

IN THE SUPREME COURT OF VICTORIA  
AT WODONGA  
COMMON LAW DIVISION

Not Restricted

S CI 2010 1978

PAUL ANTHONY MERCIECA

First Plaintiff

AMELIA JANE COOMBES

Second Plaintiff

v

SPI ELECTRICITY PTY LTD (ACN 064 651 118)  
& Ors (according to the schedule)

Defendants

SPI ELECTRICITY PTY LTD (ACN 064 651 118)

Plaintiff by Counterclaim

v

EAGLE TRAVEL TOWER SERVICES PTY LTD  
(ACN 070 093 766) & Ors (according to the  
schedule)

Defendants by Counterclaim

JUDGE:

EMERTON J

WHERE HELD:

Wodonga

DATE OF HEARING:

26 April 2012

DATE OF JUDGMENT:

16 May 2012

CASE MAY BE CITED AS:

Mercieca v SPI Electricity Pty Ltd

MEDIUM NEUTRAL CITATION:

[2012] VSC 204

PRACTICE AND PROCEDURE – Group proceeding – Application for the approval of settlement of a group proceeding – Whether the Court should approve the settlement of a group proceeding – ‘Black Saturday’ bushfire near Beechworth – *Supreme Court Act 1986* (Vic) Part 4A – Settlement approved.

APPEARANCES:

For the Plaintiffs

Counsel

Mr T Tobin SC  
Mr L Armstrong  
Ms K Bowshell  
Ms C Pierce

Solicitors

Nevin Lenne & Gross  
Maddens Lawyers

For the First and Second  
Defendants

No appearance

For the Third and Fourth  
Defendants

Mr P Zappia

Norton Rose Australia

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HER HONOUR:

Introduction

1 On the day that came to be known as 'Black Saturday', 7 February 2009, a bushfire started on the eastern edge of Buckland Gap Road, three kilometres south of Beechworth in Victoria. The fire spread south-east towards Myrtleford before a wind change swept it north-east towards Mudgegonga. It destroyed vast areas of public land and private property, and claimed the lives of two people.

2 The plaintiffs, Paul Mercieca and Amelia Coombes, lost their home and its contents in the fire, together with art works, motor vehicles, and equestrian and panel beating equipment. Ms Coombes was injured, suffering burns to parts of her body, and both Mr Mercieca and Ms Coombes claim to have experienced severe psychological trauma.

3 Mr Mercieca and Ms Coombes have brought this proceeding for damages on their own behalf and on behalf of all persons who suffered loss or damage to property as a result of the Beechworth bushfire, pursuant to Part 4A of the *Supreme Court Act 1986* (Vic).<sup>1</sup>

4 The defendants to the proceeding are SPI Electricity Pty Ltd ('SPI'), which carries on business as a supplier of electricity to residential and business consumers in Victoria and operated an electricity distribution feeder running north from Myrtleford to Beechworth, Eagle Travel Tower Services Pty Ltd ('Eagle'), which was the vegetation clearance contractor for SPI, the Secretary to the Department of Sustainability and Environment ('DSE') and Parks Victoria, being the two public authorities which were responsible for the management of the park adjacent to which the Beechworth fire started.

5 The defendants, while denying the claims made by the plaintiffs, have made counterclaims against the plaintiffs and sought contribution from each other, and each defendant has denied liability in respect of those further claims.

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<sup>1</sup> Persons who suffered personal injury are group members provided they also suffered property loss, and being group members are treated as litigating both categories of claim in the proceeding.

6 There is no dispute that the Beechworth fire started within a few metres of pole 170 on the Myt-7 electricity distribution feeder located in an area known as Buckland Gap. Around 30 metres south-east of pole 170, on or just inside the boundary of the Beechworth Historic Park, was a large apple-box eucalyptus (the 'Tree'). The Tree had a trunk which, at around four metres from ground level, bifurcated into two co-dominant stems or major scaffold branches, pointing north-east and south-west respectively. The plaintiffs alleged that the northern half of the stem and the northern scaffold branch had died some time prior to Black Saturday. They alleged that, on Black Saturday, the southern section of the trunk, carrying with it the full canopy of the southern limb, failed in the wind and the southern limb snagged on one of the three conductors (or powerlines) on the Myt-7 distribution feeder as it fell. According to the plaintiffs, the impact caused the insulator holding the powerline on pole 170 to fracture, followed by the corresponding insulator on pole 169. As the powerline sprang inwards, it made contact with the steel reinforced power-pole and, as it scraped down the pole, it remained energised and arced with reinforcing mesh inside the pole.

7 The Myt-7 feeder was equipped with an automatic circuit re-closer device ('ACR'), which was designed to detect the occurrence of electrical faults on the line. When a fault was detected, it would re-close the circuit and resume transmission of current until the line had been tripped four times. The plaintiffs allege that it was probably an arc caused by a re-closed current which produced sparks and heat which ignited dry grass near the base of pole 170 and started the Beechworth bushfire.

8 The plaintiffs' original claim was against SPI alone. They alleged that in -

- (a) failing to suppress the re-close function on the ACR on 7 February 2009;
- (b) failing to adequately train and supervise lines clearance inspectors; and
- (c) failing to detect and make safe the Tree prior to February 2009,

SPI breached both a privately enforceable statutory duty imposed by s 75 of the

*Electricity Safety Act 1998* (Vic) and a common law duty of care. They further alleged that SPI committed private nuisance.

