

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

DDT No.231 of 2009

BETWEEN: **STATE OF NEW SOUTH WALES**
Plaintiff

AND: **AMACA PTY LIMITED**
First Defendant

WALLABY GRIP LIMITED
Second Defendant

CONTRIBUTION ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulations 2007* (hereinafter referred to as "the Regulations") for a determination of the apportionment as between Plaintiff and the two Defendants.
2. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5 (1) of the Standard Presumptions Order.
3. In the present matter the Plaintiff filed a Statement of Claim on 14 August 2009 claiming

indemnity or contribution pursuant to s.5 of the *Law Reform (Miscellaneous Provisions) Act 1946* from Amaca Pty Ltd (hereinafter referred to as "Amaca") and Wallaby Grip Ltd (hereinafter referred to as "Wallaby Grip") in respect of Dust Diseases Tribunal proceedings No.70 of 2009 filed on 24 March 2009 by Cecil John (Jack) Lucas (hereinafter referred to as "Lucas") who was employed by the Plaintiff, and in the course of such employment was exposed to and inhaled asbestos dust and fibre and as a consequence of that exposure he contracted mesothelioma. The Lucas claim was settled in favour of Lucas for the sum of \$330,000 inclusive of costs.

4. The Plaintiff claims that the asbestos dust and fibre to which Lucas was exposed emanated from products manufactured or supplied by Amaca or products manufactured and supplied by Wallaby Grip.
5. I have had before me and have considered Lucas' Statement of Claim, and Statement of Particulars. Lucas died from a mesothelioma condition, which is indivisible.
6. On 14 August 2009 the Plaintiff filed a document entitled "Revised Reply" in which it was alleged that:
 - (i) The Plaintiff's predecessor was the State Rail Authority of New South Wales and the New South Wales Government Railways.
 - (ii) The Plaintiff should be placed in Category 2 while Amaca and Wallaby Grip should be placed in Category 1.
 - (iii) The Plaintiff was sued by Lucas as his employer only and not in any other capacity.
 - (iv) The Plaintiff does not fall into Category 1.
 - (v) If the Plaintiff is a Category 2 Defendant, then there should be no variation in the Standard Presumptions.
 - (vi) In the event that the State is a Category 1 Defendant and also a Category 2 Defendant, then there should be a variation in the Standard Presumptions.
 - (vii) If the Plaintiff is a Category 2 Defendant only, then the apportionment should be 20% the Plaintiff, 40% Amaca and 40% Wallaby Grip.
 - (viii) If the Plaintiff is a Category 1 Defendant and also a Category 2 Defendant, then the apportionment should be 5% the Plaintiff (Category 2), plus (Category 1) 31.6%, Amaca 31.7%, Wallaby Grip 31.7%.

7. Amaca filed a document entitled "Defendant's Reply" dated 30 September 2009 which relevantly alleges:

- (i) Lucas identified working with asbestos rope, powdered asbestos and sheets of asbestos.
- (ii) Amaca denied manufacturing asbestos cloth.
- (iii) Powdered asbestos does not particularise Amaca.
- (iv) Amaca did not manufacture asbestos rope.
- (v) That the Plaintiff, Amaca and Wallaby Grip should be placed in Category 1 and the Plaintiff should also be placed in Category 2.
- (vi) The Standard Presumptions Order to be varied as against the Plaintiff on the basis of its size and sophistication and that such variation should be 20 percentage points.
- (vii) That 50% of the Category 1 liability should be attributed to the Plaintiff and the remaining 50% of the Category 1 liability be then apportioned between Amaca and Wallaby Grip.
- (viii) The entirety of Lucas' employment occurred during period A.
- (ix) That the apportionment should be for Category 1 Defendants 55% and for Category 2 Defendants 45%.
- (x) The apportionment should be Plaintiff (Category 2) 45%, Plaintiff (Category 1) 27.5%, Amaca (Category 1) 13.75%, and WGL 13.75%.

8. On 7 October 2009 Wallaby Grip filed a reply which relevantly alleges:

- (i) Between 1943 and 1949 Wallaby Grip admits that it was one of a number of manufacturers and suppliers generally of asbestos composition and rope.
- (ii) Wallaby Grip denies it manufactured and/or supplied asbestos sheeting.
- (iii) The Plaintiff worked for the State Authority at Eveleigh and at Granville between 1943 and 1949.
- (iv) Amaca should be placed in Category 1, as should Wallaby Grip and additionally the Plaintiff should be placed in Category 1, and the Plaintiff should also be placed in Category 2.
- (v) The Standard Presumptions should be varied against the State because of the State's knowledge.

- (vi) The apportionment should be as follows: the State as employer (Category 2) 45%; State (Category 1) 18.34%; Wallaby Grip 18.3%; Amaca 18.33%.
9. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5 (8). In the present case, the only period of exposure was between 1943 and 1949, and the intensity of asbestos exposure was the same during the whole of the period.
 10. The whole of the period of employment with the Plaintiff falls within period A of the Standard Presumptions Order, and thus Category 1 Defendants are presumed to be 75% liable and Category 2 Defendants 25% liable.
 11. Notwithstanding the submissions made by the Plaintiff, I determine on the basis of the Statement of Particulars and the Replies, that the Plaintiff falls into Category 1 and also into Category 2. The Plaintiff comes within the terms "corporations, authorities and legal entities", and while the term "business" is used, it clearly encompasses the Plaintiff's operations.
 12. Insofar as the Defendants are concerned, I note the submissions as to the claimed lack of particulars relating to their products. Notwithstanding the alleged lack of particulars, I determine that Amaca did supply its products to the Plaintiff, as did Wallaby Grip, and that the supply of asbestos materials was approximately equal.
 13. I determine that the Amaca and Wallaby Grip each fall into Category 1.
 14. Insofar as Category 1 Defendants are concerned, the liability should be divided equally.
 15. The question then arises as to the contribution between Category 1 and Category 2 Defendants which is, according to the Standard Presumptions Order, to be on the basis of 75%/25%.
 16. In the present case, the Standard Presumptions take into account the various aspects of the liability of the Plaintiff and Amaca and Wallaby Grip and, accordingly, there should be no variation in the Standard Presumptions.

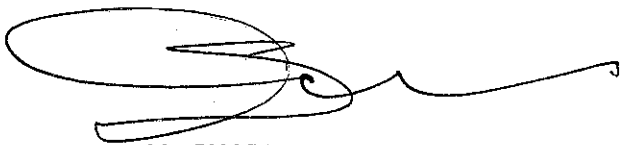
17. The following calculation as to liability can therefore be made:

- (i) The Plaintiff bears one-third of the 75% of the Category 1 liability plus 25% of the Category 2 liability, which thus totals 50%.
- (ii) Amaca is liable for one-third of the Category 1 liability, namely 25%.
- (iii) Wallaby Grip is liable for one-third of the 75% of the Category 1 liability, which totals 25%.

18. Therefore I determine the total liability of the Plaintiff and the Defendants as follows:

(i)	Plaintiff –	50%
(ii)	Amaca –	25%
(iii)	Wallaby Grip –	<u>25%</u>
	Total	100%

19. Pursuant to clause 61 of the Regulations, I appoint the Plaintiff as the Single Claims Manager as it is the primary Defendant defined under clause 61(9) of the Regulations.



J.L. SHARPE
Contributions Assessor

30 November 2009