

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

**DDT No. 204 of 2010**

BETWEEN:

**DAVID KEITH LINZ**  
Plaintiff

AND

**ACN 004 210 520 PTY LTD**  
First Defendant

**COMCARE**  
Second Defendant

**WALLABY GRIP LTD**  
Third Defendant and Cross Defendant

**WALLABY GRIP (BAE) PTY LTD**  
Fourth Defendant

**AMACA PTY LTD**  
Fifth Defendant and Cross Defendant

**QBE INSURANCE (AUSTRALIA) LTD**  
Sixth Defendant and Cross Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Registrar referred this matter to me by letter dated 13 December 2010 pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**) for a determination of apportionment as between the defendants. I have also been asked to appoint a Single Claims Manager for the claim.

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. The plaintiff, David Linz, has sued each of ACN 004 210 520 Pty Ltd (**Major Furnace**), Comcare, Wallaby Grip Ltd (**WGL**), Wallaby Grip (BAE) Pty Ltd (**BAE**), Amaca Pty Ltd (**Amaca**) and QBE Insurance (Australia) Ltd (**QBE**) for damages arising from occupational exposure to asbestos.
4. Mr Linz alleges that he suffers asbestosis and asbestos related pleural disease.
5. Cross claims have been filed by Major Furnace and BAE.

#### **Mr Linz's History of Exposure**

6. Mr Linz trained and was employed as a fitter and turner and engineer. He was never self-employed and his exposure to asbestos products was to insulation products manufactured and supplied by Bells Asbestos and James Hardie. He says that he had no exposure to fibro or brake linings.
7. Mr Linz's exposure commenced in 1960 and occurred in every occupation, to varying degrees, from that time until July 1999 when he started working for a car dealer. He had no exposure after July 1999.
8. Mr Linz worked with Major Furnace from 1960 to 1965 undertaking an apprenticeship as a fitter and turner in Moorabbin, Victoria. Mr Linz manufactured and installed combustible furnace equipment. He worked with asbestos powder, asbestos rope and half pipe sections. The asbestos powder was mixed in a bin or wheelbarrow. The asbestos rope was wrapped

around steam pipes. He used half pipe sections in jobs such as at the ICI facility. Asbestos rope was also used on oil fired burners. He describes his exposure to asbestos at Major Furnace as “very heavy”.

9. Mr Linz worked at the Commonwealth Marine Engine Works from 1965 to 1967. He describes his exposure as “very heavy”. He worked on the construction of marine engines as well as removing and installing engines. Asbestos lagging was being removed and replaced while he worked in their vicinity. He used asbestos gloves when doing this work.
10. Mr Linz worked at South Molle Island (employed by South Molle Pty Ltd) for about 1 year in 1967 to 1968 as an engineer. He worked at the power station and later worked on shipping vessels. He handled asbestos rope supplied by Bells Asbestos. He attached asbestos rope to pipes on the exhaust system of “The Crest” and “MV Gabro”. He also used asbestos rope at the power station. Although he had exposure to asbestos it was “nowhere near as heavy” as his previous roles.
11. Mr Linz worked for an international shipping company known as Port Line for 1 year. He handled asbestos rope and asbestos gland packing supplied by Bells Asbestos.
12. Between 1969 and 1971 Mr Linz worked for Ingram Offshore Australia Ltd as an engineer on a number of ships. He had some exposure to asbestos lagging while working on the “Timothy Ingram”. His exposure was not heavy and occurred periodically. All of his exposure was to Bells Asbestos products.
13. From 18 April 1971 to 20 June 1973 Mr Linz worked for English Electric Diesel Australia Ltd as a service engineer in Victoria. QBE is alleged to be English Electric’s insurer. He did repair work on ships and used asbestos

tape to lag exhausts. He also used powdered asbestos and half pipe sections. He worked on the HMAS Swan and possibly the HMAS Vampire where he recalls he had extensive asbestos exposure.

14. From 1974 to 1979 Mr Linz worked for NEI Power Engineering Ltd in Melbourne. He had some asbestos exposure to asbestos rope and millboard. He was, by this time, in a managerial role so his personal exposure was not as significant as at the start of his career.

