

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

**DDT No. 292 of 2010**

BETWEEN:

**LAWRENCE WILLIAM BENNETT**  
Plaintiff

AND

**AMACA PTY LTD**  
First Defendant

**SELTSAM PTY LTD**  
Second Defendant

**COMCARE**  
Third Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 1 March 2011 24 February 2011 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants.
2. The determination is to be made by me on the papers, on the assumption that the Defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (**Standard Presumptions**).
3. I have been asked to appoint a Single Claims Manager.

**Mr Bennett's Exposure**

4. Mr Bennett was born in 1934 and is aged 75. He alleges that he suffers asbestos related pleural disease and asbestos related pleural thickening. Mr Bennett worked in the building and carpentry trade throughout his life.
5. Mr Bennett worked in various roles in Australia and overseas up until 1959. He does not recollect being exposed to asbestos in those positions.
6. In 1959 Mr Bennett got a job doing construction and carpentry work with AV Jennings. Over the next 11 years he worked for them as well as some sub-contractors who worked for AV Jennings. He does not identify those subcontractors by name. In this role he recollects James Hardie delivering asbestos cement products to the building site in one of their branded trucks. Mr Bennett says the main products delivered were Hardiflex and Tilux. He says that this period of work was very dusty and dirty.
7. When working for AV Jennings Mr Bennett's specialty was working on the eaves. Fibro was fitted in the grooves and on the fascia boards. In order to prepare the fibro he cut the flatboard on top of some wood and then snapped it to the desired size.
8. He used an electric saw with tungsten blades to cut the Tilux. The Tilux was placed on a pedestal and leaned over it to cut it to ensure a nice straight edge was achieved.
9. Occasionally the asbestos was cut to size when it was being installed. If the edge wasn't perfect the edge would be filed to size. Cutting and filing created a large amount of asbestos dust and he describes the exposure as "*Standing only a foot below (the eave), we would breathe the dust*". Filing the Tilux to get a perfect fit "*created a huge amount of dust*".

10. He also describes working with “*grooved fibro*”. He recalls using a product called Shadowline which had an appearance of timber.
11. Mr Bennett said of his use of other manufacturer’s products: “*Sometimes we used Wunderlich asbestos cement fibro sheets but only when we couldn’t get James Hardie*”.
12. Mr Bennett did some work on his own home and private jobs. In these roles he says he used Tilux for the wet areas.
13. From 1970 to 1990 Mr Bennett says he worked as a carpenter for the “*Commonwealth Department of Industrial Undertakings*”. He says his job was to repair and maintain government buildings. Those jobs were usually quite small and not put to tender. He says that the “*nature of a (sic) carpentry during this period ensured I was often exposed to asbestos*”. One of the jobs was to insert partitions in some of the units for air force members. He divided the wall into 3 parts and covered them in fibro. He says it was “*pretty dusty work*”. He also did touch-up work using asbestos sheeting at the air force base. That work lasted about 6 months. He says the asbestos was supplied by the Commonwealth.
14. In 1990 Mr Bennett got a job with the Australian National University. He cut asbestos cement sheets to line cupboards that were used for heating experiments as well as the cupboards under the sink. He cut the asbestos with an electric saw on site. The locations were relined when a new scientist took over the lab. It is unclear how often this occurred from Mr Bennett’s Statement of Particulars.
15. In 1966 Mr Bennett moved to 67 Wakefield Ave, Ainslie. He built two sheds in the back yard using about 50ft of corrugated fibro. He bought the fibro from either District Producers (Canberra) Ltd or perhaps Ern Smith Pty Ltd. He thinks the product was manufactured by James Hardie.

16. His recollection of the duration and intensity of exposure in each role is as follows:

AV Jennings	exposed on a daily basis at high intensity
Home renovations	medium frequency of exposure at medium intensity
Commonwealth	low to medium frequency at low to medium intensity

17. Mr Bennett could not estimate his percentage of respective exposure in each period.

18. As to exposure to products by trade name he says at paragraph 4.8:

- “1. AV Jennings: Products were James Hardie and included flat board sheets, Tilux and Shadowline, some Wunderlich products. I would say 80-90% James Hardie and 10% Wunderlich.*
- 2. Home renovations: James Hardie products using corrugated fibro shedding and cable roofing at my former home in Ainslie.*
- 3. Commonwealth Department of Industrial Undertakings: fibro”.*

19. Later in his Statement of Particulars at paragraph 4.12 Mr Bennett says that he was exposed to James Hardie and “*some Wunderlich*” products at the Ainslie property. It is not clear to me why there is an apparent conflict between the plaintiff’s answer in paragraph 4.8 and 4.12. For the purposes of this assessment I will assume that there was exposure to Wunderlich products at Ainslie but it was in the much smaller proportion (ie 90:10%) that was experienced on the AV Jennings site.

