

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

DDT No. 201/ 2010

BETWEEN:

MAX HOWES
Plaintiff

AND

AMACA PTY LTD
First Defendant

STATE OF QUEENSLAND
Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. By letter dated 10 March 2011 I was appointed the Contributions Assessor by the Registrar pursuant to provisions of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**). The Registrar requested that I also appoint a Single Claims Manager in accordance with Cl 61(3)(b) of the Regulations.
2. The plaintiff is Max Howes (**Mr Howes**). He sues Amaca Pty Ltd (**Amaca**) and the State of Queensland (**QLD**).
3. The determination is to be made by me on the papers, on the assumption that the each of the defendants is liable, and applying the standard presumptions prescribed

in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007 (the Standard Presumptions)*.

Mr Howes' History of Exposure to Asbestos

4. Mr Howes' alleges that he suffers from asbestosis and asbestos related pleural disease (**arpd**).
5. Mr Howes was a carpenter. For the purposes of his exposure to asbestos there are two relevant periods of exposure. The first period is from 1950 – 1956 and then 1962 to 1983 (**the Amaca Period**). The second period is from 1956 to 1962 (**the QLD Period**). The names given for the respective periods will become apparent from the description of the work undertaken in each period which I discuss further below.

The Amaca Period

6. In the Amaca period Mr Howes had various employers including Tom Sheen, Lloyd Moffat, Smith & Anstee, Pigeon Bros, William Schlee and for a time was self employed. Most of the work involved constructing residential homes in Queensland and New South Wales. He believes 65% of his work was in Queensland and 35% in New South Wales. That work involved exposure to asbestos as a result of handling, cutting and installing asbestos building products manufactured and supplied by James Hardie. He used those products on soffit areas, wet areas, exterior and interior walls and on roofs.
7. Mr Howes says he worked with ¾ inch compressed fibro, Super Six, Hardiflex, Tilux, Versilux, Hardiplank, Shadowline, Coverline, Fibrolite and Asbestolux. He recalls seeing the James Hardie named printed on these products. As to the other products used he says in his Statement of particulars:

"I was essentially a James Hardie man throughout my career as a carpenter. I preferred using their products over those manufactured by Wunderlich. The only time that I ever used Wunderlich product was when I had to match a product – like roof sheeting. I would say that the vast bulk of my past asbestos exposure – at least 99% occurred from using James Hardie asbestos building products".

8. Mr Howes has set out in detail the manner in which he used the products. I need not recapitulate that here as there is no other defendant identified for the Amaca Period. It is sufficient to say Mr Howes handled, cut, drilled and installed the product. He did so using hand tools and electric tools.
9. Mr Howes does recall that when working for Lloyd Moffat in the Amaca Period he was invited to visit the asbestos cement factory at Newstead, Brisbane. He undertook a tour and observed the factory was extremely dusty. He was invited to pick up raw asbestos.
10. To the best of his recollection his exposure to asbestos products decreased dramatically in about 1983.
11. Mr Howes says that he was exposed to asbestos on a regular periodic basis in the Amaca Period. It varied from daily to weekly exposure. He says *"It would have been unusual for a week to go by without me having to handle, cut or install James Hardie asbestos products"*.
12. Mr Howes says his exposure when handling James Hardie products was fairly low. When he was rasping and cutting those products with a power saw or hand grinder his exposure to asbestos was high.

The QLD Period

13. During the QLD Period Mr Howes was employed by the Department of Works in Queensland as a carpenter. He was employed in Ipswich for the first 4.5 years. He then worked for 18 months around the Gold Coast. He was mainly involved in working on schools and other government buildings. He says his exposure to asbestos occurred when *“using James Hardie building products on various sites owned by the Government”*. He worked on constructing schools at Burleigh Heads, Broadbeach, Southport and Surfers Paradise. He used James Hardie building products in the construction of the schools.

14. He estimates that 60% of his duties involved working with James Hardie products. The other 40% of his work involved working with timber products and performing repair and maintenance work that did not involve James Hardie asbestos building products. He says he never used Wunderlich products in this period.

15. Mr Howes says his exposure occurred intermittently and varied from daily to weekly. He describes the level of his exposure as varying according to the work he did. When handling or drilling the asbestos products the exposure was low to medium. When using a power saw to cut it he says the exposure was high.

