BUSHFIRE CLASS ACTIONS

By Tim Tobin SC with the assistance of Andrew Fraatz

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Victoria is notorious for its changeable weather. Visitors to Melbourne frequently experience 'four seasons in a day'. In summer, this weather pattern can produce days with a northerly wind that is hot and extremely dry coming from the centre of the continent, which rapidly changes to a westerly and then to a southerly wind.

Fires ignited during the first phase of this weather pattern quickly burn south and then, when the wind changes, the long eastern flank becomes the fire front and, a little while later, with the southerly change, the northern flank becomes the fire front. This typically creates a large J-shaped fire. Saturday 7 February 2009 – 'Black Saturday' – was a hot, windy day at the end of a long, hot, dry period.

NO UNUSUAL OCCURRENCE

As weather of this nature is not unusual in Victoria, power and energy systems that are exposed to the elements – especially those with the potential to cause fire in the event of failure – must be designed and maintained to withstand such conditions.

This is not a new proposition. In 1977, Sir Esler Barber[1] reported:

'While February the 12th [1977] was a very bad day in anybody's view and was dangerous by any standards, it must be kept in mind that it was not unique. It was not as bad a day as that once in a lifetime such as February 6 1851 or January 13 1939. It was indeed, the kind of bad day which may be likely to occur in the Western District at least with some frequency. In short, it can't be regarded as so unique as to be relied upon as an excuse for inadequate preparation for fire prevention, by saying that our prevention preparations were adequate except on such an unexpectedly ferocious day.

Another important factor is that the community had ample warning that February 12th would be the kind of day it turned out to be. The Bureau of Meteorology had accurately predicted the conditions which, in fact occurred, hence the declaration of total fire ban for Friday the 11th and Saturday the 12th. On a day like Saturday the 12th with higher temperatures, low humidity and very strong north wind, once a fire obtained a real hold it was virtually impossible to stop.'

The prospect of large fires occuring in hot, windy conditions is notoriously probable in Victoria. Look at our history:

(a) Black Saturday – 6 February 1851, when one-quarter of the state was burned, 12 lives and a million sheep lost.
(b) Black Friday – 13 January 1939, when 77 people died and one-third of Victoria was destroyed.
(c) 8 February 1969, when 22 people died.
(d) 12 February 1977, which led to Sir Esler Barber's inquiry.
(e) Ash Wednesday – 16 February 1983, which resulted in 47 deaths.
(f) The Alpine fires in 2003 and 2007.

PREVIOUS LITIGATION

Following the 1977 fires, the State Electricity Commission of Victoria (SEC) was the defendant in many actions brought by way of individual writ. Damages were extensive. The litigation was conducted by firms of solicitors acting in co-operation, each acting in relation to one or more fires before Sir Esler Barber's Board of Inquiry and in pursuit of damages.

The Board of Inquiry welcomed the involvement of the legal representatives of victims who appeared before it. The victims had government and insurer funding to ensure appropriate representation. The sittings of the Inquiry lasted 52 days and Sir Esler Barber's report was handed down within six months.

Litigation was fast and cost-effective. All claims, including those litigated to judgment, whether they be the test case in *Wollington v SEC*[2] or the jury verdict in the *Dependency Act* claim of *Dunn v SEC*,[3] were completed within two years. The majority of victims received compensation within 12 months. Costs were low, with solicitor:client costs being in fact $400 per claim, plus 2 per cent of damages.

In April 1980, a fire was started at Pidgeon Ponds (a small farming district near Hamilton), caused by long-billed corellas chewing through a concentric SEC feeder line on a private property. The feeder line fell, starting a fire that damaged approximately 14 farms.

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Again, individual writs were served. The plaintiffs alleged that the SEC knew or should have known of this corella problem from the many reports and fires caused by similar incidents over previous years, and should have engineered a solution. A successful jury verdict was obtained. That jury trial, in respect of what would now be known as a reliability-centred maintenance issue, lasted nine days.

The Ash Wednesday fires of 1983 similarly resulted in extensive litigation by multiple firms, again working in co-operation. All claims proceeded by individual writs and, save for the Mortlake fire claim, which was an unsuccessful claim against the local government authority, most claimants received their damages within two years of the fire.

In respect of all of the above fires:

1. all claims were brought by individual writs;
2. there was no case management by the courts;
3. insurers, through a committee formed with the assistance of the Insurance Council of Australia, provided support to the litigating solicitors;
4. all solicitors and counsel acted on an unspoken or informal 'no win:no fee' basis;
5. discovery was completed within a matter of weeks, even in reliability-centred maintenance cases;
6. solicitor:client costs were very small by comparison with today's standards; and
7. the government and leading community members were vocal in their support of the plaintiffs pursuing their rights.

