

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

**DDT No. 266 of 2011**

BETWEEN:

**STATE OF NEW SOUTH WALES**

Cross Claimant

AND

**AMACA PTY LTD**

First Cross Defendant

**WALLABY GRIP LTD**

Second Cross Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. This matter was referred to me by Registrar Chia pursuant to the direction of Judge Curtis. The Registrar has requested that I also appoint a Single Claims Manager pursuant to Clause 61(3)(b) of the *Dust Diseases Tribunal Regulation 2007* (**the Regulation**).

2. My determination is to be made on the papers, on the assumption that the Defendants are liable, and applying the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (“the Standard Presumptions”).

### **The Principal Claim and Cross Claim**

3. Greg Smith was the plaintiff in the principal proceedings. He sued the State of New South Wales (**NSW**).
4. Mr Smith alleged that he suffered mesothelioma. The principal proceedings were resolved by way of a verdict for the plaintiff. There was no Statement of Particulars.
5. NSW cross claimed against Amaca Pty Ltd (**Amaca**) and Wallaby Grip Ltd (**WGL**) seeking contribution or indemnity for the sum it paid to Mr Smith. It adopted the allegations made by Mr Smith as if they were fully set out. There was no cross examination of the plaintiff by the cross defendants.

### **Mr Smith’s Exposure**

6. Annexed to NSW’s Reply is the affidavit of Mr Smith regarding the circumstances of his alleged exposure to asbestos dust and fibre. At the age of 16 Mr Smith obtained a job with the NSW Government Railways (**the Railways**) as a shop boy at the Chullora Workshops. In 1961 he was promoted to trainee storeman. He commenced with the Railways on 11 October 1956 and worked there until 9 August 1963.
7. As a shop boy he worked in the large erecting workshop and was required clean the underside of 36 and 38 class steam locomotives so that

maintenance and repairs could be performed on them. Throughout the time he worked as a shop boy he worked within 2 or 3 metres of tradesmen including ladders who were removing and reapplying asbestos insulation materials from boilers, steam pipes and parts of the engines of steam locomotives. The asbestos insulation materials were rectangular blocks, rope, blankets and powder which was mixed to form a paste. The tradesmen referred to those products as "asbestos".

8. The boilers of all of the steam locomotives were lagged with asbestos blocks. The ladders cut them with a hacksaw which gave off a large amount of asbestos. Mr Smith identified "Hardies 85% Magnesia For More Efficient Insulation" from a brochure. That product was used on the boiler drum of a 38 Class locomotive. Asbestos blankets or mats were sometimes put over the asbestos blocks.
9. Asbestos rope was used by tradesmen to insulate the steam pipes running to and from the boilers on the locomotives. It was cut from a wooden spool with a hacksaw or a knife and wrapped around the steam pipes. He regularly inhaled dust from the asbestos rope.
10. Asbestos powder was made up into a slurry and applied by hand to lag parts of the firebox of each locomotive. Mr Smith worked within metres of the tradesmen making up the slurry. He inhaled asbestos.
11. As well as being present at the installation of asbestos he was also present when it was removed from boilers, steam pipes and fire boxes on steam locomotives. It was removed by hand and by using chisels or scrapers. The asbestos was prone to disintegrate and dust went everywhere. Mr Smith had dust in his hair, on his clothes, on his arms and face.

12. Mr Smith also experienced exposure when cleaning up the asbestos mats, blocks, rope and slurry. He regularly swept up the workplace as well. Dry sweeping caused asbestos dust to come into the air which he breathed in. It was always dusty in the Chullora workshop.
13. When Mr Smith started work as a trainee storeman he still went to the workshop on a daily basis to deliver materials. He delivered asbestos rope, asbestos blankets or mats at least 3 or 4 days a week. When he handled those materials dust was breathed in.
14. As part of his deliveries he removed the asbestos rope and blankets from the bags they came in and placed them on a shelf in the storeroom. He had dust on his hands and clothes from handling those products.
15. He was never warned of the dangers of asbestos while working at the railways. He was not offered a mask to wear.
16. His only exposure to asbestos occurred at the Railways.

### **NSW Reply**

17. NSW submits that it should only be placed into Category 2. It submits that it should not be placed into Category 1 on the basis that it was only sued in its capacity as an employer and there is no allegation that it was a supplier or installer of asbestos products in the context of Cl 5(2) of the Standard Presumptions. It further says that as NSW lacked a "profit motive" it could not be in "a business" within the meaning of Cl 5(2)(a). If NSW were categorised as both category 1 and 2 then it says that Amaca and WGL should fall into both categories as well. In that regard "*The simple fact that they employed*

any person or occupied any premises is sufficient to make them category 2 defendants under Cl 5(2)(b)".