16. When compared to the Amaca Period Mr Howes says his exposure was comparable in the QLD Period. Therefore he estimates that he had *“roughly 3 1/2 years worth of comparable exposure to asbestos”*. He then goes on to say:

“Therefore, and doing the best I can, I roughly estimate that about 88% of my exposure to asbestos occurred with the above relevant employers. This includes my non-work exposure when building my home in Tugun. The other 12% occurred with the Department of Works” (my emphasis).

Amaca’s Reply

QLD	7.5%
Amaca	92.5%

QLD Reply

22. As to Mr Howes' condition QLD only admits that he has asbestos related pleural plaques.

23. QLD does not know whether it was an occupier of the schools, technical colleges or other locations identified by Mr Howes as locations where he was exposed to asbestos. QLD has no evidence to contradict Mr Howes' allegations in his Statement of Particulars.

24. As to the categorisation of the parties QLD accepts it should be placed into category 2 but says that it should not be placed into category 1 because it was not an installer of asbestos or plant and equipment that contained asbestos. The use of asbestos was incidental to its business which was the construction of government facilities. Accordingly QLD says the parties should be categorised as follows:

Amaca	Category 1
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QLD	Category 2
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25. QLD then submits that there is no proper basis for adjusting the Standard Presumptions.

26. As to calculating the apportionments QLD says that the plaintiff's estimate of the exposure he experienced in the QLD Period (ie 12%) should be accepted. I consider that is correct. Therefore the only issue is the apportionment as between it and Amaca for this liability. That is, the 88% liability for the Amaca Period is not in dispute.

27. The liability in the QLD Period (1956 – 1962) spans Period A and Period B of the Standard Presumptions. Applying the Standard Presumptions gives the following results:

Period A (Pre 1 Jan 1961) 5 out of 6 years = 83.3%

Amaca $83.33\% \times 12\% = 9.996\% \times 75\%$ (Cat 1) = 7.4997%

QLD $83.33\% \times 12\% = 9.996\% \times 25\%$ (Cat 2) = 2.499%

Period B (Post 1 Jan 1961) 1 of 6 years = 16.66%

Amaca $16.66\% \times 12\% = 1.992\% \times 65\%$ (Cat 1) = 1.2994%

QLD $16.66\% \times 12\% = 1.9992\% \times 35\%$ (Cat 2) = 0.6997%

28. Accordingly QLD submits that the final apportionments are as follows:

Amaca $88\% + 7.4997\% + 1.2994\% = 96.79$ rounded to 96.8%

QLD $2.4999\% + 0.6997\% = 3.1996\%$ rounded to 3.2%

Factual considerations

29. Having regard to Clause 3 of the Standard Presumptions the following factual considerations are noted by me:

(a) Mr Howes suffers from divisible conditions (asbestosis and/or arpd).

- (b) His exposure to asbestos occurred in the period 1950 to about 1983. There was some mild exposure post 1983.
- (c) The heaviest exposure occurred between 1950 and 1983. After 1983 there was intermittent low level exposure.
- (d) The lag time between his exposure and diagnosis is sufficient for the exposure to be causative of the injury.
- (e) None of the defendants in their capacity as employers, occupiers or suppliers of asbestos product took any steps to minimise the risks of Mr Howes' exposure to asbestos.

30. I categorise the parties as follows:

Amaca Category 1

QLD Category 2

31. In making that categorisation I consider that QLD was not in the business of installation of asbestos products even though asbestos installation was undertaken by its employees at sites it occupied. QLD's use of asbestos was incidental to its purpose (in part) of building government infrastructure such as schools and hospitals. Put more simply QLD was in the business of government rather than asbestos insulation.

32. I adopt Mr Howes' designation of 12% of his career exposure occurring whilst employed by the Department of Works (**QLD**).

33. There was no evidence or submissions as to the state of knowledge regarding the dangers of asbestos when Mr Howes was employed by QLD (1956 – 1962). For that reason I do not propose to adjust the Standard Presumptions.

34. I accept and adopt the submissions as to calculation of the apportionment put by QLD. I do not need to recapitulate them here having set them out above.

35. Accordingly the apportionments are:

Amaca 88% + 8.8% = 96.8% (allowing for rounding)

QLD 3.2%

36. I appoint Amaca as the Single Claims Manager.

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David Jay

Contributions Assessor

17 March 2011