

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

DDT NO. 332 of 2009; 332 of 2009/1

DOUGLAS VICTOR PENNINGS
Plaintiff

STATE OF NEW SOUTH WALES & ORS
Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. I have been appointed as Contributions Assessor by the Registrar of the Dust Diseases Tribunal pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* ("the Regulations"). I have also been asked to appoint a single claims manager at the conclusion of my determination.
2. In accordance with the DDT (Standard Presumptions) Order of 2007 I make the following assessment based upon materials in the plaintiff's statement of particulars and the materials submitted in the three replies filed by the defendant who I will refer to as "State" and the two cross defendants who I will refer to as "Amaca" and "WGL".
3. The plaintiff, as I shall call Mr Pennings, alleges and it appears to be common ground that he was employed by what is known as the State Rail Authority between 1 November 1949 and 30 June 1985.
4. His particulars record him commencing as an apprentice fitter and turner and working up until 1955 in the Large Erecting Shed at Eveleigh and Chullora. Thereafter he worked as a fitter from 1955 to 1966 at the Large Erecting Sheds at Eveleigh and Chullora working on the Garrett

locomotive boiler and thereafter as a fitter between 1966 to 1968 or 1969 at the Hornsby car sheds. He then worked as an equipment examiner till 1985. From 1985 to 1999 he continued working on Platform 1 of Hornsby Station. He retired in 1999. It appears to be common ground that to all intents and purposes he was not exposed to conditions where asbestos fibre was likely to be present after about 1985 when he worked as a technical officer.

5. He describes in his statement at paragraph 4.5 that he was exposed to asbestos on a daily basis between 1955 and 1966. In particular he was exposed to asbestos lagging material, particularly that contained in the form of asbestos blocks that were used to insulate the boilers of railway locomotives. He had occasional exposure between 1949 and 1955, and 1966 and 1999.
6. From the materials provided to me it is apparent that Amaca, certainly between 1939 and 1950, was the sole supplier of asbestos blocks to the defendant: See *Rayner* (1999) NSW DDT at 12 at paragraph 59.
7. There is a paucity of evidence as to whether or not James Hardies supply to the State was exclusive after 1950, WGL admitting only to manufacturing some composition products and asbestos rope.
8. Whilst the plaintiff did not know the identify of the manufacturer and supplier of the lagging materials having regard to his identification of the brochures relating to 85% magnesia it is a reasonable inference that, as WGL contended, most of the plaintiff's exposure was indeed to products of Amaca during his period in various railway workshops.

9. He dates his daily exposure until 1966 when he left the Large Erecting Shed at Eveleigh. Thereafter his exposure was more intermittent and occasional. He worked at the Hornsby car sheds.
10. There is little doubt and it is not contested by the defendant and cross defendants that the plaintiff suffers from a malignant mesothelioma. The Contributions Assessment therefore proceeds on the assumption that we are dealing with an indivisible disease to which all exposures are contributory.
11. The State has submitted that it is a Category 2 defendant. The cross defendants who are admittedly Category 1 defendants submit that the State should also be put in that category.
12. Amaca puts its case this way:

"Part 5(2)(a) of the Standard Presumptions Order defines Category 1 as:

'All those corporations, authorities and legal entities who engage in a business which relates to the period of exposure and which can be described as minors, [sic] manufacturers and/or installers of asbestos or of products, plant and equipment which contains asbestos.'

At paragraph 4.1 of his statement of particulars the plaintiff alleges that he was exposed to asbestos dust and fibres whilst employed by New South Wales Government Railways (now SNSW) when performing his duties in the vicinity of others who were using asbestos materials to insulate boilers.

The plaintiff's assertions are direct evidence that SNSW employees undertook activities installing asbestos and therefore SNSW should be classified as a Category 1 defendant."

13. WGL puts it at paragraph 3, p11 that the State was an installer of asbestos products and the State ought to be placed in Category 1. It

relies upon material advanced by both the plaintiff and a Mr Griffiths who also commenced proceedings in the Tribunal in respect of asbestos inhalation he alleges occurred in the locomotive boiler workshops. There is considerable evidence as to the deplorable state of those workshops in that evidence and also the evidence of Mr Ryan and Mr Coleman, who were apparently fellow employees of the plaintiff. WGL says the fact that these employees give direct evidence that the State's employees undertook general lagging activities installing asbestos brings State within Category 1. WGL also relies on a determination made by other contribution assessors in the matter of *Juleff*, DDT no 7275 of 2007, in particular at p6, and in the matter of *Coleman*, DDT no 8186 of 2008.