15. Next from 1979 to 1985 he worked for NEI Power Engineering in Sydney where he worked on HMAS Tobruk which involved installation of asbestos to an engine that was being commissioned on the ship. At the other places he worked there wasn't much exposure to asbestos.

16. Finally from 1985 to July 1999 Mr Linz was employed by the Department of Civil Aviation at Port Moresby as a service works supervisor. He cannot recall any significant exposure to asbestos.

17. Mr Linz estimates that his lifetime exposure with his various employers is as follows:

Major Furnace	35%
Commonwealth Marine Engine Works	30%
Ports Line	2%
Ingram Offshore	4%
English Electric Diesel	20%
NEI Power Engineering	5%
South Molle Island	3%
All other employer	<1%

18. Mr Linz then says:

*“In terms of my exposure on the Royal Australian Navy Ships I would estimate that just under 10% of my exposure, probably about 7.5% came on the Navy ships and this occurred when working for English Electric Diesels and NEI Power Engineering and the last ship been (sic) the HMAS Tobruk where there was some asbestos materials used”.*

19. His last significant exposure occurred in the early 1980s.

20. Mr Linz estimates that half of his exposure was to products manufactured and supplied by Bells Asbestos and half to James Hardie's products. He says that the exposure to half pipe sections was extremely dusty and gave off a lot of dust. Therefore, although he used more Bells Asbestos products the heaviest exposure was to James Hardie products.

21. He was not provided with protective equipment and no protective measures were taken to prevent him being exposed to asbestos.

### **The Defendants' Replies**

22. Major Furnace admits that it employed Mr Linz but does not admit that he was exposed to asbestos. It says that it does not hold records sufficient to substantiate or rebut Mr Linz's allegations.

23. Major Furnace says that the parties should be categorised as follows:

Major furnace	Category 2
Comcare	Category 2
WGL	Category 1
BAE	Category 1
Amaca	Category 1
QBE	Not referred to

24. Major Furnace does concede that it was a furnace and oven manufacturer and that work involved the installation of asbestos. In respect of its liability Major Furnace submits that *“it did not know and could not have been expected to know of the dangers associated with the inhalation of asbestos fibres during the period 1960 to 1965”*. It is not clear to me the basis upon which that submission is made.

25. Major Furnace submits that the Standard Presumptions should be adjusted up by the full 20% as against WGL and Amaca but does not calculate the final proposed liabilities.

### **Comcare**

26. Comcare is presently making inquiries as to whether it employed Mr Linz and so reserves its position on that issue. Comcare admits that it occupied the Commonwealth Marine Engine Works during the period of Mr Linz’s alleged exposure. In respect of other alleged exposures its enquiries are continuing.

27. Comcare submits that Major Furnace should be placed into both Category 1 and Category 2. It points to the plaintiff’s evidence that it constructed and installed combustible furnace equipment that incorporated asbestos as part of its design. That, it says, means that Major Furnace was a *“manufacturer of a particular plant or which included asbestos as part of its design”*: Standard Presumptions CI 5(2).

28. Comcare submits that it should be designated as Category 2 and WGL, BAE and Amaca into Category 1.

29. Comcare submits that QBE should be placed into both Category 1 and Category 2. It does so on the basis that while employed by its insured

(English Electric Diesel Australia) Mr Linz undertook repair work that utilised asbestos rope, tape, powder and half pipe sections. For that reason it submits QBE is an installer of asbestos as well as an employer.

30. Comcare sets out in very considered detail the apportionments that it submits should apply. I will not recapitulate those submissions but set out below Comcare's conclusions:

Major Furnace	19.5%
Comcare	12%
WGL and BAE	39%
Amaca	19.5%
QBE	10%

#### **WGL and BAE**

31. WGL and BAE have lodged a single Reply (referring to themselves together as "Wallaby Grip"). WGL ceased operations on 30 September 1966 and BAE on 31 December 1979. They submit that as they never operated simultaneously they should be treated as one entity for the purposes of calculating apportionment.

