

**FURTHER AMENDED STATEMENT OF CLAIM**

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General
Registry	Sydney
Case number	2015 / 368036

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Sharon Patricia Weber</b>
Defendant	<b>Greater Hume Shire Council</b>

**FILING DETAILS**

Filed for	<b>Sharon Patricia Weber, plaintiff</b>
Legal representative	Maddens Lawyers 219 Koroit Street WARNAMBOOL VIC 3280 DX 28001 Ph 03 5560 2000 Fax 03 5560 2099
Legal representative reference	150406 / 151167
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**TYPE OF CLAIM**

Tort – Negligence, Nuisance.

**RELIEF CLAIMED**

The Plaintiff claims on behalf of herself and the Group Members:

- 1 Damages.
- 2 Costs.
- 3 Interest.
- 4 Such further or other orders as the Court thinks fit.

**PLEADINGS AND PARTICULARS**

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## A. PRELIMINARY

### *Plaintiff*

- 1 At all material times, the Plaintiff was the lessee and tenant of the real property known as 14 Rose Street, Gerogery (**the Plaintiff's Residence**).
- 2 The Plaintiff brings this proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) on her own behalf and on behalf of group members.

### *Fire*

- 3 At around 1:30pm on 17 December 2009, a fire started at Walla Walla Rubbish Tip (**the Fire**).
- 4 The Fire burnt the area depicted in Annexure 1 (**Fire Area**).

### *Group Members*

- 5 The group members to whom this proceeding relates are:
  - a. all persons who suffered loss or damage to property as a result of the Fire;
  - ~~b. all persons who at the time of the Fire resided in, or had real or personal property in, the Fire Area and who suffered economic loss, such loss not consequent upon injury to that person or loss of or damage to their property;~~
  - c. all those persons who suffered personal injury (whether physical injury, or psychiatric injury as defined below) as a result of:
    - i. the Fire; and/or
    - ii. the injury to another person as a result of the Fire;

where psychiatric injury in this group definition means nervous shock or another psychiatric or psychological injury, disturbance, disorder or condition which has been diagnosed as such in a diagnosis given to the person by a medical practitioner prior to the commencement of this proceeding;

- d. the legal personal representatives of the estates of any persons in (a) or (b) as at the commencement of this proceeding but have since died;

but provided that the group members in this proceeding will not include the following person:

- i. the Commonwealth, a State or Territory; or
- ii. a Minister of the Commonwealth, a State or a Territory; or
- iii. a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an ~~incorporated company or association,~~ and body incorporated pursuant to the *Corporations Act (2001) (Cth)* ("*Corporations Act*") or the *Associations Incorporations Act 2009 (NSW)*; or
- iv. an officer of the Commonwealth, a State or a Territory in his or her capacity as an officer.

**(Group Members).**

- 6 As at the commencement of this proceeding, there were seven or more Group Members.

*Greater Hume Shire Council*

- 7 At all material times, Greater Hume Shire Council (**the Council**) was a body politic capable of being sued.

**Particulars**

The Plaintiff refers to section 220 of the *Local Government Act 1993 (NSW)*.

- 8 At all material times, the Council:
- a. operated the Walla Walla Rubbish Tip; and
  - b. occupied the land on which the Walla Walla Rubbish Tip was situated.

**B. NEGLIGENCE****Duty**

- 9 At all material times, the Council:
- a. had the ultimate responsibility for all activities associated with planning, design, construction, operation and maintenance of the Walla Walla Rubbish Tip; and
  - b. had the right, to the exclusion of other private persons, to:
    - i. operate and maintain the Walla Walla Rubbish Tip; or
    - ii. give directions as to the operation and maintenance of the Walla Walla Rubbish Tip;
  - c. exercised the right referred to in subparagraph 'b' above; and
  - d. in the premises, had practical control over the Walla Walla Rubbish Tip.
- 10 At all material times, it was reasonably foreseeable to the Council that:
- a. waste at the Walla Walla Rubbish Tip could ignite and sustain a fire;
  - b. if such a fire commenced, the risk of a bushfire of the spread and severity of the Fire was not insignificant;
  - c. if a bushfire occurred, there was a not insignificant risk that the Plaintiff and Group Members would suffer:
    - i. loss or damage to property within the Fire Area and consequential losses including economic losses;
    - ii. damage to property and consequential losses including economic losses within areas:
      1. affected by the physical consequence of fire, such as smoke or debris; or
      2. the subject of emergency activity to prevent the spread of fire;

**("Affected Areas")**

~~iii. economic loss, including by reason of:~~

~~1. disruption or impairment of the income earning activities of persons residing or carrying on business in the Fire Area or Affected Areas;~~

~~2. impeding the use or amenity of property located in the Fire Area or Affected Areas; or~~

~~3. reducing the value of property or businesses located in the Fire Area or Affected Areas;~~

iv. personal injury.

d. the risks referred to in subparagraph 'c' were likely to be higher on days of extreme bushfire risk.