18. NSW refers to and relies on the following material which showed that WGL and Amaca supplied asbestos products to it:

- Affidavit of Nikola Woelfl sworn 16 April 1998.
- DDT decisions involving the same parties in *Rayner* and *Woelfl*.
- Mr Smith's affidavit (reference to Hardies 85% Magnesia).
- Affidavit of James Juleff sworn 5 September 2008.
- Discovered documents.

19. NSW accepts that it has actual knowledge of the dangers of asbestos at the time of Mr Smith's exposure (ie post 1955). It further submits that the decision in *State Rail Authority of NSW v WGL [1999] NSWDDT 12 (Rayner)* shows that WGL and Amaca also had actual knowledge.

20. NSW points to the decisions of judges of the DDT where liability was apportioned as follows:

Case	Period	SRA	Amaca	WGL
Rayner	1938 – 1950	20%	40%	40%
Woelfl	1950 – 1955	30%	50%	20%

21. If its principal submission that it is a Category 2 defendant only is accepted it submits that the apportionments are as follows:

1 July 1958 – 31 December 1960 (2.5 years) = 36% - Index Period A

1 January 1961 – 30 June 1965 (4.5 years) = 64% - Index Period B

State (Cat 2)	Amaca (Cat 1)	WGL (Cat 1)
$25\% \times 36\% + 35\% \times 64\%$	$75\%/2 \times 36\% + 65\%/2 \times 64\%$	$75\%/2 \times 36\% + 65\%/2 \times 64\%$
31.4%	34.3%	34.3%

22. In the event that NSW is placed into Category 1 and Category 2 it submits that the Standard Presumptions should be adjusted against Amaca and WGL by 20% to be consistent with the Tribunal's decisions in *Rayner* and *Woelfl*. The calculations are as follows:

State (Cat 2)	State (Cat 1)	Amaca (Cat 1)	WGL (Cat 1)
$25\% \times 36\% + 35\% \times 64\%$	$75\%/3 \times 36\% + 65\%/3 \times 64\% = 22.86\% - 20\%$	$75\%/3 \times 36\% + 65\%/3 \times 64\% = 22.87\% + 20\%/2$	$75\%/3 \times 36\% + 65\%/3 \times 64\% = 22.87\% + 20\%/2$
31.4%	2.86%	32.87%	32.87%

### Amaca's Reply

23. Amaca does not admit any exposure to asbestos fibre from its products caused or materially contributed to Mr Smith's condition.

24. Amaca notes that no Statement of Particulars was filed and that the tender of Mr Smith's affidavit (which was attached to NSW's Reply and which I refer to above) was rejected by the DDT at a directions hearing on 3 November 2011. In that regard it submits:

*“...the evidence contained in the Affidavit is not evidence in these proceedings. Amaca further submits there is no evidence before the Tribunal as to the identification of the asbestos products the Claimant alleges he worked with or in the vicinity of”.*

25. The Regulations allow me to take into account documents that comprise NSW’s Reply which includes Mr Smith’s affidavit. As noted below Amaca relies on his affidavit in its Reply.
26. Amaca submits that it never manufactured asbestos rope, blankets or mats and that the reference to asbestos “powder” and “blocks” are not sufficiently particularised to identify it as a manufacturer of those products.
27. Amaca submits that it first became aware in the mid 1960s that the inhalation of asbestos fibres caused mesothelioma but only when crocidolite was present. On that basis Amaca submits that Mr Smith’s injury was not foreseeable. Amaca separately submits that it did not owe Mr Smith a duty of care on the basis that it had no knowledge of the risk of injury at the relevant time.
28. Amaca submits that NSW was an installer of asbestos for the purposes of Cl 5(2) of the Standard Presumptions. In particular it relies on Mr Smith’s affidavit evidence regarding the lagging activities which resulted in the installation of asbestos.
29. In respect of Period 2 exposure it submits that it should not be liable at all on the basis that none of its products were identified leaving WGL and NSW as the Category 1 defendants.

30. Amaca submits that the Standard Presumptions should be adjusted by 20% against NSW on the basis that it was a large and sophisticated employer. It points also to state of knowledge of the Railways (in right of NSW) at the time of Mr Smith's exposure.

31. Amaca submits that the liabilities should be apportioned as follows:

Party	Category	Calculation	Total
NSW	1 and 2	31.95% + 19.525% + 15.95% + 6.525%	73.95%
Amaca	1	4.88%	4.88%
WGL	1	14.64% + 6.525%	21.17%
Total			

### **WGL's Amended Reply**

32. WGL submits that it did not manufacture asbestos blocks at any time between 1956 and 1963. In this period it did manufacture and supply asbestos composition but says there is no evidence its product resulted in exposure to Mr Smith. It further says that its product contained chrysotile whereas Amaca's product contained predominantly amosite.