32. Wallaby Grip admits that it manufactured asbestos rope and composition. It supplied asbestos half pipe sections, millboard, asbestos rope, asbestos tape, composition, gloves/mittens, asbestos steam/fibrous packing and gaskets.

33. It denies that it manufactured asbestos half pipe sections but it did supply half pipe sections manufactured by James Hardie.

34. Wallaby Grip has no knowledge of Mr Linz's exposure to asbestos.

35. BAE says that it acquired knowledge of the dangers of asbestos in the “mid 1970’s”. It was from that time that warnings were placed on the products it supplied.

36. Wallaby Grip submits that the parties should be categorised as follows:

WGL and BAE	Category 1
Amaca	Category 1
Major Furnace	Category 1 and 2
Comcare	Category 1 and 2
QBE	Category 1 and 2

37. In summary Wallaby Grip submits that each of Major Furnace, Comcare and QBE were Mr Linz’s employers as well as installers of asbestos products.

38. Wallaby Grip submits that the Standard Presumptions should be varied against each of Major Furnace, Comcare and QBE by 20 percentage points on the basis that they had actual or at least constructive knowledge of the dangers of asbestos. Further, they say that those entities were large and sophisticated entities. In that regard it points to:

- (a) In 1965 – 1966 Major Furnace had a staff of 150 and a capital of £250,000.
- (b) English Electric (QBE) completed a contract at Hazelwood Power Station to the value of \$2,000,000. It also did work to the value of \$1,750,000 at Mica Creek Power Station.
- (c) Comcare was involved in large scale ship building with contracts exceeding \$200,000,000.

39. Wallaby Grip submits that Major Furnace, Comcare and QBE failed to take any steps to minimise the harm to Mr Linz and so should increase the Category 2 liability by 20%.

40. Applying those assumptions to Mr Linz's estimate of exposure in the workplace Wallaby Grip submits that the liabilities are as follows:

Major Furnace	26.9%
Comcare	30.8%
QBE	10%
WGL and BAE	15.08%
Amaca	16.44%
Total	99.22%

### **Amaca's Reply**

41. Amaca says that the Hardie BI Company manufactured 85% Magnesia and K-Lite Sections with CSR Ltd between 1964 and 1974. Between 1945 to 1964 (JHC) and 1964 to 1974 it manufactured Hardie BI 85% magnesia blocks, sections and plastic composition in partnership with CSR Ltd. It ceased manufacturing such products in 1974.

42. Amaca submits the parties should be categorised as follows:

Major Furnace	Category 2
Comcare	Category 2
WGL	Category 1
BAE	Category 1
Amaca	Category 1

43. Amaca submits that there should be no variation of the Standard Presumptions.

44. Amaca's principal submission is that Mr Linz's estimate of his lifetime exposure as being 50% as to Amaca and 50% as to Wallaby Grip is

inconsistent with his description of his the day to day use of asbestos products which was predominantly to WGL and BAE products. It refers to a letter dated 29 September 2010 from the plaintiff's legal representatives that his exposure in the Major Furnace period was:

Asbestos powder (WGL)	40%
Asbestos Rope (WGL)	20%
Asbestos half-pipe sections (Amaca)	40%

45. Amaca then says "*The plaintiff has confirmed the exposure to half-pipe sections represents 40% of the 35% of exposure which occurred as a result of his employment at Major Furnace & Combustion Engineers Pty Ltd, for which the First Defendant, Major Furnace is also liable as a Category 2 Defendant. Amaca's liability is limited to the exposure which occurred from half-pipe sections*

*We therefore assess Amaca's liability as follows:*

*Major furnace – 35% of overall exposure 1960 – 1965 (6 years)*

*For the year 1960 (1 year of 6 years = 16.67% of period):-*

<i>Major Furnace</i>	<i>Category 2</i>	<i>(35% x 16.67% x 40% x 25%)</i>	<i>0.583%</i>
<i>Amaca</i>	<i>Category 1</i>	<i>(35% x 16.67% x 40% x 75%)</i>	<i>1.750%</i>