14. I respectfully disagree in so far as those contribution assessments have come to that conclusion.
15. The matter is obviously not free from controversy. In the matter of *William John Harvey*, DDT no 8296 of 2008 involving the present cross defendants and BlueScope Steel similar contentions were made in respect of BlueScope's liability in respect of the lagging activities carried out at the Port Kembla Steelworks. I am conscious that in that matter I departed from other contributions assessors to which reference is made in my contributions assessment based upon my reading of the Standard Presumptions.
16. In that contributions assessment I said the following:
 32. *The language of the standard presumptions order in Category 1 and Category 2 does contemplate, as I have indicated above, that large corporations and authorities may properly be considered Category 2 defendants, being users of asbestos or products, plant and equipment which contained asbestos.*

33. *The matter in my view is one of construction. "Install" meanings include: "to put in place or position", "to put in and prepare (equipment) for use", "to connect or set in position and prepare for use".*
 34. *The question is then whether the first and second defendants were engaged in a business which relates to the period of exposure and which can be described as installers of asbestos or of products, plant and equipment which contained asbestos, or are they businesses who engage in a business which relates to the period of exposure and can be described as users. The language which is used in respect of the Category 2 occupiers contemplates that those persons conduct premises where asbestos or products, plant and equipment which contained asbestos were situated or employers of staff who in the course of or as an incident to their employment were exposed to asbestos.*
 35. *Notwithstanding the size and sophistication of its operation, in my view and contrary to Mr Jay's views op cit, AIS was not engaged in a business of installing asbestos products, plant and equipment but was rather the occupier of premises which contained asbestos.*
 36. *In my view AIS and Lysaghts were engaged in a business, namely in a broad sense steel production, at the Port Kembla and Newcastle steelworks. They were installers of asbestos in the brick ovens where the plaintiff worked but they were not in the business of installation.*
 37. *There is no evidence before me as to who was the designer and manufacturer of the plant and equipment that is referred to.*
17. Likewise in this matter I will assume for the purposes of the argument that State was engaged in a business which relates to the period of exposure. As a contributions assessor I am hampered by the lack of submissions in relation to this matter which involves on the one hand analyzing the history of the New South Wales Government Railways commencing with the *Government Railways Act 1912, the Transport (Division of Functions) Act No 31 of 1932*, and the remarks of Sir Frederick Jordan in *Skinner's Case*, (1937) 37 SR 261 cited with approval in *Wynyard Investments Pty*

Ltd v The Commissioner for Railways at 384 and at 398 where Kitto J agreed with the observations of the Chief Justice in Skinner's Case that:

'A State Railway is no more an inalienable function of government than a State brickworks.'

18. See also the discussion in *Miller*, 30th edition, *Annotated Trade Practices Act* 2009 at p50, the concept of carrying on a business, which would pick up in my view similar concepts to that set out in the concept of "engage in a business".
19. In my opinion the defendant was a large and sophisticated operator of an industrial enterprise, namely the railway network of New South Wales. In the course of its operation and in particular the use of locomotives from time to time, no doubt as part of routine maintenance, large volumes of asbestos products supplied by the cross defendants were used and to which the plaintiff was apparently exposed.
20. On the assumption that the State Rail Authority was engaged in a business, namely the conduct of rail transportation in New South Wales on a state-wide basis, they were engaged in the conveyance of passengers and freight for profit: they were not in the business of installation. That was merely an incident of its operation.
21. As such the defendant can be described under Category 2 as users of asbestos or products, plant and equipment which contained asbestos.
22. It is clear that the Category 2 employer encompasses large statutory instrumentalities or businesses. I do not believe it is an accurate description to describe their business as one of an installer of asbestos. That is consistent with Footnote 10 to the clause where it says:

“Similarly, it is not intended to include a user of asbestos products, such as a small building company, which uses bonded asbestos sheeting in building works.”

