; further or alternatively
    - (iii) burning by fire ignited as a result of the discharge of electricity;
  - (d) in the premises (a) to (c) inclusive, the transmission by Powercor of electricity along the powerlines was a dangerous activity; and
  - (e) Powercor knew, or as network operator ought reasonably to have known the matters set out in (a) to (d) inclusive above.
15. At all relevant times it was reasonably foreseeable to Powercor that:
- (a) a discharge of electricity from the powerlines could cause the emission of electricity, heat or molten metal particles (**sparks**) from the point of discharge;
  - (b) a discharge of electricity from the powerline could cause ignition of flammable material in the vicinity of the point of discharge;

### **Particulars**

Flammable material is any material capable of ignition, including without limitation ignition by contact with molten or burning metal.

- (c) such fire once ignited might spread over a wide geographic area;
- (d) the fire could cause death or injury to persons and loss of or damage to property within the area over which the fire spread, and consequential losses including economic losses;

- (e) such fire could cause personal injury, damage to property and consequential losses including economic losses within areas:
  - (i) affected by the physical consequences of fire, such as smoke or debris; or
  - (ii) the subject of emergency activity to prevent the spread of fire, including without limitation the clearing of fire breaks

**(affected areas);**
- (f) such fire or its consequences could:
  - (i) disrupt or impair the income-earning activities of persons residing or carrying on business in the fire area or affected areas;
  - (ii) impede the use or amenity of property located in the fire area or affected areas; or
  - (iii) reduce the value of property or businesses located in the fire area or affected areas;

and thereby cause economic loss to those persons, or the owners of those properties or businesses;
- (g) each of the risks referred to in (b) to (f) inclusive were likely to be higher when the environment around the powerlines was dry and hot and windy than when the environment was damp or cool or windless.

16. At all relevant times, members of the public who might be, or who owned or had an interest in real or personal property that might be, within the fire area or the affected area of a fire caused by the discharge of electricity from the powerline (**Terang Class**):
- (a) had no ability, or no practical and effective ability, to prevent or minimize the risk of such discharge occurring; and
  - (b) were vulnerable to the impact of such fire; and consequently
  - (c) were to a relevant degree dependent, for the protection of their persons and property, upon Powercor ensuring that the powerlines were safe and operated safely in the operating conditions applying from time to time.

### **Particulars**

The Terang bushfire area is shown on the map annexed to the statement of claim. Particulars of the actual affected area of the Terang bushfire will be provided prior to trial.

The operating conditions referred to included the level of electrical current being transmitted along the powerlines, the configuration of the pole-top assets on the Pole (including clearances between conductors) and the physical environment around the powerlines including, without limitation, wind direction and speed, ambient temperature and the amount of combustible fuel around or below the powerlines.

17. In the premises, at all relevant times Powercor owed to the Terang Class a duty:
- (a) to take reasonable care, by its officers and servants; and
  - (b) to ensure that reasonable care was taken, by its agents or contractors;
- to ensure that all parts of the powerlines were safe and operated safely in the operating conditions that were foreseeable for the powerlines (**General Duty**).
18. At all material times, the plaintiff and group members were persons within, or the personal representatives of deceased persons who, at the time of the Terang bushfire were within, the Terang Class.
19. In the premises set out in the preceding paragraph, at all relevant times Powercor owed the General Duty to the plaintiff and the group members.

#### *The Terang bushfire*

20. At approximately 9.30pm on 17 March 2018:
- (a) conductors on the Princes Highway Line and the Northern Line came into contact with or sufficient close proximity to each other to cause a discharge or 'arc' of electric current between them;
  - (b) electricity, heat or sparks were ejected from the points of contact of the conductors and/or the arc on the powerlines and blown by the wind to the southern verge of the Princes Highway;
  - (c) the sparks landed in and ignited a fire in grass and/or other flammable materials on the verge; and
  - (d) the fire, being the Terang bushfire, spread across the Terang bushfire area.
21. The Terang bushfire was caused by breaches by Powercor of:
- (a) the Statutory Duties; further or alternatively
  - (b) the General Duty.