33. WGL did manufacture and supply asbestos blankets and mats in the relevant period.

34. WGL did supply (but not manufacture) asbestos rope in the relevant period. It notes there is no evidence its product was responsible for Mr Smith's

exposure at the Chullora workshop. It says its blankets, mats and rope contained chrysotile.

35. As with Amaca WGL submits that NSW should be placed into both category 1 and 2. It should be placed into category 1 on the basis that it was an installer of asbestos products and refers to Mr Smith's affidavit as well as the evidence of James Ryan (Proceedings No 175 of 2009), Phillip Coleman (Proceedings No 266 of 2011/1) and Nikola Woelfl. It points to the fact that it employed its own ladders to undertake the work on the locomotives.

36. WGL next submits that the Standard Presumptions should be varied as against NSW on the basis that it had access to materials regarding the dangers of asbestos and that it was a large and sophisticated organisation. It submits the Standard Presumptions should be adjusted as against NSW by 20%.

37. In respect of apportionment WGL submits that Amaca's product, which contained amosite, were between 15 and 100 times more causative of Mr Smith's injury than its products. Taking into account the greater causal potency of the Amaca products and the proposed variation of the Standard Presumptions WGL submits the following apportionments should apply:

Party	Calculation	Total
WGL (supplier)	1.14% + 0.57%	1.71%
Amaca (supplier)	15.91 + 7.98%	23.98%
NSW	17.05% + 27.9% + 8.55% + 20.9%	74.4%
		100%

## Findings

38. In my view it is appropriate to place NSW in both Category 1 and Category 2. I place NSW into Category 1 on the basis that it was an installer of asbestos. Most particularly the work involved in stripping and re-installing asbestos on locomotives at the Railways was undertaken by Railways employees.
39. I do not agree that placing NSW (as an employer) into both Category 1 and Category 2 would destroy the distinction between the two categories of defendants intended by the legislature. My decision to place NSW into both categories is consistent with the reasoning reached in other contributions assessments.
40. I place Amaca and WGL into Category 1. I do not agree with NSW's submission that the suppliers were also employers of staff exposed to asbestos. The concept of employment is referring to an employer of staff which resulted in exposure to the plaintiff.
41. In my view it is unnecessary to amend the Standard Presumptions. NSW was a large and sophisticated organisation (in its capacity as operator of the Railways) and, applying the reasoning in *Rayner*, it had knowledge of the dangers of asbestos exposure at the time of Mr Smith's employment. One purpose of the Standard Presumptions is to take account of the relative state of the knowledge that can be attributed to the broad categories of defendants in each period. Category 1 defendants are presumed to have actual knowledge of the dangers of asbestos and the state of actual or constructive knowledge for Category 2 defendants is presumed to have changed through the various periods. So in categorising NSW in Category 1 it is presumed that it had actual knowledge. It is unnecessary to further amend the Standard Presumptions against NSW.

42. Both Amaca and WGL submit that the other should bear the vast majority of the liability for the suppliers. The identification of the actual product is quite generic but the evidence relied on by NSW indicates that both made significant contributions to the supply of product utilised onsite at Railways. There are no special features in this case which would cause me to alter the Standard Presumptions as between the suppliers.

43. As noted previously Mr Smith commenced with the Railways on 11 October 1956 and worked there until 9 August 1963 with a 3 month break in about 1959 to perform National Service - a period of about 79 months.

11 October 1956 – 31 December 1960 (48 months) = 60.75% - Index Period A

1 January 1961 – 9 August 1963 (31 months) = 39.25% - Index Period B

44. Period A – no variation  
Category 1 defendants

$75/3\% \times 60.75\% = 15.18\%$  each of NSW, Amaca and WGL

Category 2 defendant

$25\% \times 60.75\% = 15.18\%$

Period B – no variation

Category 1 defendants

$65/3\% \times 39.25\% = 8.5\%$  each of NSW, Amaca and WGL

Category 2 defendant

$$35\% \times 39.25\% = 13.74\%$$

### Final Apportionments

45. The final apportionments are as follows:

$$\text{NSW} \quad 15.18\% + 15.18\% + 8.5\% + 13.74\% = 52.6\%$$

$$\text{Amaca} \quad 15.18\% + 8.5\% = 23.7\%$$

$$\text{WGL} \quad 15.18\% + 8.5\% = 23.7\%$$

That apportionment accords with the trajectory applied by the Tribunal in *Rayner* and *Woelfl*. That is, as knowledge of the dangers of asbestos developed through the 1940s and 1950s into the 1960s the liability of NSW increased accordingly.

46. Applying CI 61(5) of the Regulations I appoint NSW as the first possible SCM and WGL as the second possible SCM

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David Jay

Contributions Assessor

10 January 2012