9 By counterclaim, SPI joined Eagle, alleging negligence and breach of contract in failing to report the Tree, and DSE and Parks Victoria, alleging negligence in failing to detect and make safe the Tree. In so doing, SPI invoked the apportionment provisions of Part IVAA of the *Wrongs Act 1958* (Vic) and sought declarations that Eagle and the State parties bore most of the responsibility for the Tree's collapse onto the powerlines.

10 Because of the apportionment provisions, the plaintiffs amended their pleading to adopt SPI's claims against the other defendants, albeit with modifications in the case of Eagle, to contend as one alternative that even if Eagle were negligent, various exceptions to the apportionment regime applied so as to leave SPI responsible for Eagle's default.

11 Each of Eagle and the State parties deny the allegations made by SPI and the plaintiffs.

12 The cause of the fire is a matter of considerable dispute between the parties and is the subject of a large number of expert reports. The State parties allege that an event unrelated to the Tree (some flying debris or perhaps a possum) caused arcing at the top of the power-pole which, in turn, caused the powerline to fracture, fall and arc against the pole, causing the fire. They allege that the Tree fell as a result of strong winds on the already collapsed powerline at some stage after the fire had begun. SPI has followed the State parties in alleging that the fire was caused by an event not involving the Tree. Moreover, it says that no arcing occurred between the conductor and the pole, but that once the powerline fell to the ground, it came into contact with vegetation and a low current fault caused charring, igniting the vegetation. This hypothesis would exonerate the ACR from any responsibility for causing the fire.

13 The factual and legal issues in the proceeding are complex and the trial was set down to be heard on an estimate of eight weeks. However, on 5 March 2012, the first

day of the trial, the parties informed Dixon J that the proceeding had settled. Terms of settlement were finalised and executed on 6 March 2012.

Plaintiffs' application to approve the settlement

- 14 By their summons filed on 7 March 2012, the plaintiffs now seek orders pursuant to:
- (a) Section 33V (and ss 33ZF, 33ZG and 33ZJ) of the *Supreme Court Act* for approval of the proposed settlement of the proceeding upon the terms set out in the deed of settlement; and
  - (b) Sections 33X and 33Y of the *Supreme Court Act* for approval of the form and content of, and the manner of distributing, a notice to group members informing them of the making of the orders approving the proposed settlement and their rights and obligations arising pursuant to the settlement.
- 15 Two affidavits have been filed in support of the summons:
- (a) The affidavit of Peter Henry Lenne sworn 17 April 2012 (made in accordance with paragraph 2 of the orders of Dixon J made 7 March 2012); and
  - (b) A further affidavit of Mr Lenne sworn 24 April 2012.
- 16 The plaintiffs also rely on the written opinion of their counsel as to whether the proposed settlement is fair and reasonable and in the interests of group members. The opinion has been filed on a confidential basis in accordance with the orders made by Dixon J on 7 March 2012 and with the established practice in group proceedings under Part 4A of the *Supreme Court Act* and cognate provisions in other jurisdictions.
- 17 The class in this proceeding is an 'open class', being all those persons who suffered property loss or damage as a result of the Beechworth fire. The members of the class need not have retained the plaintiffs' solicitors, Nevin Lenne & Gross or Maddens Lawyers, or any other solicitors. Due to the open nature of the class, the plaintiffs cannot identify every person who fits the definition of group member. Some group

members are known to the plaintiffs' solicitors and have either entered client agreements or registered with one of those two firms. However, the number, identity and losses of other group members is not known.

18 As a result, group members who are not clients of Nevin Lenne & Gross or Maddens  
Lawyers are not directly represented in the proceeding. It is their interests, in  
particular, which the Court is concerned to ensure are properly considered in an  
20 application of the present kind.

19 The Court convened at Wodonga on 26 April 2012 to hear submissions from the  
plaintiffs as to why the settlement ought to be approved and to consider any  
objections to the settlement that might be made by group members. Two days were  
set aside for the hearing. In the event, no group member attended or appeared at the  
hearing to make an objection to the settlement. However, counsel for the plaintiffs  
carefully took the Court through all aspects of the settlement, including the  
notification of group members. The Court also had the benefit of the extensive  
confidential advice prepared by the plaintiffs' counsel which, among other things,  
frankly analysed the plaintiffs' prospects of success in the proceeding.

### The Settlement Deed

20 The settlement deed provides for the defendants to pay group members an amount  
equivalent to 45% of their losses or injuries, assessed in accordance with specified  
principles, and costs on a party-party basis.

21 The amount payable by the defendants as compensation to the plaintiffs and  
participating group members is capped at \$32.85 million (the 'Settlement Sum').<sup>2</sup>  
However, if the Settlement Sum amounts to less than 43% of the total value of the  
assessed losses, the defendants must make an additional payment to make up the  
shortfall to 43% of the total assessments or \$2 million, whichever is the lesser.