11 At all material times, Group Members:

a. had no or practical ability to prevent or minimise the risk of a fire starting in the Walla Walla Rubbish Tip; and

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 the Council ensuring that:

i. no fire would start in the Walla Walla Rubbish Tip; and further or alternatively

ii. any such fire would not spread beyond the Walla Walla Rubbish Tip.

12 In the premises, the Council owed the Group Members a duty to take reasonable care to avoid prevent:

a. a fire igniting at the Walla Walla Rubbish Tip; and

b. any such fire spreading beyond the Walla Walla Rubbish Tip;

**(the Duty).**

## Standard of care

### *Foreseeable risks of harm*

- 13 At all material times, it was reasonably foreseeable that:
- a. a fire could ignite from waste kept and deposited at the Walla Walla Rubbish Tip:
  - b. ~~such a~~ fire ignited within the Walla Walla Rubbish Tip could spread within the tip, including by reason of:
    - i. no or no adequate fire breaks between different kinds of waste;
    - ii. the presence of trees, dry leaves or high grass within the tip;
    - iii. the presence of exposed combustible waste;
    - iv. the failure to suppress any fire after it commenced;
  - c. ~~such a~~ fire ignited within the Walla Walla Rubbish Tip could spread to surrounding areas causing bushfire, including by reason of:
    - i. the matters set out in the preceding subparagraph; and
    - ii. no or no adequate fire break around the tip;
  - d. the matters referred to in subparagraphs 'a' to 'c' presented risks to human life and property (the ***Risk of Harm***).

### *Probability and seriousness of the Risk of Harm occurring*

- 14 At all material times:
- a. the Walla Walla Rubbish Tip was bordered to the south-east by the Walla Walla Golf Course;
  - b. the Walla Walla Golf Course was not maintained and had tall grass.
- 15 At all material times, the foreseeable local conditions for the Walla Walla Rubbish Tip and its surrounds included:
- a. dry environmental conditions;

- b. low atmospheric humidity;
- c. high ambient temperatures; and
- d. strong winds.

16 By reason of the matters set out at paragraphs 13 to 15:

- a. the probability of the Rrisk of Hharm occurring if care were not taken was not insignificant; and
- b. the likely seriousness of the harm occurring in the event that the Rrisks of Hharm eventuated was potentially catastrophic.

*Precautions*

17 As a result of the matters pleaded in paragraphs 13 to 16, a reasonable person in the position of the Council would have taken the following precautions against the Rrisk of Hharm:

- a. prepare and implement a fire management plan to minimise the incidence and impact of fire at the Walla Walla Rubbish Tip;

*Precautions to reduce or control the spread of fire*

- b. create and maintain effective fire breaks around the perimeter of the facility and each kind of waste stored or deposited thereat;
- c. consolidate deposited waste into the appropriate areas;
- d. remove fuel such as trees, dry leaves and high grass from the facility, including from and adjacent to each particular waste area, on a sufficiently regular basis so as to prevent dangerous build-up;
- e. install and maintain fire-fighting equipment adequate to fight fires at any part of the facility;
- f. undertake inspection and monitoring of the facility during periods of extreme bushfire risk, including by way of remote monitors or closed circuit televisions;



Fire prevention precautions

- g. ensure different kinds of waste were not and did not remain mixed together, including by taking the following steps:
  - i. inspecting the waste as it was brought onto the site by the customer; and
  - ii. directing the customer to deposit the waste in the appropriate area or areas;
  - iii. supervising or otherwise verifying that the customer deposited the waste in the appropriate area or areas; and
  - iv. at the end of each operating day, inspecting the waste areas and undertaking any necessary rectification.
- h. cover waste with cover material on a sufficiently regular basis so as to minimise the risk of fire, particularly in high risk bushfire periods;

**Particulars**

Waste should have been covered with daily, intermediate and final non-combustible cover material such as soil.

