

# Case Alert

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20 FEBRUARY 2019

## Bushfire class action summarily dismissed by Victorian Court

***Block v Powercor [2019] VSC 15***

### AT A GLANCE

- In *Block v Powercor*, the Victorian Supreme Court summarily dismissed the lead Plaintiffs' claims for breach of statutory duty, negligence and nuisance in a bushfire class action issued against a Victorian electricity distributor, saying the propositions put forward by the Plaintiffs that the Defendant created or aggravated the risk were "fanciful."
- The decision is noteworthy as summary dismissals are rare, particularly in class actions and representative proceedings.
- While the decision largely turned on its facts, it reinforces the principle explained by the High Court in *Sullivan v Moody* that no general duty of care arises if that duty cuts across clear statutory responsibilities or functions.
- Wotton + Kearney acted for the successful party.

### Background

The lead Plaintiffs, Nicholas and Georgina Block, issued a class action against a Victorian electricity distributor regarding the "Gazette" bushfire in South West Victoria on St Patrick's Day 2018.

The fire started when a healthy blue gum in a privately owned plantation fell on the Defendant's low voltage line in severe weather. The tree was on the edge of a row that maintained an approximate 20m clearance between the trees and the powerline that intersected the plantation. Although the tree was just over 20m from the powerline, it was about 30m tall, which meant that if it fell in a particular direction it was capable of contacting the line.

The Plaintiffs alleged that the tree was an obvious hazard to the line, and the Defendant, as operator of the line, should have reasonably known of the risk and taken steps to maintain a safe distance between the tree and conductors, or had systems in place to identify and trim such trees.

## The statutory framework

The Plaintiffs relied on s 84 of the *Electricity Safety Act 1998* (Vic), which provides a broad obligation for electricity distributors to “keep the whole or any part of a tree clear of a line”.

Subordinate regulation to the Electricity Safety Act, the Line Clearance Code, exhaustively sets out the practices distributors need to adopt and observe regarding clearing vegetation to powerlines. The Code has a long legislative history originating from predecessor regulations made after the Ash Wednesday fires and Sir Esler Barber’s report in 1976. The Code defines a “minimum clearance space” between a tree and powerlines, which for the blue gum in question was unchallenged as 3.9m, as calculated by the Defendant under technical parameters in the Code.

## The decision

To qualify for summary dismissal the Court had to be persuaded that the proceeding had no real prospect of success, which is a high threshold.

In assessing whether the Defendant owed a duty of care in the particular circumstances, the Court considered a number of decisions from the High Court of Australia, which led the Court to conclude that the Plaintiffs’ claims must fail due to the inconsistencies between the content of the general duty alleged and the detail of the Defendant’s obligations and responsibilities under the statutory scheme.

The Court, when looking at the legislation as the “unavoidable starting point”, held that there was no specific responsibility on the Defendant if a healthy tree outside the minimum clearance space inexplicably fell and came into contact with a powerline. The Defendant was under a statutory duty to take measures for bushfire mitigation, as well as to balance the risk with environmental concerns about tree clearance.

Under the statutory scheme, the Defendant was not permitted to remove a healthy native tree from another person’s land, particularly if it was situated beyond the minimum clearance space. The recognition of a general duty at common law would distort the effect of the statutory functions and this incoherence was held by the Court to be “fatal” to the claims in both negligence and nuisance. The incompatibility was described in the judgment as a “lack of coherence falling short of a direct clash” between the alleged general duty and the statute.

The Court also observed that the Defendant was not in control of the risk that the tree would fall because it did not have the power to “clear all trees that might in theory have fallen and made contact with its powerline”.

The proposition that the Defendant created or aggravated the risk by failing to clear healthy trees in a plantation was considered “fanciful” and the Plaintiffs’ claim was summarily dismissed.

This decision upholds the principle that no general duty of care arises if that duty cuts across clear statutory responsibilities or functions, as explained by the High Court in *Sullivan v Moody* [2001] HCA 59. It remains to be seen whether the decision will be appealed by the Plaintiffs.

## What’s of interest to insurers?

In *Block v Powercor*, the claimed common law duty cut across a carefully crafted statutory scheme that has been in place for many years. While the case is fact-specific, the Court’s approach to construing a common law duty in line with legislation highlights the importance of the structures created by statutory regimes to companies and their insurers operating in highly regulated industries such as utilities.

The outcome in this case is a relative rarity in class actions but it shows that, despite the tragic impact of bushfires on people and property, not all fires caused by electrical assets are compensable.

## Need to know more?

For more information please contact us.



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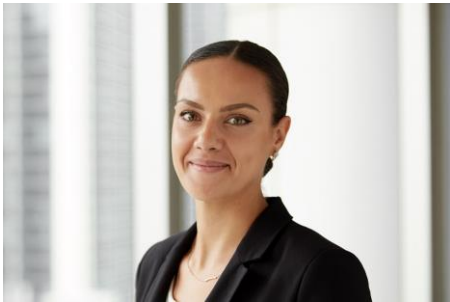


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