22 The Settlement Sum represents 45% of \$73 million, which is the rounded off

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<sup>2</sup> Plus whatever interest is earned on the Settlement Sum while it is in the Beechworth Settlement Reserve Account.



approximation of the total losses which the plaintiffs' legal representatives estimate to have been suffered across the entire class of persons who satisfy the group definition in the proceeding. The \$73 million group-wide loss estimate is the product of a modelling exercise undertaken by the plaintiffs' legal representatives necessitated by the fact that the class is an open class, and it was not possible to identify with precision all of the persons who fell within the group definition. It is to be observed, however, that if the total group-wide loss estimate of \$73 million turns out to be an underestimate, the modelling error may reduce the payout rate to group members, resulting in payments of compensation of less than 43% of assessed losses. That is a risk in the settlement model that has been chosen.

- 23 Two sub-groups within the overall claim group are subject to special provision in the deed of settlement. Settlement is conditional upon the Court permitting an amendment of the group definition to exclude municipal councils and Commonwealth, State and Territory authorities and instrumentalities. This step is described as precautionary, because s33E of the *Supreme Court Act* provides that such entities are not group members unless they consent to be so. The second category of group member receiving special attention is made up of a timber plantation owner near Myrtleford, HVP Plantations Pty Ltd ('Hancocks'), and telecommunications or utility providers (referred to collectively as the 'utility providers') whose assets may have been damaged by the Beechworth fire. Hancocks' assessed losses are to be capped at \$10 million and the assessed losses of all of the utility providers are to be capped at \$5 million. Subject to these caps, the losses as assessed are to be compensated at the 45% rate.
- 24 Importantly, the deed contemplates the making of class closure orders, by fixing a date by which persons interested in making claims must register their claims with the plaintiffs' solicitors, failing which they will remain group members and have their rights merge in the settlement, but not be permitted to claim compensation in respect of those rights.<sup>3</sup>

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<sup>3</sup> At least not without further order of the Court.

- 25 Following the registration date, the property claims of each group member will be assessed by the expert assessors agreed between the parties at the defendants' expense.<sup>4</sup> The settlement deed provides for 'Guideline Assessments' to be prepared in relation to four group members whose claims raise a wide range of the loss issues that are expected to arise among group members as a whole. Assessments must then be conducted according to the principles agreed in the Guideline Assessments and consistently with the laws of Victoria as it stands at the time of each assessment. The deed then makes specific provision for the assessments for trees (garden and non-garden trees, trees that produce an income and those that do not, trees that do not produce an income but contribute to the preservation of land or soil quality), and for work completed by the labour of the group member or by volunteers.<sup>5</sup>
- 26 The deed of settlement contains a mechanism for disputes to be considered by a review panel or a senior review panel, depending on the amount of the difference between the asserted value and the assessed value of an item.
- 27 The timing of payments once assessment has occurred recognises the risk that some claims may be complicated and require more work than others, resulting in delays in the payment of compensation. Accordingly, cl 10 of the deed permits the plaintiffs' solicitors to make an interim distribution of compensation where not less than 60% of the participating group members' claims (by value) have been finally assessed or 10 months has elapsed since the date of court approval. Having served on the defendants' solicitors an interim assessments summary identifying the claims that have been resolved to that point in time and the total value of settlement payments due in respect of those claims, the plaintiffs' solicitors are required to use reasonable endeavours to distribute among the resolved claims a proportion, not exceeding 60%, of the moneys then available in the trust account, as an interim distribution pending resolution of the balance of the claims.

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<sup>4</sup> Personal injury claims will be subject to a separate procedure also involving the appointment of agreed assessors.

<sup>5</sup> See *Powercor Australia Ltd v Thomas* [2012] VSCA 87.

- 28 Under the deed of settlement, the defendants are obliged to pay the reasonable fees and expenses of the assessors incurred in connection with each assessment and to pay group members' individual costs of the proceeding on a party-party basis. The payment of the individual costs of group members that are incurred after 2 February 2012 and for the purposes of the assessment is fixed by reference to the amount claimed. Thus, for example, the individual costs for claims assessed at less than \$150,000 are fixed at \$1,500, while costs for claims assessed at more than \$500,000 are fixed at \$4,000.
- 29 The deed makes special provision for group members who receive compensation to contribute, in proportion to the amount of compensation they receive, to reimbursing the plaintiffs for the costs incurred by them in pursuing the common questions in the proceeding, to the extent that those costs are not recovered from the defendants as party-party costs.

Applicable legal principles

- 30 There have been two other settlements of bushfire class actions requiring approval by this Court in the past six months. In *Thomas v Powercor*<sup>6</sup> and *Perry v Powercor*<sup>7</sup> (the Horsham and Coleraine bushfire class actions, respectively), Beach J set out the relevant principles for the Court's consideration of a proposed class action settlement of this kind, with which I respectfully agree. A useful starting point is the observation by Branson J. in *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd*<sup>8</sup> that the Court has to be satisfied that any settlement has been undertaken in the interests of the group members as a whole, and not just in the interests of the plaintiffs and the defendants.<sup>9</sup> In this case, the Court must be satisfied that the settlement is in the interests not only of Mr Mercieca and Ms Coombes, but of all group members who will be bound by the settlement, including group members who are not represented by the plaintiffs' solicitors.

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<sup>6</sup> [2011] VSC 614 (*Thomas*).

<sup>7</sup> [2012] VSC 113.

<sup>8</sup> (1996) 71 FCR 250.

<sup>9</sup> *Ibid* 258.