- i. manage green waste piles so as to minimise risk of self-combustion, including *inter alia*:
  - i. regularly aerating green waste piles;
  - ii. minimising their height; and
  - iii. disbursing them to non-combustible levels;
- j. manage combustible material so as to minimise the risk of combustion, including *inter alia*:

- i. restrict, further and alternatively prohibit, receipt of combustible materials during bushfire season;
- ii. ensure that all combustible materials are either disposed and buried or stored in appropriate areas or receptacles; and
- iii. divide combustible waste of any particular kind into small separate piles so as to keep a pile of material that might ignite separate from other combustible material.

## **Breach**

18 The Council failed to take reasonable care by reason of:

- a. having no or no adequate fire management plan to minimise the incidence and impact of fire;

### **Particulars**

Insofar as the plaintiff is able to say prior to discovery, the absence can be inferred from the failures identified below.

- b. taking no or no adequate steps to reduce or control the spread of fire by reason of:
  - i. ~~the absence of~~failing to create an effective fire break around the perimeter of the Walla Walla Rubbish Tip;
  - ii. ~~the absence of~~failing to create effective fire breaks around different types of waste;
  - iii. failing to, or to adequately consolidate~~ion of~~ —deposited waste into designated areas;

### **Particulars**

In July 2009, the Council reduced the frequency of contracted maintenance works, including works to consolidate deposited waste, from weekly to fortnightly.

- iv. ~~failing the failure~~ to remove trees, dry grass and high grass present in the Walla Walla Rubbish Tip in the period leading up to and including the date of the Fire;
  - v. ~~the failure~~failing to install fire-fighting equipment;
  - vi. ~~the absence failing to, or to adequately, offailing to monitor any monitoring the Walla Walla Rubbish Tip~~ during periods of extreme bushfire risk; and
- c. taking no or no adequate steps to prevent fire, including by reason of:
- i. ~~ensuring failing to, or to adequately manage~~ different kinds of waste so that they were not and did not remain mixed together;

#### **Particulars**

Insofar as the Pplaintiff is able to say prior to discovery, the Council failed to or failed to adequately:

- (a) supervise or otherwise verify that customers deposited waste in appropriate areas; and
  - (b) at the end of each operating day, inspect the waste areas and undertake any necessary rectification.
- ii. ~~covering failing to, or to adequately, cover~~ waste with cover material on a sufficiently regular basis so as to minimise the risk of fire; ~~including by reason of:~~

#### **Particulars**

Insofar as the Pplaintiff is able to say prior to discovery, the Council:

- (a) did not cover green waste; and
  - (b) covered general waste in part and fortnightly only.
- In July 2009, the Council reduced the frequency of contracted maintenance works, including 'pushing' waste and covering in part some waste, from weekly to fortnightly.
- iii. failing to, or to adequately, manageing green waste piles so as to minimise the risk of self-combustion;

### Particulars

Insofar as the Plaintiff is able to say, green waste was burnt in November 2009.

~~We~~The Plaintiff refers to and repeats the particulars to subparagraph 'ii' above.

- iv. failing to, or to adequately, manage combustible waste so as to minimise the risk of combustion;

### Particulars

Insofar as the Plaintiff is presently able to say, the Council did not or did not adequately:

- (a) restrict or prohibit receipt of combustible materials during bushfire season; and
- (b) ensure that all combustible materials are either disposed and buried or stored in appropriate areas or receptacles; and
- (c) divide combustible waste of any particular kind into small separate piles so as to keep a pile of material that might ignite separate from other combustible material

Insofar as the Plaintiff is able to say, a pile of tyres was present at the Walla Walla Rubbish Tip burnt in the fire.

Further, ~~we~~ the Plaintiff refers to and repeats the particulars to paragraph 'b' 'iii' above.

### **(the Tip Management Failures).**

- 19 By reason of one or more of the Tip Management Failures, the Council breached the Duty **(the Tip Management Breach).**

### **Causation**

- 20 The Fire was caused by the Tip Management Breach.

## Loss and damage

- 21 As a result of the Tip Management Breach the Plaintiff and Group Members have suffered loss and damage.

### Particulars

The Fire destroyed:

- (a) all of the Plaintiff's personal property at the Plaintiff's Residence at the time of the Fire; and
- (b) the Plaintiff's two pet dogs.

The Plaintiff further has suffered inconvenience.

Particulars of the Group Members' loss and damage will be provided after determination of common questions.

