

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION

No 4788 of 2009

BETWEEN

LEO KEANE  
CAROL ANN MATTHEWS

Plaintiffs

and

SP AUSTRALIA NETWORKS (DISTRIBUTION) LTD TRADING AS SP AUSNET  
SPI ELECTRICITY PTY LTD (ACN 064 651 118)

First Defendant

and

SP AUSTRALIA NETWORKS (TRANSMISSION) LTD TRADING AS SP AUSNET

Second

Defendant

**AMENDED WRIT**

(filed pursuant to orders made by the Honourable Justice Forrest  
on 23 July 2010 and 4 August 2010)

Date of Document:  
Filed on behalf of:  
Prepared by:  
Maurice Blackburn, Lawyers; and  
Oldham Naidoo Lawyers  
c/- Level 10, 456 Lonsdale Street  
Melbourne Vic 3000

5 August 2010  
The Plaintiff

Solicitor's Code: 564  
Tel: (03) 9605 2700  
DX: DX 466 (Melbourne)  
Ref: BMM/3004166

**TO THE DEFENDANTS**

**TAKE NOTICE** that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

**IF YOU INTEND TO DEFEND** the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearances stated below.

**YOU OR YOUR SOLICITOR** may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's Office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and

- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

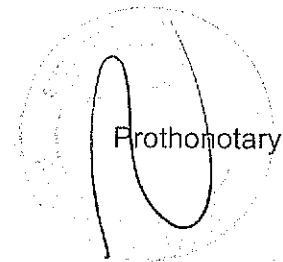
**IF YOU FAIL** to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU** on the claim without further notice.

**THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in any other place, within 42 days after service.

FILED: ~~5 August 2010~~

16/2/2009



**THIS WRIT** is to be served within one year from the date it is filed or within such further period as the Court orders.

1. Place of trial — Melbourne
2. Mode of trial — Judge alone
3. This writ was filed for the plaintiffs by Maurice Blackburn Pty Ltd and Oldham Naidoo Lawyers Pty Ltd c/- Level 10, 456 Lonsdale Street, Melbourne, Victoria, 3000 Solicitors for the Plaintiff Slidders Lawyers, solicitors, of Level 1, 318 King Street, Melbourne, Victoria, 3000;
4. The address of the plaintiff is 54 O'Keefe Street, Preston, Victoria, 3072 120 Northumberland Drive, Epping, Victoria, 3076;
5. The address for service of the plaintiff is c/- Maurice Blackburn Pty Ltd, Level 10, 456 Lonsdale Street, Melbourne, Victoria, 3000 c/o Slidders Lawyers, PO BOX 13288, Law Courts, Victoria, 8010;
6. The address of the first defendant is Level 31, 2 Southbank Boulevard, Southbank, Victoria, 3006.
7. ~~The address of the second defendant is Level 31, 2 Southbank Boulevard, Southbank, Victoria, 3006.~~

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

No. 4788 of 2009

BETWEEN:

CAROL ANN MATTHEWS

Plaintiff

- and -

SPI ELECTRICITY PTY LTD (ACN 064 651 118)

Defendant

STATEMENT OF CLAIM

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Date of Document:

5 August 2010

Filed on behalf of:

The Plaintiff

Prepared by:

Maurice Blackburn, Lawyers; and  
Oldham Naidoo Lawyers  
c/- Level 10, 456 Lonsdale Street  
Melbourne Vic 3000

Solicitor's Code: 564  
Tel: (03) 9605 2700  
DX: DX 466 (Melbourne)  
Ref: BMM/3004166

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SECTION A – PRELIMINARY

*Plaintiff*

1. The plaintiff was at all material times:
  - (a) a joint proprietor of real property located at 55 Mullers Road at St Andrews in the State of Victoria ("**the plaintiff's land**");
  - (b) the mother of Samuel Coyle Matthews (deceased) ("**Sam Matthews**").
2. The plaintiff brings this proceeding on her own behalf and on behalf of the group members.

*Kilmore bushfire*

3. The Kilmore East-Kinglake bushfire ("**the Kilmore bushfire**") is the fire that:

- (a) started near Saunders Road at Kilmore East in the State of Victoria at approximately 11:45am on 7 February 2009; and
- (b) burnt the area highlighted on the map titled "Kilmore Bushfire Area" and filed in the Court in this proceeding ("**the Kilmore bushfire area**").

