

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

No. S CI 2018 01113

B E T W E E N

ANDREW JOHN FRANCIS

Plaintiff

-and-

POWERCOR AUSTRALIA LIMITED  
(ACN 064 651 109)

Defendant

**AMENDED STATEMENT OF CLAIM**

(Filed pursuant to r.36.04(1)(a) of the Supreme Court (General Civil Procedure) Rules 2015)

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Date of Document: 16 April 2018 <del>28 March 2018</del>	Solicitors Code: 102650
Filed on behalf of: The Plaintiff	DX: 28001
Prepared by:	Telephone: (03) 5560 2000
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Preliminary

1. At approximately 9.00pm on 17 March 2018 a fire started on a property at 974 Sisters-Garvoc Road, The Sisters in the State of Victoria (**the Garvoc Fire**).
2. The Garvoc Fire travelled in a south – easterly direction and burnt ~~in excess of~~ 4,000 hectares over the area highlighted on the map annexed at Annexure 1 to this the Statement of Claim (**the Affected-Garvoc Fire Area**).

The Plaintiff

3. The plaintiff: -
  - (a) is and was at all material times, owner of property at Ridge Road, Garvoc, Crown Portion 4B of allotment 13B Parish at Garvoc, located within the Affected-Garvoc Fire Area.

- (b) was the owner of personal property destroyed in the Garvoc Fire.
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 Garvoc Fire (including without limitation, any injury suffered as a result of attempts to escape the Garvoc Fire or other emergency action taken by the person in response to the Garvoc Fire);
- 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-~~2018~~ 2019; and
- (b) all those persons who suffered loss or damage to property as a result of the Garvoc Fire (including, without limitation, loss or damage resulting from emergency action taken by any person in response to the Garvoc Fire); and
- (c) all those persons who at the time of the Garvoc Fire resided in, or had real or personal property in the ~~Affected~~ Garvoc Fire 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 Garvoc Fire; and
- (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 Garvoc Fire.

**(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 material times:
- (a) was and is a corporation registered for the purposes of the *Corporations Act* 2001 (Cth) and capable of being sued;

- (b) carried on business as a ~~supplier-distributor~~ of electricity to residential and business consumers in Victoria (**the Business**);
- (c) in carrying on the Business was:
  - (i) an ~~major electricity supplier-company~~; and
  - (ii) an ~~network-operator of a supply network~~;within the meaning of section 3 of ~~Electrical~~ Electricity Safety Act 1998 (Victoria) (**the ES Act**).

8. In the course of and for the purpose of the Business, Powercor at all material times:
- (a) owned, further or alternatively had the use and management of, the poles, pole caps, insulators, fasteners, electrical conductors and other installations (together and severally **the Installations**) comprising a 22kV electricity supply line running in an ~~east-westerly~~ direction and located on a property at 974 Sisters-Garvoc Road, The Sisters, Victoria (**the Powerline**);

#### Particulars

The 22kV line as configured on pole number 4, located on a property at 974 Sisters-Garvoc Road, The Sisters, Victoria comprised a single metal cross arm with three insulators. The pole was a timber pole with metal supports affixed to the base of the pole and extending to approximately two metres in height from the ground.

- (b) caused or allowed the transmission of electricity on the Powerline for the purposes of, *inter alia*, supply to residential and business consumers.

#### Statutory Duty of Care

~~9. At all material times section 75 of the ES Act required Powercor as a network operator to take reasonable care to ensure that all parts of its network including the power poles:~~

~~(a)(c) were designed, constructed, operated and maintained in accordance with regulations made under the ES Act; and~~

~~(b)(d) were safe and were operated safely~~

~~10.9. At all material times 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).**

~~41.10.~~ 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;

**(the Statutory Class).**

#### **Particulars**

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

~~42.11.~~ As at 17 March 2018 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 Garvoc Fire.

#### **Particulars**

~~The plaintiff resides at Ridge Road, Garvoc being and each of the Group Members had interests in real and personal property within an area at risk of burning by fire ignited as a result of a Powercor's network.~~

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

~~43.12.~~ In the premises set out in the preceding paragraph, at all material 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

14.13. At all material times Powercor:-

- (a) had the right, to the exclusion of other private persons, to:
  - (i) to construct, modify, repair, inspect, maintain and operate; and/or
  - (ii) direct the installation, modification, repair, inspection and operation of, the Powerline and its Installations, including the power poles;
- (b) exercised the said right; and
- (c) in the premises, had control over the Installations.

