

**IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES**

DDT No. 08373/08

**Amaca Pty Limited (Under NSW Administered  
Winding Up) (Formerly James Hardie &  
CoyP/L)**

Plaintiff

**STATE OF QUEENSLAND**

Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1.The Registrar referred this matter to me pursuant to the Dust Diseases Tribunal Regulation 2007 (“the Regulations”) for a determination of apportionment. My determination is to be made on the papers, on the assumption that the Defendant is liable, and applying the Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007 (“the Standard Presumptions”).

2.It is a matter that falls under Division 6 of the Regulations. The original Proceedings 6156/06 giving rise to this new Cross Claim were determined by Judgment/Order of the Tribunal dated 15 September 2008 whereby Amaca (the sole Defendant) was ordered to pay Bruce Lachlan John Tucker (the substituted legal personal representative of his late wife Jenny Patricia Tucker who died of mesothelioma on 29 November 2007)\$330,000 inclusive of costs.

3.For convenience, I will refer to the parties as:

Plaintiff – “Amaca”

Defendant – “The State”

**Basis for Determination**

4. Regulation 49(4) prescribes that my determination is to be made on several bases and assumptions as follows:-

- i. The assumption that each Defendant is liable;
- ii. On the Plaintiff's Statement of Particulars (PSP) ; and
- iii. On the Defendant's Reply;

iv On the Standard Presumptions as to apportionment.

5. The relevant “standard presumptions” are set out within the Dust Diseases Tribunal (Standard Presumptions Apportionment) Order 2007 - Schedule 1.

6. I pause to observe that Regulation 56(1) directs the initiating defendant (in this instance Amaca) to serve with the new cross-claim the original claim material including

- (a) the statement of particulars of the plaintiff on the original claim, and
- (b) the replies of each of the original claim defendants to the original claim, and
- (c) an appropriately revised version of Part 8 (Apportionment of liability among defendants) of Form 2 of the initiating defendant’s reply to the original claim against the defendant, for the purpose of the apportionment exercise.

7. I note that there was no Reply filed in the original claim [which material (ie the Tribunal’s file) is available to me] and no appropriately revised version of Part 8 of Form 2 from Amaca is filed in these proceedings. Accordingly there are no submissions from Amaca as to the apportionment exercise I am to undertake.

8. I do however have a Reply from the State with its Part 8 as to Apportionment completed. I accordingly have regard to these as well as the particulars of the plaintiff in the original claim

9. Clause 5(7) of the Standard Presumptions directs the methodology which I should adopt in determining apportionments when considering multiple contributions to a claim involving an indivisible disease. More specifically, the apportionments in Clause 5(1) of the Standard Presumptions should apply to the whole claim unless I am satisfied by reference to the separate periods of exposure that a differential determination of the contribution of each such separate period of exposure should be made. If so this Regulation directs that :-

- (i) I determine on the basis of the papers the existence of separate periods;
- (ii) I determine what proportion of the whole each separate period of exposure bears having regard to the number of periods, the length of such period and the duration of and intensity of exposure to asbestos within each period; and that I treat each separate period as equal in contribution to the disease; and
- (iii) I then apply to each Clause 5(1) to each separate period.

#### **Relevant Facts:**

10. In the narrative of the Plaintiff’s Form 1 from the original proceedings she described her non-occupational exposure to asbestos dust from Amaca’s asbestos-cement building products as a child both in assisting her father’s weekend work in home renovations between 1960 and 1969, and, from

1965 to 1969, in attending with him during her school holidays when he was building bus shelters, amenities, buildings, council buildings and shire halls in the course of his employment by the Maroochy Shire Council as a carpenter. She described a variety of typical activities of a carpenter cutting fibro with shears and “occasionally” power tools and of helping her father to clean up and the dust involved in that. She described Amaca products she remembered and various particular jobs and job types she did with him and in the vicinity of about ten men who worked in a team with him using the fibro her father had brought to the site when she was exposed to asbestos dust and fibre

11. Besides this exposure the late Mrs. Tucker declared as to her occupational exposure to asbestos dust and fibre in the course of her work as a registered nurse at Nambour General Hospital between 1975 and 1988 and between 1989 and 1996. This exposure occurred on the late Mrs Tucker’s account because of demolition and renovation work that was being carried out during both of those periods. She describes particular parts of the hospital and fibro sheeting therein which was demolished in her working vicinity. She referred to the demolition and renovation work on fibro buildings at Nambour Hospital located between Blocks 1 and 3. She described the demolition work generating a lot of dust and “clouds of dust that could often be seen rolling through the hospital grounds...” etc. She recalled seeing fibro sheeting being bashed in “with a blunt instrument” but could not identify whose product it was.

