



AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2017/131194

TITLE OF PROCEEDINGS

First plaintiff	Manfred Kuhn
Second plaintiff	Elizabeth Kaye Stewart
Defendant	Infigen Energy Limited ABN 39 105 051 616

FILING DETAILS

Filed for	Manfred Kuhn and Elizabeth Kaye Stewart, the plaintiffs
Legal representative	Brendan Pendergast, Maddens Lawyers 219 Koroit Street, Warrnambool, Victoria, 3280 DX:28001 Tel: (03) 5560 2000
Legal representative reference	170191
Contact name and telephone	Brendan Pendergast, (03)55602000
Contact email	bfp@maddenslawyers.com.au

TYPE OF CLAIM

Torts - Negligence - Personal Injury - Property Damage

RELIEF CLAIMED

The plaintiffs claim on their own behalf and on behalf of each of the Group Members:

- A. Damages.
- B. Costs.
- C. Interest on damages and costs pursuant to sections 100 and 101 of the *Civil Procedure Act 2005* (NSW).
- D. Such further order as the Court deems fit.

PLEADINGS AND PARTICULARS

A. INTRODUCTION

A.1. The plaintiffs

1 The first and second plaintiffs (**plaintiffs**):

- a. owned personal and real property in New South Wales at 783 Mount Fairy Rd, Mount Fairy;
- b. suffered loss and damage by reason of the bushfire which commenced on 17 January 2017 in the vicinity of Tarago (**Currandooley Bushfire**) and burnt the area depicted in Annexure 1;
- c. commence this proceeding as a representative proceeding pursuant to section 157 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**) on behalf of all persons (**Group Members**), who or which:
 - i. suffered loss or damage to property as a result of the Currandooley Bushfire;
 - ii. suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of:
 - A. the Currandooley Bushfire; and, or alternatively
 - B. an injury to another person as a result of the Currandooley Bushfire.

(where psychiatric injury in this group definition means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed by a medical practitioner prior to the commencement of this proceeding);
 - iii. are the legal personal representatives of the estates of any person who would be a Group Member but for their death after the date of the fire;
 - iv. are not any of the following:
 - A. a related party (as defined by section 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of Infigen Energy Limited (**Infigen**);

- B. a related body corporate (as defined by section 50 of the Corporations Act) of Infigen;
- C. an associated entity (as defined by section 50AAA of the Corporations Act) of Infigen;
- D. an officer or a close associate (as defined by section 9 of the Corporations Act) of Infigen; or
- E. the Commonwealth or a State or any body corporate, Minister or officer acting in the capacity of an officer of the Commonwealth or a State.

2 Immediately prior to the commencement of this proceeding, seven or more persons have claims against Infigen within the meaning of section 157 of the Civil Procedure Act.

3 The plaintiffs and Group Members have the same interest in this proceeding, by reason of the fact that the plaintiffs and each Group Member claim the same type of relief against Infigen in negligence and require a resolution of at least the common issues of law or fact identified in Section D of this amended statement of claim.

A.2. Infigen Energy Limited (Infigen)

4 Infigen is and at all material times was:

- a. incorporated pursuant to the Corporations Act and capable of being sued;
- b. the owner and operator of the Capital Renewable Energy Precinct located near Bungendore in New South Wales, Australia incorporating the Capital Windfarm comprising 67 wind turbines and the Woodlawn Windfarm comprising 23 wind turbines;
- c. the owner of and had under its care, control and management the electricity power lines and associated equipment or electricity structures that formed the distribution system used to convey and control the conveyance of electricity within and from the Capital Windfarm and the Woodlawn Windfarm (**Electricity Works**); and
- d. to the extent that the Capital Windfarm, Woodlawn Windfarm or Electricity Works were built on land that Infigen did not own or lease in whole, was licenced to keep in place and maintain the Capital Windfarm or Electricity Works on the land on which they were situated.

B. CURRANDOOLEY BUSHFIRE

- 5 Shortly before 10:00 AM on 17 January 2017, the Currandooley Bushfire commenced in grass adjacent to the Electricity Works.

Particulars

*The Currandooley Bushfire commenced in the vicinity of pole #25 of the WOO 33 kV transmission powerline ("**pole #25**") which passes from Woodlawn Windfarm to a substation on the Capital Windfarm owned and operated by Infigen.*

- 6 The Currandooley Bushfire spread from its point of ignition to surrounding areas and caused extensive damage before being brought under control.
- 7 The Currandooley Bushfire was caused by a bird coming into contact with the Electricity Works.

Particulars

The Currandooley Bushfire was caused by an interaction between a bird and the Electricity Works, which involved, alternatively:

- a. *a bird coming into contact with two phases or a phase and ground, causing the bird to be electrocuted, catch on fire and fall into dry grass at the base of pole #25, causing a fire to commence;*
- b. *a bird coming into contact with two phases or a phase and ground, causing the Electrical Works to ignite and eject burning or heated material, causing a fire to commence in the vicinity of the base of pole #25;*
- c. *a bird perched on the Electrical Works ejecting a streamer onto or near an insulator or conductor forming part of the Electricity Works, causing a flashover and an ignition by either of the sub-particulars a. or b. above; or*
- d. *a bird otherwise configuring the Electricity Works so as to cause the Currandooley Bushfire.*

C. NEGLIGENCE

C.1. Duty of Care

- 8 At the material times, Infigen caused or allowed electricity to be transmitted via the Electricity Works.
- 9 At the material times, Infigen knew or ought to have known that the activity of transmitting electricity via the Electricity Works created a risk of fire (**Risk of Fire**).