23. In my view the footnote is merely an example and does not confine the argument to exclude larger organizations such as the SRA.
24. Having reached that conclusion however, I have no doubt, having regard to its size and notwithstanding its statutory structure that for the entire period of the plaintiff's employment as a Category 2 employer the SRA had actual knowledge which was consistent with its identity, capacity, size and state of sophistication. I would accordingly throughout the relevant period vary the standard presumption set out in clause 5 by 20%. I am reinforced in that by the fact that the defendant was the employer and had a non-delegable duty of care.
25. I also accept the submission that the plaintiff had very little exposure in the period 1966/1979 although I believe it is reasonable to accept the cross defendant's analysis that until he took up duties in 1985 at Hornsby Station the possibility of exposure cannot be excluded. These exposures were much lighter and, even though they are within the range of time for contraction of mesothelioma, are very much at the later end of the band for the contraction of mesothelioma.
26. Based on the plaintiff's particulars I adopt the following separate periods of exposure as follows:

A1	November 1949 to June 1955	Occasional exposure
A1	July 1955 to December 1960	Daily exposure
B1	January 1961 to June 1966	Daily exposure
B2	July 1966 to 1985	Possible occasional exposure.

27. I also take into account that whilst WGL ceased operations on 30 September 1966, the possibility of exposure to its products thereafter continued and I will make an arbitrary cut-off date of 31 December 1966.
28. As between Category 1 defendants, the suppliers and the State, in respect of Period A – that is, the period before 1 January 1961 – the suppliers' liability is 60% and the State's liability is 40%.
29. For Period B, 1 January 1961 until 31 December 1978 the respective apportionment should be 52% : 48% as between suppliers and the State.
30. In relation to Period C between 1979 and 1985 the respective standard presumptions are varied to be 48% and 52% respectively.
31. In relation to causal potency however, it is clear that substantial weighting should be given to the plaintiff's exposure on a daily basis for 4 years and 6 months in what the State describes as Period A2, from 1955 till December 1960. Although this only represented 54 months of the 121 months in Period A1 and A2, in my view the weighting for that period should be 80% in respect of A2 and only 20% in respect of A1.
32. A similar ratio to A1 should be applied to the period from January 1961 to cessation of exposure by WGL on 31 December 1966, a period of 6¹/₂ years or 78 months.
33. In respect of the period 1 January 1967 to 30 June 1985 I believe that in terms of contribution and causal potency all periods after 1979 can probably be excluded as being of causal relevance to the contraction of the plaintiff's condition. Adopting the necessarily broad brush approach in respect of that period there should be 50:50 contribution between State and Amaca who is the only relevant supplier for that period. However, in

terms of causal potency I regard that period as being of much lesser significance.

34. Based on causal potency, I believe the solution based on temporal apportionment should be varied as follows, adopting some of the methodology of WGL's table at p22 of its reply.
35. In particular, the time-weighted periods set out at p22 of the WGL reply should be varied to reflect the intensity of the period referred to as A2 in the State's submission at p17, the period between July of 1955 and December 1960.
36. Period A of 31% should be heavily weighted to reflect the daily exposure for that five year period.
37. I believe that Periods A1 and B1 set out at p17 of the State's reply are approximately equivalent.
38. I adopt the following weighted percentages for the periods that are referred to:
 - Period A1 – 20% of total exposure
 - Period A1 – 50%
 - Period B1 – 20%
 - Periods B2 and C – 10%(C being the period 1 January 1979 to 30 June 1985 which is of marginal relevance in this matter.)
39. For the two A periods I apportion in accordance with the Standard Presumptions as varied:

State's responsibility as 40% of 70% - total 28%;

Amaca's responsibility as 80% of 60% of 70% - total 33.6%; and

WGL's responsibility as 20% of 60% of 70% - total 8.4%.

40. For Period B1 up until cessation of WGL in the market place I assess liability as follows, varying the Standard Presumptions by 20%:

State: 48% of 20% - total 9.6%;

Amaca: 80% of 50% of 20% - total 8.32%; and

WGL: 20% of 52% of 20% - total 2.08%

41. For Periods B2 and C, as I have stated above I am treating the State and Amaca, the only two parties being 50:50 of 50% each of 10%, a total of 5% each.

42. In summary, the final percentages are as follows:

a) State:

- Period A – 28%;
- Period B – 9.6%;
- Periods B2 and C – 5%

= 42.5%

b) Amaca:

- Period A – 33.6%;
- Period B – 8.32%;
- Periods B2 and C – 5%

= 47%

c) WGL:

- Period A – 8.4%;
- Period B – 2.08%

$$= \frac{10.5\%}{100\%}$$

43. I appoint Amaca as the Single Claims Manager. I have forwarded them my memorandum of fees dated 1 March 2010.

1. I have forwarded them my memorandum of fees.

Dated the 1st day of March 2010

PAUL BLACKET SC
CONTRIBUTIONS ASSESSOR.