

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

DDT NO. 151 of 2009

**DENIS MICHAEL FITZGERALD**  
Plaintiff

**AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LTD**  
First Defendant

**EVANS DEAKIN & COMPANY PTY LTD**  
Second Defendant

**WORKCOVER QUEENSLAND**  
Third Defendant

**STATE OF NEW SOUTH WALES**  
Fourth Defendant

**RAHUC PTY LTD (FORMERLY AUSTRALIAN ASBESTOS (CONTRACTING)  
PTY LTD**  
Fifth Defendant

**COMCARE**  
Sixth Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. In this matter I have been appointed as Contributions Assessor pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulation 2007*.
2. By an amended statement of claim filed on 2 March 2010 the plaintiff alleges that he has contracted asbestos-related pleural plaques, asbestos-related pleural thickening, diffuse pleural thickening, asbestos-related pleural disease and asbestosis. The plaintiff alleges that these conditions resulted from his work as a painter and docker on the *Queensland* between January 1961 and June 1962 and 1967 and 1971

whilst in the employment of the first and second defendants (hereafter referred to as **AUSN** and **Evans Deakin**).

3. The third defendant has in effect assumed responsibility in the filing of its reply for those two defendants.
4. The State of New South Wales has appeared as the fourth defendant in respect of the work performed by the plaintiff between January and June 1963 at the State Dockyard on ships being repaired on the Newcastle waterfront.
5. The fifth and sixth defendants appear in respect of exposure between January and June 1964 whilst employed by RAHUC as a painter and docker on the *Empress of Australia* which was then being constructed at the Cockatoo Island Dockyard which was in the control of the sixth defendant.
6. There was a further exposure between 1967 and 1971 whilst employed by the first and second defendants and which has been referred to as the second Brisbane exposure in the sixth defendant's reply.
7. Helpful medical reports from two thoracic physicians, Dr Oliver and Professor Breslin, appear to confirm that the plaintiff has asbestosis-related pleural disease, pleural thickening and early signs of asbestosis. He has a number of other intercurrent medical conditions that are not relevant to this assessment.
8. The plaintiff's condition is a divisible condition. As the sixth defendant has submitted, there are some minor gaps in the plaintiff's history in so far as he did work for a period of short duration in New Zealand and had some

other minor asbestos exposure with other entities who have not been sued in these proceedings.

9. The plaintiff's industrial history is set out in his particulars. I see little point for the purposes of this Contributions Assessment in setting it out. It is conceded by nearly all of the defendants that for the purposes of the Contributions Assessment, all of the defendants are Category 2 defendants. The Commonwealth has submitted that the fifth defendant, Australian Asbestos Contracting Pty Ltd, is both a Category 1 and a Category 2 defendant. Having regard to the nature of the work that it was doing at Cockatoo Island, in my view that submission is soundly based.
10. The plaintiff's assessment of his exposures are set out at paragraph 4.7 of his particulars. I reproduce them here.

"4.7 If you have had more than one exposure period, estimate (if you can reliably do so) as a percentage the proportion that this period of exposure constitutes of your total exposure.

Virtually all of my asbestos exposure has occurred when working for Evans Deakin, AUSN, on the Empress of Australia for the company I understand is known as Australian Asbestos (Contracting) Pty Limited and when working at the State Dockyard.

I would have had a very small exposure to asbestos when doing very occasional work for Patrick's, Peter's Slip, Carrington Slipways and when working at a hardware store in New Zealand and occasionally handling some fibro sheeting. I do not believe these exposures would constitute more than say 2% of my overall level of asbestos contact.

The remainder of my asbestos exposure I breakdown as follows:

Evans Deakin -14%

AUSN - 28%

Empress of Australia - 50%

State Dockyard - 6%

I have allocated 50% of my lifetime asbestos exposure to my work on the Empress of Australia. The reason for this is that it was a very intense period of exposure as I was spraying asbestos for three months. There is no doubt I had high exposure at Evans Deakin, AUSN and State Dockyard but even though it was only a three month period I do believe it represents 50% of my lifetime asbestos exposure.

In terms of Evans Deakin and AUSN I think I had about twice as much asbestos exposure with AUSN as I did a lot of ship repair work for it. In terms of the State Dockyard I had asbestos exposure there but it was a lesser period than with Evans Deakin and AUSN and this why its a lesser amount than the other two companies.

The above is to the best of my recollection but I do believe it is accurate and I have no doubt that the ranking of my asbestos exposure with Empress of Australia, representing the most asbestos exposure, down through AUSN, Evans Deakin and State Dockyard is correct."