31 The general test to be applied is whether the proposed settlement is fair and reasonable in all the circumstances. In *Williams v FAI Home Security Pty Ltd*,<sup>10</sup> Goldberg J identified the following factors as relevant to whether a settlement is fair and reasonable:

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- (a) the amount offered to each group member;
- (b) the prospects of success in the proceeding;
- (c) the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer;
- (d) the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding;
- (e) the likely duration and costs of the proceeding if continued to judgment; and
- (f) the attitude of group members to the settlement.<sup>11</sup>

32 These factors are not intended to be applied mechanically as some kind of checklist, and the Court must have regard to the particular circumstances of each case. In the present case, the factors identified by Goldberg J provide a useful framework for considering the fairness and reasonableness of the proposed settlement, although it is convenient to consider these factors under different headings.

### Is the settlement fair and reasonable?

#### Prospects of success and reasonableness of the settlement overall

33 When considering the reasonableness of the settlement, I have had regard to the confidential opinion, to the pleadings and to the nature and extent of the expert evidence put forward by the parties to date, as well as to the legal context in which the claims are brought and the defences are advanced. The proceeding raises complex issues of law and fact. On at least the question of liability, the proceeding is

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<sup>10</sup> *Williams v FAI Home Security Pty Ltd* (2000) 180 ALR 459.

<sup>11</sup> *Ibid* 465 [19].

finely balanced. I am therefore satisfied that a discount of slightly more than 50% for all the liability and recoverability risks in the proceeding is within the range of reasonable outcomes for the plaintiffs and group members. Moreover, insofar as the claims assessment principles involve a compromise between the plaintiffs and the defendants, I am satisfied that the various compromises are within the range of results open on the evidence.

34 Of course, the ability of the plaintiffs and group members to recover 45% of their losses depends on the \$73 million estimate for total group losses being sufficient. If the losses exceed the estimated \$73 million figure, there is only an additional \$2 million available to make up any deficiency.

35 The figure of \$73 million for total group losses was derived from modelling carried out by the plaintiffs' representatives prior to settlement. The plaintiffs explained that even in respect of the identified claimants in the class, it was uneconomical and impractical to undertake full loss assessments for each claimant prior to settlement. However, some loss assessments were carried out to completion, while 'desktop' assessments, based on extensive data collected by the solicitors, were completed for around 25 other clients. The model that was developed used the results of the assessment reports where available, plus the results of questionnaires delivered to all client group members,<sup>12</sup> to generate estimates as to the proportion of claimants who claimed various items of loss, the average value of each item when claimed and an adjusted estimate of the total value of all claims for the client group members. To extrapolate from the results of the client sub-group across the total claim group, client records were cross-referenced to records of payments made from the Victorian Bushfire Relief Fund for claims associated with the Beechworth fire. By these means, the total group-wide loss estimate of around \$73 million was derived.

36 At the hearing for the approval of the settlement, I questioned counsel about the accuracy of the model. Having been provided with some of the material used to develop the model, I am satisfied that a serious and conscientious effort has been

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<sup>12</sup> That is, group members who are clients of Nevin Lenne & Gross or Maddens Lawyers.

made to accurately estimate the amount of total losses and that it is not unreasonable to proceed to settlement on the basis of the estimate.

#### Fairness of settlement as between group members

37 Importantly, I am also satisfied that the settlement is fair between group members. Like the settlement of the Horsham and Coleraine bushfire class actions, the assessment and payment of compensation pursuant to the deed of settlement does not involve different treatment of the members of the group. With the exception of Hancocks and the utility providers, all participating group members will be entitled to be paid the same percentage of the amount assessed for their loss or damage.

38 It is possible that the application of the claims assessment principles may be more generous in respect of one group member than they are in respect of another. However, no group member has made any such complaint. On the material before me, it cannot be said that any of the claims assessment principles display a more generous approach to any particular group members than to other group members. I consider them to be fair and reasonable between the plaintiffs and group members.

39 Hancocks and the utility providers are treated less favourably than the other group members, in that their individual entitlements to compensation are capped. The Court was informed that Hancocks was specifically consulted about the cap in the course of negotiations and that it had indicated that the cap was acceptable to it. The utility providers have received notice of the cap applicable to any claims that they may make, but have not taken any steps to identify themselves as potential claimants. In my view, both Hancocks and the utility providers are well able to protect their own interests and could have attended the hearing at Wodonga to make their objections to the settlement known, if they had any. I assume from their silence that they do not object to the terms of the settlement.

40 I note also that it is to the benefit of the individual group members that the funds available pursuant to the settlement not be absorbed by a small number of large payments to corporations.

### Class closure

41 The deed of settlement contemplates a class closure procedure, under which persons who are group members and wish to claim compensation for their losses must register with the plaintiffs' solicitors by a fixed registration date, failing which they will remain group members in the sense that their rights will merge in the settlement, but they will not be entitled to compensation. Such an order is specifically authorised by s 33ZG of the *Supreme Court Act*.

42 The closure of the class by way of the requirement to register claims by a fixed date facilitates the assessment and payment procedures, given the limit on the total compensation payable by the defendants and the need to distribute funds in accordance with the assessment principles. In *Thomas*, Beach J considered a proposed class closure order of this kind having regard to the alternative of making orders to permit group members to opt out within some relatively defined period. His Honour was persuaded that the latter course would not be appropriate, because it would allow group members to avoid contributing to the plaintiff's unrecovered costs in the proceeding by entering into private settlement agreements on like terms with the defendants.<sup>13</sup> Although I did not hear argument on this point, I agree with the reasons given by Beach J as to why a class closure order is appropriate in cases of this kind.