THE RURAL DISTRIBUTION NETWORK

The electricity distribution network underwent enormous expansion approximately 50 years ago, with a single wire earth return (SWER) system delivering power to many farms for the first time. In effect, this system delivers electricity via a single wire conductor carried on a wooden pole, which forms its circuit by way of an earth return. It is an old system and many of its assets are nearing or past their useful life. Pole-top assets – that is, the insulators, pole caps or tie wires holding the conductors – are adversely affected by the various stresses of weather, rust and age and, in particular, a phenomenon called 'Aeolian vibration'. 'Aeolian vibration' is the humming you hear near such lines at wind speeds >>

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of 5 to 15kms per hour. Over time, that vibration causes degradation in all pole-top assets.

7 FEBRUARY 2009 (BLACK SATURDAY)

The devastation caused by fire on Black Saturday was catastrophic. The Black Saturday fires were investigated by the Victorian Bushfire Royal Commission (VBRC). However, prior to the VBRC commencing its hearings, fire victims were discouraged from commencing litigation by persons such as the Victorian attorney-general and the mayor of Horsham, although it was apparent that many of the fires were the result of inadequacies in the power system. The victims even had to fight to get leave to appear on a limited basis before the VBRC. The insurers, despite very successful recovery in earlier fires, did not in the main provide any support to the victims in litigation, preferring instead to adopt a parasitic response to the class actions that were issued.

Class actions were issued in respect of five Black Saturday fires:

1. Horsham – this fire occurred when the pole cap holding the conductor on a SWER line blew off because two of the three retaining screws had fallen out over time. This allowed the wind to blow the cap off the top of the pole with the conductor attached, where it fell to the ground, arcing with the ground and starting a fire. This fire spread in the classical 'J' curve around the city of Horsham, destroying many buildings including homes and the clubhouse of the Horsham Golf Club.
2. Coleraine – where the conductor fell on a SWER line from the top of the pole when the 40-year-old wires tying the conductor to the insulator failed.
3. Weerite/Pomborneit – where the VBRC found that clashing conductors caused metal to be ejected when they arced and started a fire.
4. Beechworth – where the VBRC found that a bifurcated apple gum tree had split and fallen on to the eastern conductor of a three-phase line, bringing it down.
5. Kinglake – where a conductor on a SWER line spanning over 1km across a valley broke. One of the three strands of the conductor had broken a considerable time before the fire and partly unravelled; the remaining two strands failed on Black Saturday, causing the conductor to fall and strike the metal cable acting as a stay on the pole on the other side of the valley, to arc with it and start the fire.

THE LITIGATION SO FAR

Class actions are group proceedings under Part 4A of the *Supreme Court Act* 1986 (Vic). At the time of writing, the progress of these class actions has been as follows:

1. Horsham – after various skirmishes seeking access to reports, including one such issue being determined in the plaintiff's favour by the Court of Appeal, a trial commenced before Justice Jack Forrest in the Supreme Court in Horsham in September 2011. Liability was settled after five weeks of evidence. By that time, all lay evidence had been given; concurrent evidence by four assessors had been received and completed; and three days of an expected seven days of concurrent evidence by eight experts of various disciplines as to liability had been received.

   The settlement involved a discounting of the claim by effectively one-third; His Honour, in the week following settlement of liability, heard submissions on various heads of damages, which had not been agreed, particularly as to those types of damages common to other members of the group. On 5 December 2011, Beach J approved the compromise of the proceedings as to liability and, immediately thereafter, Forrest J gave his judgment as to damages. That judgment has been appealed by the defendant; on 15 March 2012, this appeal was heard by the Court of Appeal, which has reserved its decision.
2. Coleraine – The hearing for the class action in respect of this fire settled in mid-February 2012 on terms similar to Horsham. On 27 March 2012, Beach J approved this settlement.
3. The Pomborneit trial is listed to be heard before Justice Jack Forrest in Warrnambool in September 2012, and is only against the power distributor. (The Horsham, Coleraine and Pomborneit class actions are against the distributing power company, Powercor Australia Ltd.)
4. The Beechworth trial before Dixon J commenced in Wodonga on 5 March 2012. The action was issued against the power company, SPI Electricals Pty Ltd, and the company it engaged to do tree inspections, Eagle Travel Towers Services Pty Ltd. SPI joined the Department of Sustainability and Environment (DSE) and Parks Victoria, on the basis that the tree that fell was on the edge of a national park managed by DSE.

   The trial was listed for eight weeks but, with at least 18 experts in fields as diverse as electrical, fire burn behaviour, arboreal dendochronology and damage assessments, who were to conduct conclaves and produce joint reports before giving concurrent evidence, it was doubtful that the proceeding would have been completed within the allocated time.