*Group Members*

- 4. The group members to whom this proceeding relates are:
  - (a) all those persons who suffered personal injury (whether physical injury, mental injury, psychiatric injury or nervous shock) as a result of:
    - (i) the Kilmore bushfire (including, without limitation, an injury suffered as a result of attempts to escape the Kilmore bushfire or other emergency action taken by any person in response to the Kilmore bushfire); and/or
    - (ii) the death of or injury to another person as a result of the Kilmore bushfire; and
  - (b) the estates of or dependants of any person who died in or as a result of the Kilmore bushfire (including, without limitation, a death resulting from attempts to escape the Kilmore bushfire or other emergency action in response to the Kilmore bushfire); and
  - (c) all those persons who suffered loss of or damage to property as a result of the Kilmore bushfire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Kilmore bushfire); and
  - (d) all those persons who at the time of the Kilmore bushfire resided in, or had real or personal property in, the Kilmore bushfire area and who suffered economic loss, which loss was not consequent upon injury to that person or loss of or damage to their property.
  
- 5. As at the date of commencement of this proceeding there are seven or more persons who have claims against the defendant.

*Defendant*

6. The defendant ("**SPI**") at all material times:
- (a) is and was a corporation registered for the purposes of the *Corporations Act 2001 (Cth)* and capable of being sued;
  - (b) carried on business as a supplier of electricity to residential and business consumers in Victoria ("**the electricity supply business**");
  - (c) in carrying on the electricity supply business was:
    - (i) an electricity supplier; and
    - (ii) a network operator;
 within the meaning of section 3 of the *Electrical Safety Act 1998 (Victoria)* ("**the ES Act**");
  - (d) is and was the successor to the electricity supply business carried on by State Electricity Commission of Victoria ("**SECV**") until December 1994 and TXU Corp ("**TXU**") until July 2004, and acquired the liabilities of SECV and TXU in respect of the business;
  - (e) while network operator, was required to comply with an Electrical Safety Management Scheme ("**ESMS**") approved by Energy Safe Victoria ("**ESV**");

**Particulars**

The ESMS was submitted by TXU to ESV pursuant to Division 2 of Part 10 of the ES Act in or about November 2001. Further particulars may be provided following the completion of discovery and interrogation.

- (f) was required by its ESMS to undertake programs of cyclic inspection to identify required maintenance works ("**scheduled inspections**") (ESMS cl.2.10.5.1).
7. In the course of and for the purpose of the electricity supply business, SPI at all material times:
- (a) owned, further or alternatively had the use and management of, the poles, pole fittings, conductors, fuses, circuit reclosers, transformers and like installations

(together and severally "**installations**") comprising a single-wire earth return electricity supply line known as the "Pentadeen Spur SWER line" at Kilmore East in the State of Victoria ("**the SWER line**"), including the conductor strung between Poles 38 and 39 on the SWER line ("**the Valley Span**"); and

- (b) transmitted electricity along the SWER line for the purposes of supply to consumers.

## **SECTION B – BREACHES OF STATUTORY DUTY, AND NEGLIGENCE**

### **Duties of care**

#### *Statutory Duty*

8. At all material times section 75 of the ES Act required SPI as a network operator to take reasonable care to ensure that all parts of its network were safe and were operated safely ("**the Statutory Duty**").
9. The Statutory Duty imposed on SPI 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 any part of SPI'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.

#### **Particulars**

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

10. At all material times the plaintiff and each of the group members (together and severally "**claimants**") were:
- (a) persons within the class described in the preceding paragraph; or

- (b) estates or dependents of persons within the class described in the preceding paragraph; or
- (c) persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the class described in the preceding paragraph.

**Particulars**

The plaintiff, her husband and her two adult children, including Sam Matthews, resided in an area susceptible to bushfire ignited by a discharge of electricity from the SPI network, being Mullers Road at St Andrews.

11. In the premises, at all material times SPI owed the Statutory Duty to the claimants.

*General duty*

12. At all material times SPI:
- (a) was the owner and/or operator of the SWER line;
  - (b) had the ultimate responsibility for all activities associated with planning, design, construction and maintenance of electrical network assets that it owned and/or operated;

**Particulars**

Page 8 of the ESMS.

- (c) had the right, to the exclusion of other private persons to:
    - (i) construct, repair, modify, inspect and operate the SWER line; or
    - (ii) give directions as to its construction, repair, modification, inspection or operation;
  - (d) exercised the right referred to in (c) above; and
  - (e) in the premises, had practical control over the SWER line.
13. At all material times:
- (a) SPI used the SWER line to transmit electricity at high voltage;



- (b) the transmission of electricity along the SWER line created a risk of unintended discharges of electricity from the SWER line;
- (c) unintended discharges of electricity from the SWER line were 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 by the discharge of electricity;
- (d) in the premises set out in sub-paragraphs (a) to (c) inclusive, the transmission by SPI of electricity along the SWER line was a dangerous activity;
- (e) SPI knew or, as the network operator of the SWER line, ought reasonably to have known of the matters referred to in sub-paragraphs (a) to (d) above.