12. Her estimation was that “approximately 15% to 20%” of her overall exposure to asbestos occurred at the Nambour Hospital. It is notable that this exposure was in the nature of “neighbourhood exposure” rather than the direct exposure she had to asbestos products when working with her father.

Undoubtedly the dust she described at Nambour would have comprised all of the dust of demolition but she has made a considered effort to assess, and I accept, with that fact in mind, the percentage of her overall exposure from “fibro-related” asbestos dust in the mix at Nambour.

#### **Time Periods:**

13. Exposure in Index Periods A and B (as regulated) i.e. between 1960 and 1969 only involve Amaca. Any exposure after 1975 (when Mrs Tucker started work at Nambour Hospital) involves only the State in liability. Although whilst inferentially there may be some probability that the building sheets at the hospital were Amaca’s product neither the late Mrs. Tucker nor the State provide any evidence of that. Period B (from 1 January 1961 to 31 December 1978) carries a 65:35 standard apportionment as between Category 1 and Category 2 Defendants. It is notable however that Mrs. Tucker’s description of the demolition activities, whilst generally stated as between 1975 and 1990 is related more specifically by her to activities she describes from the “late 1970’s” the “late 1980’s” and the “early 1990’s”. For the purpose of my exercise I regard this as being substantially outside Period B. Therefore my apportionment is between 2 tortfeasors within separate periods before and after 1978. I am satisfied a differential determination should be made of the contribution each period made for reason of the nature and likely intensity of each exposure as estimated by the late Mrs. Tucker in her own account of the percentage contribution.

#### **Category of Each of the Plaintiff and Defendant:**

14. Ultimately because of the separate periods the question of categories has little relevance. At best it would only have relevance to the occupational exposure after 1975 (which I have found on Mrs Tucker’s account to be after 1978) in the differential determination if I found there was Amaca product at Nambour. I cannot make such a determination on the material available to me. I only

note in passing that I would find that the State is a Category 2 defendant with a generally lesser responsibility on the Standard Presumption ratios as against Amaca as a Category 1 for any relevance it might have had to the post 1975 period as well as in my overall consideration of the culpability question.

### **Variation of the Standard Presumptions:**

15. The State “asserts” that the Standard Presumptions should be varied in favour of the State because Amaca was a profit making asbestos manufacturer and entrepreneur whereas the State operated a not-for-profit public hospital. These are significant facts and while I agree with the relevance of the observation about Amaca the State had a significant obligation to its employee at the hospital that went beyond its not-for-profit status. The State makes no particular submission as to the level of the variation it contends for or how it should be applied.

### **Apportionment:**

16. The State submits that the late Mrs. Tucker’s (Plaintiff’s) assessment of 15 to 20% of her overall exposure occurring during her employment at Nambour was speculation on her part as to the amount if any of asbestos dust and fibre in the demolition. To some degree this submission may be fair but equally it appears to ignore the Plaintiff’s identifying the fibro she saw being demolished. I do not accept the submission that the Plaintiff’s estimate should be regarded as “extremely speculative”. The Plaintiff’s account of clouds of dust and being in the immediate vicinity of fibro demolition cannot be ignored as complicit in her disease.


17. On the other hand however the nature of her exposure as a child (“Amaca exposure”) as described was more direct. Again however it appears to have been sporadic between the ages of 5 and 14, so that beyond the late Plaintiff’s own estimate I am in no better position to judge how an apportionment should be made with regard to this frequency and intensity of exposure.

18. I have determined on the papers that the State’s culpability is confined to the period of the late 1970’s onward (i.e. after 1978 which obviates the need for a e.g.65:35 apportionment in Index Period B between the different category defendants). Accordingly doing the best I can and having regard to general intent of the Standard Presumptions, the nature and intensity of the various exposures and more particularly the late Mrs. Tucker’s evidence I determine apportionment between them as Amaca 80% and the State 20%

**Overall Apportionment**

<u>Plaintiff</u>	<u>80%</u>
<u>Defendant</u>	<u>20%</u>

Dated 17 May 2010

  
**BERNARD J. McHARDY**