   The parties settled this claim on 7 March 2012 (subject to the approval of the Court) for effectively 45 per cent of the damages.
5. The Kinglake trial is listed to start in Melbourne in January 2013 before Justice Jack Forrest. This proceeding has similar parties to the Beechworth fire; that is, the distributor, a contracted inspecting company

and various state parties. The damage caused by this fire was catastrophic, probably ten times the damage caused by the other four fires put together. The destruction was enormous, occasioning 121 deaths and damages estimated to be upwards of $2 billion. The pleadings in this action raise almost every conceivable issue including duty; scope of duty; foreseeability of a fire becoming so large; whether power companies owe duties to people who may insure for that risk; and the liability of bodies such as the Victorian Police and the Country Fire Authority to provide warnings to people of the fires' approach. An application as to whether this is to be heard as a jury or a cause has not yet been determined.

CLASS ACTION LITIGATION

Class action litigation is portrayed by some as American. Yet, since its early evolution (principally through the Federal Court) it has been very much at the forefront of Australian litigation.

The Victorian Supreme Court suggested class action legislation in 1997 to the then attorney-general. When the government did not initially respond, the Court in 1999 introduced Rules of Court to permit such proceedings. This initiative provoked the government to introduce the present legislation in Part 4A of the *Supreme Court Act* 2000. Similar legislation now exists in all jurisdictions across Australia.

Under the Act, a group proceeding is available where seven or more persons have claims against the same person; and the claims of those persons are in respect of, or arise out of, the same, similar or related circumstances; and the claims of the persons give rise to a substantial common question of law or fact.[4]

The object of a group proceeding procedure is to enable a proceeding to be brought by a substantial number of victims of an alleged wrong committed by the same wrongdoer, thereby pooling resources and ensuring that the courts' resources are used efficiently and expeditiously. Where an individual may be deterred from taking on a large financially secure party, the group proceeding legislation is aimed at enabling individuals to band together to bring a proceeding. The guiding principle of Part 4A is justice.[5]

In *Thomas v Powercor Australia Limited*,[6] Forrest J reviewed the purpose of Part 4A:

'26 In the Second Reading Speech in the Federal Parliament in relation to Part IVA of the *Federal Court Act* (which is mirrored by Part 4A of the *Supreme Court Act*), the Commonwealth attorney-general said:

"The government believes that an opt-out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieved the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately."[7]

27 Part 4A was introduced into the *Supreme Court Act* in 2000.[8] In the Second Reading Speech in the Victorian Parliament, the attorney-general said:

"The Supreme Court's initiative was based on the provisions of Part IVA of the *Federal Court Act* 1976 and was designed to provide Supreme Court litigants with a procedure which closely followed the Federal Court procedure.

The rules provide the means by which ordinary litigants could access the court system.

We live in an age of mass production and distribution of goods and services. The potential for loss or damage which can be caused by a single supplier of single goods or services on a mass scale is enormous.

However, while the overall damage may be great, the amount of damage incurred by an individual may be relatively small in proportion to the legal fees and court costs.

In the worst cases, litigants can face ruin yet lack the means to bring proceedings to redress the wrong they have suffered. The class actions procedure addresses some of the imbalance between ordinary litigants and large and powerful corporate litigants."'[9] >>

In today's computerised era, discovery involves tens of thousands of documents and enormous resources – the ability of court processes to manage this time-consuming and costly exercise is the challenge of modern litigation.

Any person of appropriate standing may commence the proceeding (s33E). The proceeding is commenced by writ (s33H). Part 4A is an 'opt-out' model, which does not require the consent of a group member (defined in the originating process) to be part of the group (s33E). The personal identities of group members are not known, nor is their number (s33H). A group member is automatically represented, and bound by the findings of the court (s33ZB), unless he or she opts out of the group (s33J).

The proceeding is subject to specific management procedures by the court, especially in respect of notices including regarding the commencement or proposed settlement of the proceeding or any other matter (s33X), opting in or out (s33J) of the group, and approval of any compromise (s33V). The form of a notice to the group must be approved by the court (s33X).

The lead plaintiff is solely responsible for the costs of the proceeding, including the defendant's costs (s33ZD). The Act, however, provides special powers to the court regarding orders that the costs of the plaintiff be shared by the group (s33ZJ).

The court may, on application by the defendant, order that a proceeding no longer continue under Part 4A, if it is satisfied that it is in the interests of justice to do so, for any reason (including such as excessive costs or, if the relief sought can be obtained by means of a proceeding other than a group proceeding, it is inappropriate for claims to be pursued by means of a group proceeding – s33N).

In summary, if you have more than seven people of a similar interest, a writ may be issued. Once issued, the court supervises the action regarding notices in respect of opting out, compromise and costs. Although class actions seem to be brought by a few larger firms, the mechanism is such that it is relatively easily utilised by any small litigation firm.