43 I am satisfied that, provided that adequate notice is given to group members, there is nothing unreasonable or unfair about a class closure order of the kind proposed.

### Time and costs savings

44 The trial of the proceeding was estimated to take place over eight weeks. In addition to the daily costs of approximately 10 to 12 members of counsel and a similar number of solicitors, around two weeks of 'conclave' evidence of liability experts was anticipated, at great expense to the parties.

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<sup>13</sup> *Thomas v Powercor* [2011] VSC 614, [34]–[35].

45 The settlement avoids the need for a lengthy trial on the common issues relating to liability, and the claims assessment procedure established by the settlement deed will plainly be less costly than the serial hearing by the Court of the individual claims of group members. The reduction in the costs of determining the common issues and in the costs of individual claims assessments will benefit group members, especially to the extent that they are ultimately liable to bear the unrecovered portion of the plaintiffs' costs of having the common issues determined by the Court. Most importantly, the proposed settlement will accelerate the process of obtaining compensation. Participating group members will receive their entitlements much sooner than they would have had the action proceeded to judgment, especially given the possibility of appeal and the subsequent requirement to assess individual claims.

#### The attitude of group members to the settlement

46 The existence of the proceeding and the proposed settlement have been advertised and covered extensively in local and state-wide news media. It is unlikely that group members are unaware of the proceeding and its proposed settlement.

47 The Court was informed that prior to settlement, the plaintiffs' solicitors convened a consultative group of larger claimants who were consulted in relation to the proposed settlement and who indicated their support for it. The Court was also informed that group members who have contacted Nevin Lenne & Gross and Maddens Lawyers since the publication of the notice of proposed settlement have been broadly supportive of the settlement.

48 The Court has not been alerted to the existence of any group member who objects to the proposed settlement. Group members were given an opportunity to object to the settlement at the hearing of the plaintiffs' application for approval of the settlement in Wodonga on 26 April 2012. No group member appeared or attended to make an objection. It is open to infer that group members are content with and/or support the proposed settlement.



## Costs

- 49 Group members are to receive from the defendants their party-party costs of the proceeding and the costs of the assessment. The payment of the costs of group members on a party-party basis (rather than on an indemnity basis) does not seem to me to be unfair or unreasonable in the circumstances and can be viewed as one of the compromises necessary to secure a settlement. As to the fixing of post-February 2012 costs in the proceeding and for individual assessments, the Court was informed that actual professional fees for assessments were likely to be close to the specified caps. The erosion of group members' net recovery on account of additional 'own costs' is therefore likely to be small. On that basis, the arrangements for group members' costs to be paid by the defendants seem to be fair and reasonable.
- 50 There remains the question of the special provision made for the plaintiffs' costs and the fairness of requiring group members to contribute to the plaintiffs' unrecovered costs in respect of the common questions in the proceeding.
- 51 The costs contribution order sought in respect of the plaintiffs' costs is in the same form as the orders that were made in the Horsham and Coleraine bushfire class actions. As Beach J observed in *Thomas*, there is no reason why the plaintiffs should be burdened on their own with the unrecovered costs for pursuing the common questions in the proceeding and there is every reason why those costs should be shared amongst the plaintiff and the participating group members: those who benefit from the plaintiffs' work should share the cost of the work with the plaintiffs.<sup>14</sup> The Court was informed that all group members were notified from the first 'notice of commencement and opt-out' in mid-2010 that the plaintiffs would seek such an order if ever there was a favourable settlement or judgment in the action. Group members, being on notice of that obligation, elected to remain group members and to take the benefit of the work done on their behalf.
- 52 Moreover, the impact of the costs contribution order on group members is different only as to the dollar amount which will be payable by each of them. The costs

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<sup>14</sup> Ibid [30].

contribution order is framed to ensure each successful group member contributes at the same rate to the plaintiffs' unrecovered costs.

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The absence of agreement that the defendant indemnify the plaintiffs and group members for the actual costs of prosecuting their claims gives rise to questions as to how the excess of actual costs over party-party costs is to be borne among group members. In my view, the solution of the costs contribution order that is proposed is fair and reasonable. It ensures that all successful group members, whether clients or non-clients, contribute on an equal basis to the costs that were incurred equally for their benefit. As the plaintiffs submit, it is difficult to envisage a basis upon which group members could object to the costs contribution order. The comparator when assessing the reasonableness of the costs contribution order would be a separate proceeding in which the individual sued in his or her own name. That alternative could not reasonably be thought to be a less expensive option for the claimant.

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Finally, I have considered the basis upon which the plaintiffs' solicitors have agreed to act in this proceeding. Both firms of solicitors have acted for their respective client groups on a no win, no fee basis. Counsel has also appeared on a conditional basis. This involves charging an uplift of 25% on professional fees. Section 3.4.28 of the *Legal Profession Act 2004* (Vic) permits such a course where there is a conditional costs agreement.<sup>15</sup> I have formed the view that in litigation of this type, where the legal representatives carry substantial risk over a long period of time, there is nothing unreasonable or unfair about this course.