14. At all material times it was reasonably foreseeable to SPI that:

- (a) a break or defect in, or damage to the conductor on the SWER line could cause or allow an unintended discharge of electricity from the SWER line;
  - (b) a discharge of electricity from the SWER line could cause a fire in the vicinity of the point of discharge;
  - (c) such fire could spread over a wide geographic area;
  - (d) such fire could cause death or injury to persons and loss of or damage to property within the area over which such fire spread ("**fire area**"), and consequential losses including economic losses;
  - (e) such fire could cause 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, such as the clearing of firebreaks;
- ("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; or
- (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) the risks referred to in sub-paragraphs (b) to (f) above were greater during periods of high or extreme bushfire risk.

15. At all material times persons who:

- (a) were from time to time; or
- (b) owned or had an interest in property; or
- (c) carried on business;

in the fire area or affected areas:

- (i) had no ability to prevent or minimize the risk of such discharge occurring;  
and
- (ii) were vulnerable to the impact or effects of such fire; and consequently
- (iii) were dependent, for the protection of their persons, property and interests, upon SPI ensuring that the SWER line was safe and operated safely in the operating conditions applying to it from time to time.

16. At all material times the claimants were:

- (a) persons within the class described in the preceding paragraph; or
- (b) dependents of persons within the class described in the preceding paragraph; or
- (c) persons likely to suffer mental injury, psychiatric injury or nervous shock as a result of the death of or injury to persons within the class described in the preceding paragraph.

17. In the premises set out in paragraphs 8 to 16 inclusive, alternatively paragraphs 8 and 12 to 16 inclusive, at all material times SPI owed to the claimants a duty:
- (a) to take reasonable care by its officers, servants and agents; and
  - (b) to ensure that reasonable care was taken by any contractors engaged by it;
- to ensure that all parts of the SWER line were safe and operated safely in the operating conditions that were foreseeable for the SWER line ("**the General Duties**").

### **Kilmore bushfire**

18. At approximately 11:45am on 7 February 2009, the conductor on the Valley Span failed near the western end of the helical fitting on pole 39 and ignited a fire, which fire became the Kilmore bushfire.

#### **Particulars**

So far as the plaintiff is able to say prior to the completion of discovery and interrogation and the delivery of expert reports:

- (i) the conductor when it failed fell across the southern stay assembly supporting Pole 38;
  - (ii) the conductor discharged electricity into the stay assembly;
  - (iii) the discharge of electricity ignited flammable material on or near the stay assembly; and
  - (iv) the ignition led to a grass fire which spread from the area around the southern stay wire supporting Pole 38 south-eastward and thereafter across the Kilmore bushfire area.
19. The Kilmore bushfire was caused by breaches by SPI of:
- (a) the Statutory Duty; further or alternatively
  - (b) the General Duties.

#### **Particulars of Breach**

##### *Asset management system failures*

- (i) failing to have or implement adequate systems for determining risk factors affecting the likelihood of failures of SWER installations and in particular conductors;
- (ii) failing to keep adequate records to identify SWER installations operating in conditions presenting increased risk of damage and failure;

- (iii) failing to take reasonable steps to identify the Valley Span as a span subject to increased risk of installation damage and failure, being risks arising from inter alia:
  - a. its length of approximately 1043 metres, being one of the 16 longest spans on the SPI SWER network;
  - b. its time in service, being approximately 43 years;
  - c. its anticipated service life of 40 to 60 years;
  - d. its unknown tension;
  - e. its location, being strung between two hills or ridges;
  - f. its location in terrain defined by ENA C(b)1-2006 as Type II terrain
  - g. its likely exposure to high wind;
  - h. its likely exposure to high-frequency low-amplitude vibration induced by wind, associated with its location;
  - i. its small diameter, being the smallest diameter conductor available;
  - j. incorrect configuration of the helical termination assembly holding the conductor in place within the Pole 39 pole top assembly, being the misplacement of the helical wrap outside the groove of the thimble and its jamming between the outside edge of the thimble and the inside edge of the clevis;
  - k. the absence of vibration dampers;
- (iv) failing to have any or any adequate program for scheduling replacement of SWER conductors on a precautionary basis according to an adequate assessment of the reliability of the conductor having regard to risk factors affecting the conductor;
- (v) having or purporting to have a system of replacing conductors according to inspections of their condition during scheduled inspections, in circumstances where the content and frequency of scheduled inspections was inadequate, as referred to in particulars (vii) to (xix) below;
- (vi) failing to replace the Valley Span conductor prior to February 2009;