THE ADVANTAGES OF A CLASS ACTION

The advantages of proceeding by way of class action are:

(a) A writ may be issued expeditiously once instructions are obtained from a person who has the appropriate status and the class is identified. That writ, once issued, benefits the whole class in respect of entitlements to interest, sharing of costs and suspension of limitation periods (ss33ZE).

(b) Solicitors acting on behalf of the class can focus on proof of the common question (usually liability) without spending too much time and disbursements in taking individual instructions and assessing damages until liability is determined.

(c) The liability for the defendant's costs is limited only to the plaintiff.

(d) There is no need to incur costs of multiple writs, spend time in preparing multiple actions and focusing on individual damages and the assessment thereof. This is a particular advantage in bushfire litigation, where the assessor's costs for an average claim are likely to exceed $10,000.

(e) The size of the claim enables and justifies the engagement of leading experts in each area of dispute.

(f) The defendant cannot cherry-pick settlement, isolate or target particular plaintiffs, or act in a way to divide the group.

THE DISADVANTAGES OF A CLASS ACTION

The disadvantages of running a class action include:

(a) As class members do not have to give instructions, they often do not feel involved in the proceedings.

(b) The creation of such a large single action with the need for notices and close court management inevitably leads to delays, the arguing by the defendant of what can appear to be esoteric defences, and the desire by defendants to fight even small issues with a vigour that would not occur in a non-group proceeding.

(c) The problems of delays and slow recovery of costs mean that solicitors embarking on such actions have to be well-funded in cases where the plaintiff or the group cannot pay, and where insurers adopt a parasitic approach. Often, class action funders must be engaged to provide this resource. Class action funders take a percentage of the bounty of litigation if so engaged. The stresses of running a long action without funding have been felt by those acting for the plaintiffs in the Black Saturday proceedings. As these proceedings are now entering their fourth year, the visits by counsel and

solicitors to friendly bank managers for carry-on finance are increasing.

(d) Insurers have shown that they can 'fence sit' without committing to the welfare of the group or the capacity of the group, which they would be less able to do with individual writs. The benefit of this, however, is that the solicitors for victims are not required to be answering to their needs and demands in the conduct of the litigation, but only that of the insured.

(e) A group member in an opt-out class action is able to free ride on a representative party's efforts, because they are not obligated to contribute to the costs of bringing the proceeding or to any adverse costs order, should the proceeding be unsuccessful.[10]

(f) Technical issues peculiar to Part 4A proceedings frequently arise, requiring the proceeding to be more complex than if on behalf of only one plaintiff.

WHERE TO NOW?

Having been closely involved in bushfire litigation over the last 35 years, my principal observations are:

1. As with all litigation, discovery is a major issue. In fire litigation in the 1970s and 80s, before the era of computers, email, easy access to photocopiers and printers, the volume of documents discovered would not extend beyond two or three lever arch folders. Discovery now involves tens of thousands of documents, some only ever being in email form. Discovery involves enormous manpower in its collation, provision, dissemination and understanding. The ability of the court processes to manage this highly time-consuming and costly exercise is the challenge of modern litigation.
2. The breaking of the SEC into private corporations, whose prime motivation is profit, and the outsourcing by them of various tasks, has led to a different attitude to litigation to that adopted previously by the SEC. In effect, it considered itself an extension of government with a community responsibility. This change in attitude has resulted in a far less co-operative approach to the resolution of issues and the provision of compensation to victims.
3. The greater the involvement of an inquiry such as the VBRC and management by courts, the greater the risk of delay. In effect, parties are forced to prepare cases in piecemeal fashion, focusing on the next stage of the VBRC or the next directions hearing for the resolution of a question that directs the next action to be taken. The old system of preparing for trial, with access back to the court possible only if a party was not complying, results in much quicker and cheaper access to justice.

While justice is now being obtained for the victims of the Black Saturday fires, it is a pity that the system itself has slowed down the delivery of that justice. This delay has itself effectively obstructed justice, creating as it has circumstances that encourage compromise and exacerbate the scars of people who have already been badly injured in body, mind and property. ■

Notes: **1** Sitting as a Board of Inquiry into *The Occurrence of Bush and Grass Fires in Victoria report*. **2** *Wollington v SEC* (1) 1979 VR 115. **3** *Dunn v SEC* (unreported Hamilton Supreme Court September 1988). **4** See s33C of the *Supreme Court Act* 1986. **5** See s33ZF. **6** *Thomas v Powercor Australia Limited* (Ruling No. 1) [2010] VSC 489. **7** Second Reading Speech by the attorney-general, Australia, House of Representatives Parliamentary Debates, *Hansard*, 14 November 1991, p3176. **8** Act No. 78 of 2000. **9** Second Reading Speech by the attorney-general, Victoria, House of Assembly, Vic *Hansard*, 1252, 2000. **10** Michael Legg, 'Funding a class action through limiting the group: What does Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) permit?' (2010) 33 *Australian Bar Review* 17, 23.

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