### Conclusion

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The settlement of this proceeding is fair and reasonable both as between the parties and as between the plaintiffs and the group members. The aspects of the settlement concerning the respective rights and obligations of the parties are within the range of reasonable outcomes for very difficult, complex litigation in which the plaintiffs are exposed to a risk of failure. As between the plaintiffs and the group members, the settlement aims to ensure equal treatment in the funds distribution process,

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<sup>15</sup> Subject to compliance with the requirements of s 3.4.28.

including an equal (in the sense of proportional) obligation to contribute to the overall costs that have been incurred in obtaining the outcome for the group as a whole. To the very limited extent that any group members are treated differently – I refer here to Hancocks and the utility providers – that different treatment does not, in my view, detract from the overall reasonableness and fairness of the settlement. The finalisation of the proceeding at a much reduced cost and within a much shorter timeframe than would otherwise have been the case is in the interests of all group members.

56 The settlement will be approved.

#### Orders

57 Subject to any further submission as to the form of appropriate orders, the Court will make orders in the following form:

#### *Public authority exclusion orders*

1. The group definition in paragraph 1 of the Further Amended Statement of Claim filed 14 February 2012 be amended by adding to the end of the paragraph the words “, but excluding municipal councils and other Commonwealth, State or Territory authorities or instrumentalities.”

#### *Approval of Settlement*

2. Pursuant to sections 33V, 33ZF, 33ZG and 33ZJ of the *Supreme Court Act 1986* (Vic) (the ‘Act’), settlement of the proceeding upon the terms set out in the document titled “Settlement Deed” signed by the parties (“Settlement Deed”) be approved.
3. Pursuant to section 33ZF of the Act, persons who filed Notices of Opting Out in the proceeding have leave to withdraw the said Notices and resume group membership by registering with the plaintiffs’ solicitors in accordance with paragraph 4 below.

*Class closure – "Claims Registration"*

4. Pursuant to section 33ZG of the Act, any group member (including persons referred to in paragraph 3 above) who wishes to claim compensation in respect of the claims made on their behalf in the proceeding register their claims with either Nevin Lenne & Gross Solicitors or Maddens Lawyers (collectively 'the plaintiffs' solicitors') by 29 June 2012, in default of which the group member shall not, without further order of the Court or the consent of the defendants, be entitled to participate in or obtain any payment pursuant to the claims assessment procedure set out in the Settlement Agreement.

*Costs contribution by participating group members*

5. Pursuant to section 33ZF, alternatively section 33ZG, alternatively the inherent jurisdiction of the Court:
  - (a) each group member who becomes entitled to a payment of compensation in consequence of the Settlement Deed apply the compensation entitlement first in reimbursement of the plaintiffs for the difference between those costs incurred by the plaintiffs in respect of the common questions in the proceeding and recovered from the defendants ('recovered costs'), and the total costs incurred by the plaintiffs in respect of the common questions in the proceeding (that difference being the plaintiffs' 'unrecovered costs'); and
  - (b) the reimbursement amount payable by each group member referred to in (a) be calculated by multiplying the total amount of the plaintiffs' unrecovered costs by the proportion which the individual group member's compensation entitlement bears to the total value of all compensation entitlements assessed in favour of group members.
6. The reimbursements ordered pursuant to paragraph 5 above be payable and paid to the plaintiffs' solicitors, and the said solicitors have leave to calculate

and deduct the reimbursement payment of each group member prior to disbursing from their trust account the balance of the compensation entitlement of the group member.

*Settlement Approval and Claims Registration – notice to group members*

7. Pursuant to sections 33X and 33Y of the Act, the form and content of the notice to group members set out in Annexure A to these Orders ('Settlement Approval Notice'), informing them of the making of orders 1 to 6 inclusive above, be approved.
8. Pursuant to section 33X of the Act, by 4:00pm on 30 May 2012, the Settlement Approval Notice be given to group members by the plaintiffs, by their solicitors, causing the notice to be:
  - (a) published in two weekday editions of the Border Mail newspaper;
  - (b) published in one weekday edition of each of:
    - (i) The Myrtleford Times newspaper;
    - (ii) The Weekly Times newspaper;
    - (iii) The Herald-Sun; and
    - (iv) The Australian newspaper;
  - (c) where the database of registered group members maintained by the plaintiffs' solicitors contains:
    - (i) an email address for a group member – emailed to that address;
    - (ii) a postal address for a group members – sent by ordinary pre-paid post to that postal address;
  - (d) uploaded to the website of the plaintiffs' solicitors; and

(e) uploaded to the Court website.

9. By 4:00pm on 7 June 2012, the plaintiffs by their solicitors file and serve an affidavit as to compliance with Order 8 above.

*Other matters*

10. Pursuant to section 33ZF of the Act, the plaintiffs, their solicitors, and the defendants each have leave to apply to the Court for orders in respect of any issue arising in relation to the administration of the Settlement Deed.
11. Pursuant to section 33ZF of the Act, the hearing of any application for orders pursuant to paragraph 10 above be conducted by the trial judge or otherwise as he may direct.
12. The plaintiffs' summons filed 7 March 2012 is adjourned *sine die*.