*For the years 1961 to 1965 (5 years of 6 years = 83.33% of period):-*

<i>Major Furnace</i>	<i>Category 2</i>	<i>(35% x 83.33% x 40% x 35%)</i>	<i>4.083%</i>
<i>Amaca</i>	<i>Category 1</i>	<i>(35% x 83.33% x 40% x 65%)</i>	<i>7.58%</i>

*Amaca liability is therefore a maximum of 9.33% in this matter.*

## **QBE's Reply**

46. QBE is sued as the insurer of English Electric. QBE's position is that English Electric's system of work was "*such that if a service was retained in Victoria then, during the entire period of his employment, he was paid by the Victorian branch and was declared as a worker relevant to Victorian Insurance Cover*".

47. QBE says it has no record of insuring English Electric during the relevant period. Accordingly, even if English Electric is liable QBE says that it did not issue a policy that responds to provide cover to it.

48. QBE submits that the parties should be categorised as follows:

Major Furnace	Category 1
Amaca	Category 1
WGL and BAE	Category 1
Comcare	Category 2
QBE	Category 2

49. QBE does not propose any variation to the Standard Presumptions.

50. In respect of the English Electric Period (20%) QBE submits that the liabilities are as follows:

WGL + BAE + WGL	13% (or 4.33%)
QBE	3.5%
Comcare	3.5%

## **Findings**

51. I categorize the parties as follows:

Major Furnace	Category 1 and Category 2
WGL	Category 1
BAE	Category 1

Comcare	Category 2
QBE	Category 2

In categorising Major Furnace as both Category 1 and 2 I find that it was a “*supplier and/or installer of asbestos or of products, plant and equipment which contain asbestos*”: Standard Presumptions Cl 5(2)(a). Mr Linz says that he was involved in all aspects of the construction and installation of combustible furnace equipment. That included using asbestos rope and powder when constructing and then installing burners in situ.

52. I do not consider repairs works on ships (Comcare and QBE) to constitute the installation of plant and equipment which contained asbestos.

53. I accept Wallaby Grip’s submission that BAE and WGL should be considered to be 1 entity.

54. I reject Wallaby Grip’s submissions that the Standard Presumptions should be adjusted by 20% as against the Category 2 defendants.

55. I have also considered Amaca’s submissions regarding limiting its liability. It seems to me that the issue as to whether Mr Linz was exposed to Amaca’s product at all at Major Furnace and whether his lifetime exposure was less than the 50% he estimated in his Statement of Particulars is a question of fact that must be resolved at a contested hearing. There is evidence to support Amaca’s contention, but equally Mr Linz has given evidence as to his best recollection of his lifetime exposure. For the purpose of this assessment I accept that 50% of his lifetime exposure was to Amaca product.

56. Mr Linz’s description of his exposure is patchy. For instance, it is not entirely clear to me the exact circumstances of his use and exposure to the half pipe sections. It is not possible to arrive at a perfect calculation based on his

description. That is not a criticism of Mr Linz but an acknowledgement that in a case such as this I must apply a broad brush in attempting to reach an equitable result. I have applied a methodology which has attempted to calculate Wallaby Grip's liability and then assume that Amaca's liability must be equal. To the extent that there are discrepancies in any period of exposure they will balance out over Mr Linz's lifetime so that his lifetime exposure of 50:50 is reflected in the final result.