11. Dr Breslin is in agreement with that apportionment and there seems to be no strong dissent from it.
12. The only question is whether there should be some weighting to take into account the position of the State of New South Wales and of Comcare having regard to their size, sophistication and role as a major utilizer of asbestos products and their state of medical and scientific knowledge.
13. I am indebted to the analysis provided by the sixth defendant in its reply and I respectfully adopt what is said in paragraph 8.1 which I reproduce here.

**"8.1 Into which category should each defendant be placed?"**

**Under the Dust Diseases Tribunal (Standard Presumptions - Apportionment) Order 2007 Schedule 1, 5, 2 (a) Category I**

defendants include "installers of asbestos or of products, plant and equipment which contained asbestos".

Further, "installer" is defined to include the designer and manufacturer of a particular plant or equipment which included asbestos as part of its design, as well as a company which is engaged to "install" the plant in accordance with the manufacturer's instructions (footnote 10).

Schedule 1, 5, 2 (b) provides that Category 2 defendants include employers of staff who in the course of, or as an incident to, their employment were exposed to asbestos.

Schedule 1, 5, (3) states that if a defendant, in any particular case, falls within both Category 1 and Category 2 (ie. as an installer and employer of a Claimant) then a separate share is to be calculated by the Contributions Assessor for the role of that defendant which falls within each category.

The Sixth Defendant submits that all defendants (apart from the Fifth Defendant) are Category 2 defendants.

In respect of the Fifth Defendant, the Claimant's evidence in the Statement of Particulars is that he was exposed to asbestos whilst employed by Australian (Asbestos) Contracting Pty Limited to spray asbestos on a ship which was being constructed at Cockatoo Island Dockyard. The Sixth Defendant contends that spraying of asbestos insulation by a company, which apparently specialises in asbestos was 'installation' of asbestos within the meaning of the standard presumptions.

Therefore, the Sixth Defendant submits that the Fifth Defendant is both a Category 1 defendant and a Category 2 defendant because it's insured (Australian Asbestos (Contracting) Pty Limited) was an "installer" of asbestos and also "employer" of the Claimant when the Claimant was exposed to asbestos.

Therefore, in summary each defendant should be placed in the following category:

<b>First Defendant</b>	<b>Australasian United Steam Navigation Company Limited (AUSN)</b>	<b>Category 2</b>
<b>Second Defendant</b>	<b>Evans Deakin &amp; Company Pty Limited</b>	<b>Category 2</b>
<b>Third Defendant</b>	<b>WorkCover Queensland</b>	<b>Category 2</b>
<b>Fourth Defendant</b>	<b>State of New South Wales</b>	<b>Category 2</b>
<b>Fifth Defendant</b>	<b>Allianz Insurance Australia Limited</b>	<b>Category 1 &amp; 2</b>
<b>Sixth Defendant</b>	<b>Comcare</b>	<b>Category 2</b>

### **Apportionment**

14. I further respectfully adopt the apportionment analysis set out at paragraph 8.9.
15. However I disagree as to the apportionment between Category 1 and Category 2 defendants in respect of Sydney exposure, in my view the position of Comcare at Cockatoo Island and RAHUC is indistinguishable. The Commonwealth very properly alludes to previous determinations in the Tribunal.
16. As to the State of New South Wales, no such question arises as it is the only relevant defendant at that time.
17. Further, I disagree and decline to vary the Standard Presumptions in favour of the sixth defendant by virtue of the fifth defendant's role as employer. I see no greater factual difference between the position of Comcare specifying and permitting the use of asbestos products on the

vessel and the role of the employer installer fulfilling its contractual requirements with the sixth defendant in stripping and applying asbestos.

18. In my view, in respect of what is described as the Sydney exposure, the fifth and sixth defendants should accept responsibility of 50% each for that 50%.

19. In respect of other exposures I accept the 2% analysis suggested by the plaintiff and adopted by others.

20. In summary, the liability should be apportioned as follows:

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|--|-----|
| a) First defendant (insured by the third defendant)  | 28% |
| b) Second defendant (insured by the third defendant) | 14% |
| c) Fourth defendant                                  | 6%  |
| d) Other exposures                                   | 2%  |
| e) Fifth defendant                                   | 25% |
| f) Sixth defendant                                   | 25% |

21. I appoint the third defendant as the insurer of the first and second defendants as Single Claims Manager.



Dated the 3rd day of August 2010.

**PAUL BLACKET SC**  
CONTRIBUTIONS ASSESSOR.