**BEECHWORTH BUSHFIRE CLASS ACTION**

**NOTICE OF COURT APPROVAL OF SETTLEMENT**

Persons who suffered loss of or damage to property as a result of the Beechworth bushfire on Black Saturday, 7 February 2009 should **TAKE NOTICE** that a **SETTLEMENT** of the class action on behalf of victims of the fire has now been **APPROVED** by the Supreme Court of Victoria.

If you are, or think you might be, a person who suffered loss of or damage to property as a result of the Beechworth bushfire, you should **READ THIS NOTICE CAREFULLY AS IT WILL AFFECT YOUR RIGHTS**.

**Beechworth Bushfire Class Action**

The Beechworth Bushfire Class Action was commenced in the Supreme Court of Victoria by the plaintiffs, Paul Mercieca and Amelia Coombes. The plaintiffs bring the action on their own behalf and on behalf of all persons who suffered loss of or damage to property as a result of the fire which started on the eastern edge of the Buckland Gap Road, three kilometres south of Beechworth in the State of Victoria on 7 February 2009 ("the Beechworth fire"). Those other persons are called "group members" in the class action.

The defendants to the class action are SPI Electricity Pty Ltd (SP AusNet"), Eagle Travel Tower Services Pty Ltd ("Eagle"), the Secretary to the Department of Sustainability & Environment ("DSE"), and Parks Victoria.

Briefly, the plaintiffs allege that the fire started when a tree fell across an SP AusNet powerline, pulling down the line and causing it to "arc" against a powerpole. They allege that SP AusNet was negligent in failing to keep the powerline clear of hazardous trees, and also in the operation of its "reclosing" circuit-breaker devices. They also allege that SP AusNet's vegetation clearance contractor, Eagle, was negligent in conducting vegetation clearance assessments. Lastly, they allege (in the alternative) that DSE and Parks Victoria

were negligent in failing to detect and remove the hazardous tree from its location in a national park. The plaintiffs seek compensation and other remedies on their own behalf, and on behalf of all the group members as defined.

Some of the claims made by the plaintiffs are also made as between defendants. All of the defendants deny any liability, both on the plaintiffs' claims and on the various cross-claims between them.

The claims which the plaintiffs make against the defendants are set out in a "Further Amended Statement of Claim". A copy of that document can be viewed:

(a) at the offices of the plaintiffs' solicitors Nevin Lenne & Gross (who are acting for the plaintiffs jointly with another firm, Maddens Lawyers). The Nevin Lenne & Gross office is at Crystal Court, 25 South Street in Wodonga;

(b) on the website of Nevin Lenne & Gross at [http://www.nlgsolicitors.com.au/attachments/Further\\_Amended\\_SofC\\_12\\_02\\_06.pdf](http://www.nlgsolicitors.com.au/attachments/Further_Amended_SofC_12_02_06.pdf); or

(c) on the website of Maddens Lawyers at <http://www.maddenslawyers.com.au/Bushfire-Compensation/2009-Bushfires/Beechworth-Mudgegonga-Bushfire.aspx>; or

(d) at the Supreme Court Registry in the Courts Complex at 5 Elgin Boulevard in Wodonga or on the Supreme Court website at [www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au).

Similarly, the defendants' defences and cross-claims may be inspected at the offices or websites listed above.

The trial of the class action was scheduled to commence at Wodonga on 5 March 2012, and was due to run for 8 weeks. Shortly prior to commencement of the trial, the plaintiffs and the defendants agreed upon terms for a settlement of the class action. As a result the trial was adjourned.



### **Settlement of the class action**

The settlement agreement between the parties is set out in a "Deed of Settlement" ("Deed"). The agreement recorded in the Deed was conditional on the Supreme Court approving the settlement. That approval was granted by the Court on 16 May 2012.

The grant of Court approval for the Settlement Deed means that the settlement is binding on all persons who fit the definition of "group members". This means that the arrangements set up by the Deed are now the only way for group members to claim compensation for their losses. If you are a group member but do not follow the claims procedures set out in the Deed, you will lose your rights to compensation for losses suffered as a result of the Beechworth Bushfire. The claims procedure is explained below.

### **Group members MUST REGISTER to claim compensation**

Under the Settlement Deed, and orders made by the Court, all persons who wish to claim compensation for the losses and damage they suffered as a result of the Beechworth Bushfire must register as "participating group members".

To register, group members **MUST** complete the "Group Member Registration Form" shown at the bottom of this notice and send it to either Nevin Lenne & Gross Solicitors, or Maddens Lawyers, **BEFORE 30 JUNE 2012**.

If you are a group member but you do not register, you will lose your right to claim compensation from the defendants for any property loss or damage you suffered as a result of the Beechworth bushfire. If you suffered personal injury as well as property loss, you will lose your rights to claim compensation for the personal injury as well.

### **What if you "opted out" of the class action?**

Some people who were group members "opted out" of the class action by filing a "Notice of Opting Out" during 2011. Such persons are not currently group members.

Under the Settlement Deed, however, persons who opted out will be permitted to withdraw their Notices of Opting Out, resume group membership and claim compensation

using the "claims assessment procedure" in the Settlement Agreement.

If you opted out, but now wish to resume group membership and participate in the settlement, you may do so by registering as a group member with Nevin Lenne & Gross Solicitors or Maddens Lawyers using the Group Member Registration Form below. Again, the form must be returned to one of the solicitors firms BEFORE 30 June 2012.