## C. NUISANCE

- ~~22~~ Further to the matters in paragraphs 9-21 above, the Plaintiff brings this proceeding as a subgroup representative of those Group Members (~~Subgroup Group Members~~) who suffered loss or damage caused by the Fire's interference in their use or enjoyment of the interests in land held by them.

### Creation of nuisance

- ~~23~~22 The Fire was caused by the Council's Tip Management Failures.

### Foreseeability of loss and damage

- ~~24~~23 At all material times:

- a. the matters in paragraph 10 and ~~13~~12; and
- b. the risk that a fire ignited in the Walla Walla Rubbish Tip would unreasonably interfere with the use or enjoyment of the interests in land:
  - i. over which the fire passed; further or alternatively

- ii. that was affected by the physical consequences of the fire or by emergency response to the fire;
- iii. by the Plaintiff and ~~Subgroup~~Group Members;

were reasonably foreseeable to the Council.

### **Interference with interests in land**

2524 The Fire substantially and unreasonably interfered with the use or enjoyment of the interests in land held by the Plaintiff and ~~Subgroup~~Group members.

#### **Particulars**

The Fire burned over and destroyed all property which the Plaintiff owned or otherwise had an interest in, and which was situated at the Plaintiff's Residence. Particulars of the Plaintiff's losses are set out in paragraph 21 above.

Particulars of interference suffered by ~~Subgroup~~Group Members will be provided after determination of common questions.

2625 In the circumstances set out in paragraphs 1-2425, the Plaintiff and the ~~Subgroup~~Group Members suffered nuisance created by the Council (**the Nuisance**).

### **Loss and damage**

2726 As a result of the Nuisance, the Plaintiff and ~~Subgroup~~Group Members have suffered loss and damage.

#### **Particulars**

The Plaintiff repeats her particulars in paragraph 21.

Particulars of the ~~Subgroup~~Group Members' loss and damage will be provided after determination of common questions.

**D. COMMON QUESTIONS OF LAW OR FACT**

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

- 1 whether the General Duty was owed by the Council to the Plaintiff and the Group Members, and if so, the content of the General Duty;
- 2 whether the Tip Management Failures were breaches of the General Duty;
- 3 whether the Tip Management Breaches caused the Fire;
- 4 whether the Plaintiff and ~~Subgroup~~Group Members suffered nuisance created by the Council;
- 5 what are the principles for identifying and measuring compensable losses 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 plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature

## **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 plaintiff's 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](http://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 plaintiff 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](http://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: 828 Sydney
Telephone	(02) 9230 8111

## AFFIDAVIT VERIFYING

Name    Brendan Francis Pendergast  
Address                                        219 Koroit Street Warrnambool, Victoria 3280  
Occupation                                   Principal  
Date    3 April 2017

I, Brendan Francis Pendergast of 219 Koroit Street, Warrnambool, Victoria, Solicitor, make oath and say as follows:

- 1            I am a Principal of Maddens Lawyers of 219 Koroit Street, Warrnambool and have the carriage of this matter for and on behalf of the Plaintiff.
- 2            The plaintiff was a tenant of property at 14 Rose Street, Gerogery, NSW 2642, which was destroyed in the Walla Walla Gerogery fire described in the Statement of Claim (“**the fire**”).
- 3            The Plaintiff’s knowledge of the allegations of fact in the pleading are limited by reason of the representative nature of these proceedings and accordingly I have been authorised to make this Affidavit on behalf of the plaintiff.
- 4            I have undertaken extensive investigations into the cause and circumstances of the fire including attending at the fire seat, reviewing documentation obtained through the New South Wales Coroner and pursuant to the Government Information (Public Access) Act and other relevant documentation that is available to me.
- 5            I have received instructions from in excess of seven or more owners of property damaged in the fire, including the plaintiff, to pursue a claim against the Greater Hume Shire Council seeking compensation and damages for loss and damage suffered as a result of the fire.
- 6            As to any allegations of fact pleaded in the Statement of Claim, I believe that the allegations are true.

SWORN at

Wagga Wagga, New South Wales

Signature of deponent

Name of witness

Address of witness

219 Koroit Street, Warrnambool, Victoria 3280

Capacity of witness

Solicitor

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.

Signature of witness

ANNA CATHERINE FRANCES  
BUZOLICH  
219 KOROIT ST  
WARRNAMBOOL  
LEGAL PRACTITIONER

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.