#### **Particulars of Breach**

- (i) failing to design or maintain the powerlines to ensure a safe distance was maintained between conductors on the powerlines to prevent clashing;
- (ii) ~~failing to have adequate systems for identifying electrical conductors and spans at risk of clashing~~ identify and remedy the fact that the clearance between the red phase conductor on the Northern Line and the blue phase conductor on the 22kV circuit of the Princes Highway Line was only about 210mm as at 17 March 2018;
- (iii) failing to ensure that the clearance between the red phase conductor on the Northern Line and the blue phase conductor on the 22kV circuit of the Princes Highway Line was not less than 900mm, as required by:

- (A) Powercor's Distribution Construction Standard - Clearances – Conductors on the Same Support (DC161);
  - (B) the industry standards:
    - (1) Guidelines for Design and Maintenance of Overhead Distribution and Transmission Lines C(b)1 – 2006
    - (2) AS/NZ 7000: Overhead Line Design;
- (iv) failing to ensure that the clearance between the red phase conductor on the Northern Line and the blue phase conductor on the 22kV circuit of the Princes Highway Line was not less than 900mm at the time of:
  - (A) replacing the centre cross arm at the Pole on or around March 1998;
  - (B) replacing the lower cross arm at the Pole on or around December 2009;
- (v) failing to identify that the clearance between the red phase conductor on the Northern Line and the blue phase conductor on the 22kV circuit of the Princes Highway Line was less than 900mm:
  - (A) at the time of attendance at the Pole on or around 1 March 2007 for the purposes of undertaking a technical assessment of maintenance works to be undertaken (PM order 1144625);
  - (B) at the time of attendance at the Pole on or around 8 June 2007 for the purposes of effecting maintenance works, which included the straightening of Anchor Pole 3 and re-sagging of the Northern Line (PM order 1144625);
  - (C) during a line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employee Peter Dalton on or around 18 October 2010;
  - (D) during a line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employees Wayne Ward and Lachlan Venn on or around 11 October 2011;
  - (E) during a line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employee Dean McDonald on or around 22 October 2015;
- (vi) failing to identify from Lidar data captured in 2014 that the clearance between the red phase conductor on the Northern Line and the blue phase conductor on the 22kV circuit of the Princes Highway Line was only about 240mm rather than the minimum of 900mm, as required by Distribution Construction Standard Clearances – Conductors on the Same Support (DC161);
- (vii) failing to identify that the ground line clearance of the Northern Line over the Princes Highway was less than 6900mm, as required by Distribution Construction Standard – Clearances above Ground, Road, Rails or Water (DC111), which, if identified would have led to the redesign of the pole top infrastructure at the Pole to ensure compliance with DC111 and DC161:
  - (A) during re-sagging works undertaken on the Northern Line on or around 8 June 2007;
  - (B) during the line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employee Peter Dalton on or around 18 October 2010;
  - (C) during the line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employees Wayne Ward and Lachlan Venn on or around 11 October 2011;
  - (D) during the line condition audit of the Princes Highway Line and the Northern Line undertaken by Powercor employee Dean McDonald on or around 22 October 2015;



- (viii) failing to identify a lack of compliance with DC111, DC161, AS/NZ 7000 and/or ENA C(b)1 prior to 1 November 2015 as part of Powercor's circuit to circuit clearance program which formed part of the Asset Management Plan for Overhead Conductors (PAL-AMP-07).

Further particulars of breach ~~will~~ may be provided subsequent to completion of discovery and service of expert evidence.

*Subgroup Claims – Private Nuisance*

22. Further to paragraph 5 above, the plaintiff brings this proceeding on behalf of those group members (**subgroup members**) who suffered loss of or damage to property, further or alternatively economic loss, in connection with the Terang bushfire's interference in their use or enjoyment of interests in land.

**Particulars**

The Terang bushfire burned over and destroyed all property which the plaintiff owned or otherwise had an interest in and which was situated at 102 Browns Road, Elingamite, Victoria.

Particulars relating to individual subgroup members will be provided following the trial of common questions or otherwise as the Court may direct.