Particulars

Infigen as a producer and transmitter of electricity knew or ought to have known that the activity of transmitting electricity carried a risk that electricity might escape from the Electricity Works and cause fire on or around the Electricity Works.

- 10 At the material times, Infigen knew or ought to have known that the Risk of Fire created a risk of:
- a. loss or damage to the property of the plaintiffs and Group Members; and, or alternatively
 - b. personal injury (whether physical injury, or psychiatric injury as defined in paragraph 1c.ii of this amended statement of claim) to the persons of the plaintiffs and Group Members,
- (together, **Risk of Harm**).

Particulars

The Risk of Harm arose because:

- a. *if ignition by the Risk of Fire occurred in a bushfire prone area in bushfire season there was a risk of a bushfire; and*
- b. *if a bushfire occurred in the vicinity of the Electricity Works there was a risk that a class of persons including the plaintiffs and Group Members would suffer loss and damage to their property and person.*

- 11 At the material times, the plaintiffs and Group Members:
- a. had no or no practicable ability to prevent or minimise the risk of a fire starting in connection with the Electricity Works by the Risk of Fire;
 - b. were vulnerable to the impact or effects of such fire; and consequently
 - c. were dependent, for the protection of their persons, property and interests, upon Infigen taking precautions against the Risk of Harm.
- 12 As a result of the matters pleaded in paragraphs 8 to 11 above (separately or in combination) Infigen, at the material times, owed a duty of care to the plaintiffs and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm (**Duty of Care**).

C.2. Breach

- 13 At the material times, the Risk of Harm was:
- a. foreseeable to Infigen; and
 - b. not insignificant.

Particulars

- a. *Infigen was aware of the Risk of Fire and the Risk of Harm.*

- b. *Infigen was aware that, on 4 January 2017, a fire broke out at a property known as "Pylara", which spread over 20ha and that the fire was caused by a crow landing on or near pole #67 of the WOO 33 kV transmission powerline, being electrocuted and falling alight to the ground.*
- c. *Infigen was aware that it was not uncommon for bird strikes to occur on powerlines and that a bird strike could cause a fire.
(<http://www.theaustralian.com.au/news/nation/flaming-crows-bird-on-wire-sparks-bushfire/news-story/22148adfcc118eae0ca015ab426392ce>)*
- d. *Following the Currandooley Fire, Infigen conducted environmental improvements including laying gravel around the base of power poles and slashing/spraying long grass.
(<http://www.theaustralian.com.au/news/nation/flaming-crows-bird-on-wire-sparks-bushfire/news-story/22148adfcc118eae0ca015ab426392ce>)*
- e. *Infigen was aware that the Capital Windfarm and Electricity Works were located in an area designated by the Rural Fire Service as bushfire prone.*
- 1. *Infigen was aware that a Total Fire Ban was in place on 17 January 2017.*
- g. *Infigen was aware that the foreseeable local conditions for the land upon which the Electricity Works were located and its surrounds included:*
 - *dry environmental conditions;*
 - *low atmospheric humidity;*
 - *high ambient temperature; and*
 - *strong winds.*

14 As a result of the matters pleaded and particularised in paragraphs 9 to 13 above:

- a. there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
- b. the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve destruction of property and danger to life;
- c. the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and potential seriousness of the harm if that occurred; and
- d. the social utility of Infigen operating the Electricity Works was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.

15 As a result of the matters pleaded and particularised in paragraphs 9 to 14 above, a reasonable person in the position of Infigen at the material times would have taken the following precautions against the materialisation of the Risk of Harm:

- a. reducing fuel load in the vicinity of the Electricity Works, and in particular near the parts of the Electricity Works comprising high-voltage transmission lines, including near the WOO 33 kV transmission powerline;

Particulars

Fuel load should have been managed by:

- a. *regular scheduled slashing and maintenance operations in the vicinity of the Electricity Works supplemented by additional slashing as necessary when inter alia weather conditions led to greater and higher grass in the vicinity; or alternatively*
 - b. *cultivation or tilling of the soil within any easement area of the Electricity Works.*
- b. installing safety features on those parts of the Electricity Works comprising high-voltage transmission lines to minimise dangerous interaction of animals or objects;

Particulars

The following safety features should have been installed:

- a. *beds of gravel or other non-flammable material around the pylons supporting the Electricity Works;*
 - b. *an appropriately designed auto-reclose system; and, or alternatively*
 - c. *adequate separation and/or insulation of active conductors to minimise flashover from external causes..*
- c. modifying or designing the Electricity Works to deter bird strikes or other unsafe animal contact, including the emission of streamers over high-risk areas; and, or alternatively

Particulars

The following modification or design features should have been adopted:

- a. *bird deterrents and/or diverters, including perch deterrents and safe perches to lure birds away from energised conductors and nearby hardware;*
- b. *insulating sleeves, including placing low density polyethylene pipe over live aluminium conductor steel-reinforced cables (in particular the centre phase and where used as a jumper on auxiliary structures) to prevent birds or animals contacting two phases or a phase and ground; and, or alternatively*

c. covered or gapped ground conductors to prevent phase to ground contact by birds or animals.