*Asset inspection system failures*

- (vii) failing to have adequate systems for setting the content or frequency of scheduled inspections of the Valley Span, and in particular failing to set the content or frequency of inspections by reference to:
  - (a) adequate records identifying risk factors affecting the Valley Span; or
  - (b) the fact that the Valley Span was located in a High Bushfire Risk Area (as designated pursuant to section 80 of the ES Act);
- (viii) setting the content and frequency of scheduled inspections of installations on the Valley Span by reference to failure modes of poles and not by reference to any or any adequate data regarding the failure modes of conductors located on spans like the Valley Span;
- (ix) failing to conduct adequate inspections of the Valley Span, and in particular failing to inspect the conductor using inspection techniques suitable for the detection of damage to SWER conductors such as (without limitation) inspection by trained line repair personnel carried out from an elevated work platform located close to the conductor

- ("line-height inspections"), or inspections using thermal imaging equipment;
- (x) failing to schedule inspections at appropriate intervals;
  - (xi) failing to have an adequate system for recording observations made by personnel conducting scheduled inspections of SWER installations ("inspectors") regarding the condition of installations; or making such records available to inspectors for comparison with observations at later inspections;
  - (xii) failing to take reasonable steps to ensure that inspectors received adequate training in the identification and correct fitting of, or risk factors affecting, or damage to installations on the SWER network;
  - (xiii) failing to take reasonable steps to ensure inspectors did not receive training instruction to the effect that a "quick scan" of a SWER conductor from ground level was a sufficient inspection, or if not sufficient was the best inspection that was required of them;
  - (xiv) failing to take reasonable steps to ensure that inspectors, following training, were competent in the identification and correct fitting of, or risk factors affecting, or damage to installations on the SWER network;
  - (xv) failing to take reasonable steps to ensure that inspectors trained as referred to in particulars (xiii) and (xiv) above received corrective training before being permitted to carry out unsupervised inspections;
  - (xvi) failing to require scheduled inspections to be carried out by two-person inspection teams;
  - (xvii) failing to take reasonable steps to ensure that inspectors recorded observations for each installation on a SWER pole and did so while on site at the pole;
  - (xviii) failing, by its servants and agents, to exercise due skill, care and diligence in inspecting the Valley Span and in particular failing to do so when undertaking a scheduled inspection of the Valley Span in or about February 2008 ("**2008 inspection**");
  - (xix) alternatively to (xviii), failing to take reasonable steps to ensure its contractors exercised due skill, care and diligence in carrying out the 2008 inspection.

*Engineering failures*

- (xx) failing to fit vibration dampers to the Valley Span;
- (xxi) having or purporting to have, and observing a policy of not installing vibration dampers on existing spans;
- (xxii) failing to take reasonable steps to ensure the Valley Span was tensioned in accordance with ENA guidelines to reduce the risk of damage from vibration and metal fatigue;
- (xxiii) failing to install adequate circuit-breaking devices on the Valley Span;
- (xxiv) installing on the Valley Span a circuit-breaking device, being an oil-operated automatic circuit recloser ("**OACR**"), programmed to "reclose" and resume transmission of electricity following a fault detection;
- (xxv) failing to set the OACR to minimise the duration of electricity flow following a fault detection;

- (xxvi) failing to "suppress" the reclose function on the OACR at the commencement of the summer season, or at any time prior to 7 February 2009;

### SECTION C – PRIVATE NUISANCE

20. Further to paragraph 4 above, the plaintiff brings this proceeding as subgroup representative of those group members ("**subgroup members**") who suffered injury, loss or damage caused by the Kilmore bushfire's interference in their use or enjoyment of interests held by them in land.
21. At all material times each of:
- (a) the risks referred to in paragraphs 13 and 14 above; and
  - (b) the risk that a bushfire ignited by a discharge of electricity from the SWER line would unreasonably interfere with the use or enjoyment of interests in land:
    - (i) across which the fire passed; or
    - (ii) affected by the physical consequences of fire, such as smoke; or
    - (iii) the subject of emergency activity to prevent the spread of fire, including but not limited to, the clearing of firebreaks;
- were reasonably foreseeable to SPI.
22. By transmitting electricity on the SWER line SPI:
- (a) caused or allowed an unplanned discharge of electricity to occur; and thereby
  - (b) brought onto land under the Pole 38 stay a fire, which became the Kilmore bushfire.
23. The Kilmore bushfire unreasonably interfered in the use or enjoyment by the plaintiff and subgroup members of interests which they held in land.