23. At all relevant times each of:
- (a) the risks referred to in paragraphs 14 and 15 above; and
  - (b) the risk that a fire ignited as a result of the discharge of electricity or sparks from the powerlines, would unreasonably interfere with the use or enjoyment of interests in land –
    - (i) over which the fire passed; alternatively
    - (ii) within the affected areas,by the persons entitled to such use or enjoyment;
- were reasonably foreseeable to Powercor.
24. By reason of the matters set out in paragraphs 20 and 21 Powercor:
- (a) caused electricity, heat or sparks to be ejected from the powerlines onto flammable relevant on the; and thereby
  - (b) caused the ignition of the Terang bushfire, which spread to the Terang bushfire area being land upon which the plaintiff or subgroup members had interests.
25. Further, the spread of the fire across the Terang bushfire area:
- (a) ignited peat fires, which continue to burn;
  - (b) caused smoke, fumes and airborne debris to spread to and impact land within the affected areas, being land upon which the plaintiff or subgroup members had interests.

### **Particulars**

Further particulars of the peat fires and lands affected shall be provided prior to trial.

26. The Terang bushfire unreasonably interfered with the use or enjoyment by the plaintiff and subgroup members of their interests in the lands:
  - (a) over which the fire passed;
  - (b) within the affected areas.
27. Further, the matters referred to in paragraph 25 constitute a continuing nuisance caused by Powercor.
28. In the premises, the plaintiff and each of the subgroup members suffered nuisance created by Powercor.

### *Causation and Loss and Damage*

29. By reason of:
  - (a) the breaches of the Statutory Duties;
  - (b) the breaches of the General Duty; further or alternatively
  - (c) the nuisance;by Powercor alleged above
  - (i) the plaintiff,
  - (ii) each of the group members described in paragraphs 5(a) to (c) hereof;
  - (iii) the deceased persons referred to in paragraphs 5(d) hereof;
  - (iv) each of the subgroup members

as the case may be, suffered loss and damage of the kinds referred to in paragraph 15(d) to (f) above.

### **Particulars of loss and damage**

The plaintiff suffered property loss and damage of all of the plaintiff's property located at 102 Browns Road, Elingamite at the time of the fire including but not limited to household chattels, farming equipment and machinery and a motorbike. The plaintiff further has suffered inconvenience.

Further particulars of the plaintiff's loss and damage, including particulars as to quantum, will be provided prior to trial.

Particulars relating to individual group members will be provided following the trial of common questions.

*Common Questions of Law or Fact*

30. The questions of law or fact common to the claims of the plaintiff and each of the group members are:
- (a) whether the Statutory Duties were owed by Powercor to the plaintiff and group members, and if so the content of those duties;
  - (b) whether the General Duty was owed by Powercor to the plaintiff and group members, and if so the content of the duty;
  - (c) how the Terang bushfire started;
  - (d) whether the Terang bushfire was caused by a breach by Powercor of any of the Statutory Duties or the General Duty;
  - (e) whether the plaintiff and subgroup members suffered actionable nuisance created by Powercor;
  - (f) what are the principles for identifying and measuring compensable losses suffered by the claimants resulting from the breaches of duty or nuisance alleged.

**AND THE PLAINTIFF CLAIMS on his own behalf and on behalf of the group members:**

- A. Damages.
- B. Interest.
- C. Costs.

Tim Tobin SC

Andrew Fraatz

*Maddens*

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**Maddens Lawyers**  
Solicitors for the Plaintiff

1. Place of trial: Melbourne
2. Mode of trial: Judge Alone
3. This writ was filed for the plaintiff by Mr Brendan Pendergast of Maddens Lawyers, Warrnambool
4. The address of the plaintiff is 102 Browns Road, Elingamite, Victoria, 3266.
5. The address for service of the plaintiff is:  
Maddens Lawyers  
219 Koroit Street  
Warrnambool, Victoria, 3280  
Ref: 180455
6. The email address for service of the plaintiff is [bfp@maddenslawyers.com.au](mailto:bfp@maddenslawyers.com.au)
7. The address of the defendant is Level 8, 40 Market Street, Melbourne, Victoria, 3000

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**No. S CI 2018 01290**

**B E T W E E N**

**ANTHONY JAMES LENEHAN**

Plaintiff

-and-

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

Defendant

**CERTIFICATE IDENTIFYING ANNEXURE**

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Date of Document: ~~10 April 2018~~ 21 June 2019  
Filed on behalf of: The Plaintiff  
Prepared by:  
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This is the Annexure referred to in the Amended Statement of Claim dated ~~10 April 2018~~ 21 June 2019

**Map of the Terang  
Bushfire Area dated 10 April 2018**

## Terang Bushfire Area