15.14. At all material times:

- (aa) Powercor used the Powerline to transmit electricity at high voltage;
- (a) the transmission of high-voltage electricity along the Powerline created a risk of unintended discharges of electricity from the Powerline;
- (b) unintended discharges of electricity from the Powerline 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;
- (c) in the premises set out in paragraphs "a" and "b", the transmission by Powercor of electricity on the Powerline was a dangerous activity; and
- (d) Powercor knew, or as network operator ought reasonably to have known the matters set out in "a" to "c" above.

16.15. At all material times it was reasonably foreseeable to Powercor that:

- (a) a discharge of electricity from the Powerline could cause the emission of electricity, heat or molten metal particles ("**sparks**") from the point of discharge;
- (b) 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;

- (c) 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;

**Particulars**

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

- (d) such fire once ignited might spread over a wide geographic area;
- (e) 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;
- (f) 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):**

- (g) 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;
- (h) the risks referred to in “a” to “eg” inclusive were likely to be higher when the environment around the Powerline was dry and hot and windy than when the environment was damp or cool or windless.

17.16. At all material times, Group members within the Affected Area 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 (Garvoc 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 material degree dependent, for the protection of their persons and property, upon Powercor ensuring that the Powerline and its Installations were safe and operated safely in the operating conditions applying from time to time.

### Particulars

The Garvoc Fire 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 Powerline, the construction of the Installations (including timber poles) and the physical environment around the Powerline including, without limitation, wind direction and speed, ambient temperature and the amount of combustible fuel around or below the Powerline.

~~18-17.~~ In the premises set out in paragraphs 8 to 17 inclusive, alternatively paragraphs 4 and 14 to 17 inclusive, at all material times Powercor owed to the plaintiff and Group Members Garvoc 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 Powerline and its Installations were safe and operated safely in the operating conditions that were foreseeable for the line (**the General Duty**).

18A 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 Garvoc Fire were within, the Garvoc Class.

~~19-18.~~ In the premises set out in the preceding paragraph, at all material times Powercor owed the General Duty to the plaintiff and the Group Members.

### The Garvoc Fire

~~20-19.~~ At approximately 9.00pm on 17 March 2018: -

- (a) a timber power pole marked with identification number 4, located on a property at 974 Sisters-Garvoc Road, The Sisters in the State of Victoria (**the**

- Pole**) failed and broke away from the metal supports affixed to the base of the Pole;
- (b) the Pole, two 22kV electrical conductors and other Installations came into contact with the ground;
  - (c) electricity, heat or sparks emitted from the Installations landed in and ignited a fire in grass on a property at 974 Sisters-Garvoc Road, The Sisters;
  - (d) the fire, being the Garvoc Fire, spread across the ~~Affected~~ Garvoc Fire Area.

24-20. The Garvoc Fire was caused by breaches by Powercor of:

- (a) the Statutory Duties; further or alternatively
- (b) the General Duty.

#### **Particulars of Breach**

- (i) Failing to adequately maintain the Installations, in particular timber power poles, to ensure the safe operation of the electricity supply network;
- (ii) failing to have adequate systems for identifying power poles at risk of failure; and
- (iii) failing to have adequate systems for the replacement of power poles at risk of failure.

Further particulars of breach will be provided subsequent to discovery.

#### *Subgroup Claims – Private Nuisance*

22-21. Further to paragraph 4 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 Garvoc Fire's interference in their use or enjoyment of interests in land.

#### **Particulars**

The plaintiff was the registered proprietor of land over which the Garvoc Fire burned, being land at Ridge Road, Garvoc, Crown Portion 4B of allotment 13B Parish at Garvoc.

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

23-22. At all material times each of:

- (a) the risks referred to in paragraph 16 above; and
- (b) the risk that a fire ignited as a result of the failure of a power pole which brought the Powerline and its Installations in contact with flammable



materials, would unreasonably interfere with the use or enjoyment of interests in land over which the fire passed, by the persons entitled to the said use or enjoyment;  
were reasonably foreseeable to Powercor.