### **Amaca’s Reply**

20. Amaca accepts that the plaintiff suffers from asbestos related pleural disease in the form of pleural thickening on the right side. That injury occurred as a result of exposure to asbestos.

21. Amaca admits that it manufactured Hardiflex, Tilux and Shadowline. It admits that manufactured products that fit the plaintiff's description of "asbestos fibro sheets", "corrugated fibro" and "flat board sheets" but says that Wunderlich manufactured those products also.

22. Amaca accepts that if the plaintiff was exposed to its products prior to 1977 that it breached its duty of care to the plaintiff.

23. Amaca submits that the parties should be categorised as follows:

Amaca	Category 1
Seltsam	Category 1
Comcare	Category 2

24. As to apportionment Amaca submits that for the AV Jennings period (1959 - 1970) that an assumed 50:50 split between itself and Amaca should be adjusted up 10% against it. It submits that on a time on risk analysis that Comcare is responsible for 65% of the plaintiff's exposure (1970 – 1990) and the balance is in the AV Jennings period giving the following result:

AV Jennings	(1959 – 1970)
Seltsam	$35\% \times 40\% = 14\%$
Amaca	$35\% \times 60\% = 21\%$

Comcare	(1970 – 1990)
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Comcare	65%
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25. In respect of the exposure experienced by Mr Bennett at 67 Wakefield Avenue, Ainslie, Amaca submits that this should form part of the AV Jennings period.

26. In my view, Amaca's submission that the manufacturers' liability should be split 60 : 40 (Amaca : Seltsam) is not supported by the material in Mr Bennett's Statement of Particulars. His evidence is that he only used Seltsam when Amaca product was not available. His estimate of only using about 10% Seltsam must be instructive in coming to a final assessment.

### **Seltsam's Reply**

27. Seltsam admits that the plaintiff suffers from some asbestos related pleural thickening which occurred as a result of exposure to asbestos.

28. Seltsam does not admit that the entirety of the plaintiff's disabilities are caused by his asbestos related condition pointing to the significant non-asbestos related disabilities set out in paragraph 2.4 of Mr Bennett's Statement of Particulars.

29. Seltsam's principal position in respect of the plaintiff's exposure is that none of the products it manufactured are identified by trade name.

30. In respect of categorising the parties Seltsam says it and Amaca should be placed into category 1. As to Comcare it submits:

*"Comcare, being an employer of the claimant, should be classified as a Category 2 defendant. Comcare should also be categorised as a Category 1 defendant. The description of the work undertaken by the claimant whilst repairing and maintaining government buildings during his employment with Comcare clearly demonstrates that Comcare was an installer of asbestos containing products (paragraph 4.1.22 and 4.1.23 of the claimant's Statement of Particulars). Further, asbestos containing products were supplied to the claimant by Comcare (paragraph 4.1.23)".*

31. Accordingly Seltsam submits that Comcare should be placed into Categories 1 and 2.

32. Seltsam says that it ceased manufacturing and supplying asbestos containing products in July 1977 so any exposure after this period cannot be a reference to its products. Seltsam made the following calculations:

Period of Exposure	Estimated percentage	Defendants liable	Calculation	Final Apportionment
AV Jennings 1959 – 1970 (11 years)	35%	Seltsam 10%	$35\% \times 10\% = 3.5\%$	Seltsam 3.5% Amaca 31.5%
		Amaca 90%	$35\% \times 90\% = 31.5\%$	
Comcare 1970 – 1990 (20 years)	65%			Comcare 65%

33. Therefore the final apportionments are:

Comcare            65%  
Amaca                31.5%  
  
Seltsam              3.5%

**Comcare’s Reply**

34. Comcare did not admit the plaintiff’s diagnosis at the time of filing its Reply, although it was its intention to have Mr Bennett examined by Dr Stevenson.

35. In respect of the allegations against it Comcare says it does not know of the existence of the “*Commonwealth Department of Industrial Undertakings*”. It has not been able to locate any records relating to the plaintiff.

36. Comcare says that other than the Fairbairn Airbase no properties occupied by it have been identified by Mr Bennett. I infer from that that the third defendant has no legal relationship to the Australian National University.