#### Particulars

The Kilmore bushfire burned over and destroyed all improvements, fixtures and chattels on the plaintiff's land. Particulars of the plaintiff's losses are set out in paragraph 25 below.

Particulars of interference suffered by subgroup members will be provided following the trial of common questions.

24. In the premises, the plaintiff and the subgroup members suffered nuisance created by SPI.

#### **SECTION D – LOSS AND DAMAGE**

25. By reason of:

- (a) the breaches of the Statutory Duty;
- (b) the breaches of the General Duties; further or alternatively
- (c) the nuisance;

by SPI alleged above the plaintiff, and each of the group members or subgroup members as the case may be, suffered loss and damage of kinds referred to in paragraph 14 above.

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

##### *Property damage*

The Kilmore bushfire destroyed the plaintiff's residence at 55 Mullers Road, St. Andrews, together with the contents thereof.

Further, a renovated barn in which her son Sam resided with his sister was also destroyed as were other outbuildings on the property.

In addition to the destruction of buildings on the property, pasture, trees, gardens and machinery were also destroyed.

##### *Personal injuries*

The plaintiff is now aged 50 having been born on 7 December 1959.

The plaintiff's 22 year old son Sam, who was born on 12 October 1986, died in the Kilmore bushfire.

On 7 February 2009, the plaintiff was at Inverloch with her husband. During the late afternoon of 7 February 2009 the plaintiff received a telephone call from Sam requesting that his parents return to the property as soon as possible because of the bushfire situation. The plaintiff's husband immediately left Inverloch to try to return to St Andrews. Sam then told the plaintiff that a tree outside their home had just exploded, he was surrounded by fire and couldn't get through to the emergency help number "000". The plaintiff could hear that Sam was panicking. Sam repeatedly asked the plaintiff for help on what to do. As the plaintiff was trying to advise and assist her son, she heard explosions, which she believed and believes were the windows of the house exploding due to the fire.

The plaintiff told Sam to hang up and she would call "000". Sam did hang up. This was the last contact that the plaintiff had with her son. The plaintiff called "000" but could not get through to an operator. The plaintiff tried to call Sam back but could not get through. The plaintiff then left Inverloch to try to get back to St Andrews. She was stopped at a roadblock on the Heidelberg-Kinglake Road.

The plaintiff and her husband spent all night and the next day trying to learn the whereabouts of their son. Late on 8 February 2009 she was told that her son was dead. She had official confirmation that her son died in the bushfire when Sam's remains were found at the property on 11 February 2009.

As a consequence of the circumstances surrounding the death of her son, the plaintiff has suffered severe psychiatric injury. The plaintiff has incurred medical and like expenses in relation to such injury.

As a consequence of the injury the plaintiff has been incapacitated for employment as a senior area coordinator for the Victorian Infant Hearing Program at the Royal Children's Hospital. The plaintiff, prior to the Kilmore bushfire, was working in employment on a full time basis earning approximately \$78,000 gross per annum.

Further particulars of the plaintiff's claim for damages for property loss and personal injury will be provided prior to the trial of this proceeding.

## **SECTION E – COMMON QUESTIONS OF LAW OR FACT**

26. The questions of law or fact common to the claims of the plaintiff and each of the group members or subgroup members are:

- (a) whether the Statutory Duties were owed by SPI to the claimants, and if so the content of those duties;
- (b) whether the General Duties was owed by SPI to the claimants, and if so the content of the duty;
- (c) how the Kilmore bushfire started;
- (d) whether the Kilmore bushfire was caused by a breach by SPI of any of the Statutory Duties or the General Duties;
- (e) as between the plaintiff and subgroup members – whether the plaintiff and subgroup members suffered actionable nuisance created by SPI;
- (f) the principles for identifying the losses caused by the Kilmore bushfire and suffered by the claimants which are recoverable from SPI for the breaches of duty or the nuisance alleged herein, and the principles for assessing damages in respect of those losses.



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

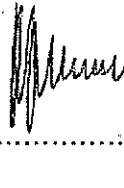
- A. Damages;
- B. Interest pursuant to statute;
- C. Costs.

**Dated: 5 August 2010**

**R. Richter QC**

**T. Tobin SC**

**L. Armstrong**



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**Maurice Blackburn and Oldham Naidoo Lawyers**

**Solicitors for the Plaintiff**