24-23. By reason of the matters set out in paragraphs 20 and 21 Powercor:

- (a) caused electricity, heat or sparks from the Powerline to come into contact with combustible material on a property at 974 Sisters-Garvoc Road, The Sisters; and thereby
- (b) caused the ignition of the Garvoc Fire, which spread to the ~~Affected~~ Garvoc Fire Area being land upon which the plaintiff or subgroup members had interests.

25-24. The Garvoc Fire unreasonably interfered with the use or enjoyment by the plaintiff and subgroup members of their interests in the lands over which the fire passed.

26-25. In the premises, the plaintiff and each of the subgroup members suffered nuisance created by Powercor.

### Causation and Loss and Damage

26A. 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 paragraphs 16(e) to (g) above.

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

The plaintiff suffered property loss and damage, including the destruction of:

- (i) a shipping container;
- (ii) personal chattels;
- (iii) chickens; and
- (iv) an extensive permaculture garden

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*

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

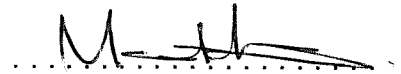
- (a) whether the Statutory Duties were owed by Powercor to the plaintiff and Group Members, and if so the content of those duties;
- (b) whether the General Duty was owed by Powercor to the plaintiff and Group Members, and if so the content of the duty;
- (c) how the Garvoc Fire started;
- (d) whether the Garvoc Fire was caused by a breach by Powercor of any of the Statutory Duties or the General Duty;
- (e) ~~as between the plaintiff and subgroup members—~~ whether the plaintiff and subgroup members suffered private nuisance created by Powercor;
- (f) what kinds of loss caused by the Garvoc Fire and suffered by the plaintiff and Group Members are recoverable from Powercor for the breaches of duty or the nuisance alleged herein, and the principles for assessing those losses.

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

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

Andrew Fraatz

Tim Tobin SC

A handwritten signature in black ink, appearing to be 'Maddens', is written over a horizontal dotted line.

Maddens Lawyers  
Solicitors for the Plaintiff

FORM 4A

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

S CI 2018 01113

B E T W E E N

ANDREW JOHN FRANCIS

Plaintiff

-and-

POWERCOR AUSTRALIA LIMITED  
(ACN 064 651 109)

Defendant

OVERARCHING OBLIGATIONS CERTIFICATION

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Date of Document: 16 April 2018 ~~28 March 2018~~  
Filed on behalf of: The Plaintiff  
Prepared by:  
Maddens Lawyers  
219 Koroit Street  
Warrnambool VIC 3280

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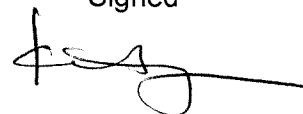
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In accordance with section 41 of the **Civil Procedure Act 2010**, I Kathryn Emeny certify to the Court that I have read and understood the overarching obligations set out in sections 16 to 26 of that Act and the paramount duty set out in section 16 of the Act.

Date: 16.04.18

Signed



**KATHRYN AMY EMENY**  
of Maddens Lawyers 219 Koroit Street  
Warrnambool An Australian legal practitioner  
within the meaning of the Legal Profession  
Uniform Law (Victoria)

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

S CI 2018 01113

**B E T W E E N**

**ANDREW JOHN FRANCIS**

Plaintiff

-and-

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

Defendant

**PROPER BASIS CERTIFICATION**

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Date of Document: 16 April 2018 ~~28 March 2018~~  
Filed on behalf of: The Plaintiff  
Prepared by:  
Maddens Lawyers  
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In accordance with section 42 of the **Civil Procedure Act 2010**, I Kathryn Emeny certify to the Court that, in relation to the Statement of Claim filed on behalf of the plaintiff, Mr Andrew Francis, on the factual and legal material available to me at present each allegation of fact in the document has a proper basis.

Date 16.04.18

Signed



**KATHRYN AMY EMENY**  
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Warrnambool An Australian legal practitioner  
within the meaning of the Legal Profession  
Uniform Law (Victoria)