Further

**After registration – "claims assessment procedure"**

Persons who register as group members with Nevin Lenne & Gross or Maddens by 30 June 2012 will be required to prepare "Claim Books" identifying the loss and damage they suffered as a result of the Beechworth Bushfire. The Claim Books will need to include all available supporting documentation.

Each claim will then be assessed by independent assessors. Once each claim has been assessed, the defendants will pay compensation equal to forty-five percent (45%) of the assessed value, being 40% of the value of the claim plus 5% on account of interest. The compensation will be paid 60% by SP AusNet, 25% jointly by DSE and Parks Victoria and 15% by Eagle.

Further details of the Settlement Agreement, including an explanation of the "claims assessment procedure", may be viewed at the websites of

Nevin Lenne & Gross – [www.nlgsolicitors.com.au](http://www.nlgsolicitors.com.au) or

Maddens Lawyers – [www.maddenslawyers.com.au](http://www.maddenslawyers.com.au)

**Legal assistance and legal costs**

You can obtain more information about preparing the "Claim Book" from the websites of Nevin Lenne & Gross or Maddens Lawyers, identified above.

There is no requirement that you engage lawyers to help you prepare a Claim Book, or participate in the "claims assessment procedure". If you do wish to engage a lawyer, you may use Nevin Lenne & Gross Solicitors, Maddens Lawyers, or other lawyers as you

choose. The lawyers will charge fees for doing that work. The defendants have agreed they will pay a portion of any legal costs incurred by a group member in the claims assessment procedure (as set out in the Settlement Deed), but the remainder of any fees will be payable by each group member.

You should also note that the defendants will be required to pay some but not all of the legal costs the plaintiffs have incurred in running the main or "common" issues in the class action. The Court has ordered that the "common issue" costs not payable by the defendants be shared between all the group members who recover compensation as a result of the settlement. Each group member will be required to contribute to those "unrecovered" costs in proportion to the amounts which each of them becomes entitled to receive as a result of the settlement. These amounts will be fixed at the end of the claims assessment procedure, and will be deducted from any compensation you become entitled to receive.

#### What group members must do

The Settlement Deed is binding on every group member, and the "claims assessment procedure" is the only way for group members to recover compensation for the losses caused by the Beechworth Bushfire.

If you are a group member and do not register your claim with either Nevin Lenne & Gross or Maddens Lawyers by 30 June 2012 you will not be entitled to participate in or obtain any payment under the Settlement Deed, and you will lose the right to make any claim against SP AusNet or the other defendants for loss of or damage to property as a result of the Beechworth bushfire.

Please consider the above matters carefully, and if you wish to claim compensation then make sure you return your "Group Member Registration Form" to Nevin Lenne & Gross or Maddens Lawyers as soon as possible. **PLEASE ACT PROMPTLY.**

**BEECHWORTH BUSHFIRE CLASS ACTION**

**GROUP MEMBER REGISTRATION FORM**

**To:** Beechworth Bushfire Class Action – Settlement Administrator

Maddens Lawyers

PO Box 320

WARRNAMBOOL VIC 3280

Nevin Lenne & Gross Solicitors

57 Clyde Street

MYRTLEFORD VIC 3737

or Crystal Court

25 South Street

WODONGA VIC 3690

Fax: (03) 5560 2099

(03) 5752 1463

Email: [info@maddenslawyers.com.au](mailto:info@maddenslawyers.com.au)

[vhaccou@nlgsolicitors.com.au](mailto:vhaccou@nlgsolicitors.com.au)

Name of Group Member: .....

Is the Group Member already a client of Maddens Lawyers? Yes / No (circle one)

Is the Group Member already a client of Nevin Lenne & Gross? Yes / No

Did the Group Member previously file a "Notice of Opting Out"? Yes / No

Dated: .....

Signed: .....

Name of person .....

signing (print)

Telephone .....

Email .....

Postal address .....

.....

.....

CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Emerton of the Supreme Court of Victoria delivered on 16 May 2012.

DATED this sixteenth day of May 2012.



Associate to the  
Honourable Justice Emerton

SCHEDULE OF PARTIES

S CI 2010 01978

BETWEEN:

PAUL ANTHONY MERCIECA First Plaintiff

AMELIA JANE COOMBES Second Plaintiff

-and-

SPI ELECTRICITY PTY LTD (ACN 064 651 118) First Defendant

EAGLE TRAVEL TOWER SERVICES PTY LTD  
(ACN 070 093 766) Second Defendant

SECRETARY TO THE DEPARTMENT OF  
SUSTAINABILITY & ENVIRONMENT Third Defendant

PARKS VICTORIA Fourth Defendant

AND BETWEEN:

SPI ELECTRICITY PTY LTD (ACN 064 651 118) Plaintiff by Counterclaim

- and -

EAGLE TRAVEL TOWER SERVICES PTY LTD  
(ACN 070 093 766) First Defendant by Counterclaim

SECRETARY TO THE DEPARTMENT OF  
SUSTAINABILITY & ENVIRONMENT Second Defendant by Counterclaim

PARKS VICTORIA Third Defendant by Counterclaim

PAUL ANTHONY MERCIECA Fourth Defendant by Counterclaim

AMELIA JANE COOMBES Fifth Defendant by Counterclaim