- d. immediate reporting of actual or suspected ignitions to emergency services in bushfire season and/or Total Fire Ban days.

(together and separately, **Bushfire Risk Precautions**).

16 Infigen failed to take reasonable care in relation to the Risk of Harm by reason of it, prior to 17 January 2017:

- a. failing to reduce fuel load in the vicinity of the WOO 33 kV transmission powerline in bushfire season;
- b. failing to lay gravel beds (or other non-flammable material) under the WOO 33 kV transmission powerline poles and/or pylons;
- c. failing to install an appropriate auto reclose system on the Electricity Works;
- d. failing to adequately separate or insulate the conductors;
- e. failing to modify or design the WOO 33 kV transmission powerlines and auxiliary infrastructure so as to minimise the risk of unsafe bird contact with the Electricity Works;
- f. failing to contact emergency services as soon as the ignition which resulted in the Currandooley Bushfire became apparent; and, or alternatively
- g. otherwise failing to carry out or carry out with reasonable care any of the Bushfire Risk Precautions particularised in paragraph 15 above.

(together and separately, **Bushfire Risk Failures**).

17 By reason of one or more of the Bushfire Risk Failures, Infigen breached its Duty of Care (**Bushfire Risk Breach**).

C.3. Causation

18 Had the Bushfire Risk Breach not occurred, the Currandooley Bushfire:

- a. would not have occurred; and
- b. would not have caused loss and damage to the plaintiff and Group Members.

C.4. Loss and damage of plaintiffs

19 The plaintiffs have suffered loss and damage as a result of the Bushfire Risk Breach.

Particulars

The loss suffered by the plaintiffs is:

- a. *the cost of repair of property;*
- b. *any diminution in the value of property; and, or alternatively*
- c. *any consequential losses being the necessity to pay interest and other expenses resulting from the damage to property.*

Further particulars of further loss and damage will be provided in due course and prior to the hearing.

C.5. Loss and damage of Group Members

20 Group Members have suffered loss and damage as a result of the Bushfire Risk Breach.

Particulars

The loss suffered by Group Members will be particularised following the initial trial of the plaintiffs' claim and prior to the determination of Group Members' claims but with the plaintiffs' current state of knowledge will likely consist of:

- a. *the cost of repair of property plus any diminution in the value of property post any repairs;*
- b. *the cost of replacement of property less any salvage value of the damaged property;*
- c. *any consequential losses being the loss to income and profits resulting from the damage to property;*
- d. *any consequential losses being the necessity to pay interest and other expenses resulting from the damage to property; and, or alternatively*
- e. *personal injury (if relevant to a particular Group Member).*

D. COMMON QUESTIONS OF LAW OR FACT

21 The questions of law or fact common to the claims of the plaintiffs and each Group Member are:

- a. whether the Risk of Fire and Risk of Harm existed;
- b. whether Infigen owed the Duty of Care to the plaintiffs and Group Members;
- c. the nature, scope and content of the Duty of Care;
- d. whether the Risk of Harm was foreseeable;
- e. whether a reasonable person in the position of Infigen at the material times would carry out the Bushfire Risk Precautions;

- f. whether and to what extent the Bushfire Risk Failures were breaches of the Duty of Care;
- g. whether the Bushfire Risk Breach caused or contributed to the Currandooley Bushfire; and
- h. the principles for identifying and measuring compensable loss suffered by the claimants resulting from the breaches of duty or negligence alleged herein.

SIGNATURE OF LEGAL REPRESENTATIVE

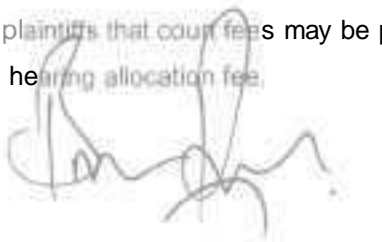
I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiffs that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature



23rd June 2016

BRENDAN FRANCIS PENDERGAST
of Maddens Lawyers 219 Korot Street
Warrnambool, An Australian legal practitioner
within the meaning of the Legal Profession
Uniform Law (Victoria)

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiffs' costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 if money is claimed, and you believe you owe the money claimed,** by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
 - Paying the plaintiffs that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales Law Courts Building, Queens Square 184 Phillip Street, Sydney NSW 2000 Australia
Postal address	Supreme Court of New South Wales GPO Box 3 Sydney NSW 2001 Australia DX: 829 Sydney
Telephone	(02)9230 8111

SWORN at

Warrnambool, Victoria

Signature of deponent



Name of witness

Christopher McDonald

Address of witness

219 Koroit Street, Warrnambool, Victoria, 3280.

Capacity of witness

Lawyer

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35 7B.

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