57. As noted previously Mr Linz estimates his lifetime exposure as follows:

Major Furnace	35%	Event 1
Commonwealth Marine Engine Works	30%	Event 2
Ports Line	2%	Event 3
Ingram Offshore	4%	Event 4
English Electric Diesel	20%	Event 5
NEI Power Engineering	5%	Event 6
South Molle Island	3%	Event 7
All other employer	<1%	Event 8

**Event 1 – Major Furnace 35%**

58. Time on risk analysis period:

Period	Dates	Months	Calculation	Total
A	01.06.60 – 31.12.60	7	$(7/60) \times 35\%$	4%
B	01.01.61 – 01.06.65	53	$(53/60) \times 35\%$	31%
Total		60		

Period A

Party	Category	Calculation	Total
Major Furnace	2	$25\% \times 4\%$	1%
Wallaby Grip	1	$(75\%/3) \times 4\%$	1%

Amaca	1	$(75\%/3) \times 4\%$	1%
Major Furnace	1	$(75\%/3) \times 4\%$	1%
			<b>4%</b>

Period B

Party	Category	Calculation	Total
Major Furnace	2	$35\% \times 31\%$	10.85%
Wallaby Grip	1	$(65\%/3) \times 31\%$	6.72%
Amaca	1	$(65\%/3) \times 31\%$	6.72%
Major Furnace	1	$(65\%/3) \times 31\%$	6.72%
			<b>31%</b>

**Event 2 – Commonwealth Marine Engine Works 30%**

59. Mr Linz was exposed during Period B “from 1965 to 1967” a total of 24 months and comprised 30% of his exposure.

Party	Category	Calculation	Total
Comcare	2	$35\% \times 30\%$	10.5%
Wallaby Grip	1	$(65\%/2) \times 30\%$	9.75%
Amaca	1	$(65\%/2) \times 30\%$	9.75%
			<b>31%</b>

**Events 3 and 4 Port Line and Ingram offshore (2% and 4%)**

60. Mr Linz estimates 6% of his lifetime exposure occurred in this role at Port Line and Ingram Offshore. I split it equally between the suppliers:

Amaca                    3%  
Wallaby Grip        3%

**Event 5 English Electric (QBE) 20%**

61. This exposure occurred between 19 April 1971 and 20 June 1973 and comprised 20% of Mr Linz's lifetime exposure (in Period B).

Party	Category	Calculation	Total
QBE	2	$(35\%/2) \times 20\%$	3.5%
Comcare	2	$(35\%/2) \times 20\%$	3.5%
Wallaby Grip	1	$(65\%/2) \times 20\%$	6.5%
Amaca	1	$(65\%/2) \times 20\%$	6.5%
			<b>20%</b>

**Event 6 NEI Power Engineering 5%**

62. This period traverses periods B and C and was from 1974 to 1985. It comprised 5% of his lifetime exposure. Applying a time on risk analysis each period is:

Period	Dates	Months	Calculation	Total
B	01.07.74-31.12.78	30	$30/108 = 27.8\%$	1.4%
C	01.01.79-30.06.85	78	$78/108 = 72.2\%$	3.6%
Total		108		5%

The Period B liability is shared between Amaca and Wallaby Grip giving 0.7% each.

63. In respect of the Period C liability Wallaby Grip submits that it ceased operations on 31 December 1979 it can have no liability after that date. I don't accept that submission. Products that it manufactured and supplied may have been continued to be used for many years. The liability that arises does not cease to exist once manufacturing ceases.

Period C

Party	Category	Calculation	Total
Comcare	2	$(40\%) \times 3.6\%$	1.44%
Wallaby Grip	1	$(60\%/2) \times 3.6\%$	1.08%
Amaca	1	$(60\%/2) \times 3.6\%$	1.08%
			<b>3.6%</b>

**Event 7 South Molle Island 3%**

64. Mr Linz says that his exposure to Wallaby Grip asbestos products was equal to his Amaca exposure. The South Molle Island liability of 3% is split equally between those parties.

Amaca                    1.5%

Wallaby Grip        1.5%

**Event 8 All other employers 1%**

65. This liability is shared between Amaca and wallaby Grip

**Total Liabilities**

Wallaby Grip                    30.75%  
Amaca                            30.75%  
Major Furnace                19.57%  
Comcare                        15.44%  
QBE                              3.5%

66. As there is no party with 50% or a liability that exceeds the next defendant's by at least 20% there is no primary defendant. Applying Reg 61(4) of the DDT Regulation 2007 I appoint Wallaby Grip as the Single Claims Manager.

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David Jay  
Contributions Assessor  
21 December 2010