37. If it can be shown that it was Mr Bennett's employer then it admits Comcare breached its duty of care.

38. Comcare submits that the parties should be categorised as follows:

Amaca	Category 1 (manufacturer)
Seltsam	Category 1 (manufacturer)
Comcare	Category 2 (employer)

39. Comcare's submissions on apportionment are based on a closer analysis of the duration and intensity of exposure in each period. In particular it points to the fact that Mr Bennett characterised the AV Jennings period as high intensity and daily exposure. The Comcare work was low to medium intensity and low to medium exposure and the home renovation work was medium intensity at medium frequency.

40. For the purpose of calculating the number of days of exposure Comcare ascribed the following assumptions to its calculations:

Daily – 5 working days

Low to medium – 2 working days

Medium – 3 days (including both weekends and work undertaken during the week)

41. Applying those assumptions the calculations are as follows:

Exposure	Total days of exposure	Proportion of time on risk
AV Jennings (Amaca and Seltsam)	11 yrs x 52 weeks x 5 days per week = 2860 days	$2860/8060 \times 100 = 35\%$
Commonwealth (Comcare)	20 yrs x 52 weeks x 2 days per week = 2080 days	$2080/8060 \times 100 = 26\%$
Home renovations (Amaca &/or Seltsam)	20 years x 52 x 3 days per week = 3120 days	$3120/8060 \times 100 = 39\%$
		100%

42. Comcare then submits that there should be a further adjustment because of the AV Jennings exposure being high compared to the other exposures so that the AV Jennings period is 45%, Commonwealth 20% and the home renovations period 35%.

43. The final apportionments are:

Category 1 (Amaca and Seltsam) =  $45 + 35 = 80\%$

Category 2 (Comcare) = 20%

### **Assessment**

44. In my view Comcare should be placed into Category 2. It was Mr Bennett's employer. I do not think there is sufficient evidence to indicate that it was an "installer" of asbestos. Mr Bennett's description of his work with the Commonwealth appears to be in the nature of a mobile carpenter who attended small jobs as and when required. Sometimes he worked with asbestos but that was not his principal role.

45. In respect of his exposure I accept the submission of Seltsam that in the AV Jennings period the greatest proportion of the materials he worked with were manufactured and supplied by James Hardie. Mr Bennett's own estimate is that 80-

90% were James Hardie and 10% Wunderlich products. I propose to adopt Mr Bennett's estimate of his use of Wunderlich products at 10% for the AV Jennings period.

46. There is an inconsistency in Mr Bennett's answers regarding whose products he used when doing home renovation work. At paragraph 4.8 he only identifies James Hardie but at paragraph 4.12 he refers to using "*some Wunderlich*". I will assume that, once again, about 10% of the materials used for home renovations was Wunderlich.

47. Mr Bennett does not say when he built the fibro sheds at the back of his home in Wakefield Ave, Ainslie. He moved in to the home in 1966. At paragraph 3.2 (under the heading non-work related exposure) he says his exposure period ended in 1986. I take that to mean he no longer lived in that house in 1986, not that he was working with asbestos by building the back shed from 1969 to 1986. In fact, I am left to speculate when he built the shed. I am prepared to assume that it occurred entirely within the AV Jennings period (ie completed prior to 1971).

48. In respect of other home renovation work I infer from the plaintiff's answer to paragraph 4.3 that there was no asbestos exposure in those roles.

49. I accept Comcare's submission that there must be an adjustment for the relative intensity and duration of the exposure in the AV Jennings period as against the Comcare period (1970 – 1990). The exposure at AV Jennings is described as intense and daily. The exposure whilst employed by the Commonwealth is low to medium frequency at a low to medium intensity although it endured for 20 years.

50. In my view the AV Jennings period is responsible for the greatest portion of Mr Bennett's lifetime exposure. I have assumed it included the time that he used asbestos cement products at his home in Ainslie. Doing the best I can, I consider that the contribution to Mr Bennett's exposure for each period is follows:

AV Jennings  
Including renovations (1959 – 1970)            70%  
  
Commonwealth (1970 - 1990)            30%

51. Applying Mr Bennett's estimate that he used 10% Wunderlich products in the AV Jennings period gives the following results:

Amaca                            63%  
  
Seltsam                        7%  
  
Comcare                        30%

52. I have been asked to appoint a Single Claims Manager (**SCM**). Applying Reg 61(5) of the Regulations Amaca is the primary defendant and is the first possible SCM. Comcare is the second possible SCM. I nominate Amaca as the SCM.

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David Jay

9 March 2011