

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

DDT No.192 of 2009

STATE OF NEW SOUTH WALES

Plaintiff

AMACA PTY LIMITED

First Defendant

WALLABY GRIP LIMITED

Second Defendant

CONTRIBUTIONS 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* ("the Regulations") for a determination of the apportionment as between the Plaintiff and the Defendants. I am required to assume that each of the Defendants is liable.
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 was originally sued as a Defendant by Wynsome Bessie McKenzie (as legal personal representative of the estate of the late Malcolm John McKenzie), alleging that during the period between 1943 and 1944 the late Malcolm John McKenzie (hereinafter referred to as the "deceased") was employed as a shop boy assisting boilermakers at premises known as the Broadmeadow Running Sheds and during that time he was exposed to and inhaled asbestos dust and fibre. Additionally during the period between 1951 and 1956 the deceased was employed as a tradesman by the Plaintiff at its premises known as the Cardiff Workshops and during that period of employment was exposed to and inhaled asbestos dust and fibre.
4. Proceedings taken by Wynsome Bessie McKenzie against the Plaintiff (DDT No.8228/08) claimed

damages for, *inter alia*, the deceased's pleural malignant mesothelioma, which is an indivisible condition.

5. The deceased died on 23 September 2008.
6. Prior to his death, the deceased swore an affidavit on 19 September 2008 and, so far as is relevant, asserted the following:
 - (i) In about the beginning of 1943 he commenced employment with the Government Railways at the Broadmeadow Running Sheds doing general maintenance and he assisted boilermakers who repaired locomotives.
 - (ii) In assisting the boilermakers he removed old asbestos insulation and then replaced it with new asbestos insulation on the steam pipes, insulated small steam pipes with asbestos cord and had some dealings with asbestos blankets.
 - (iii) Additionally, the Plaintiff replaced asbestos rope around the steam pipes and also used asbestos cord. When the asbestos rope or cord was removed it was very dusty.
 - (iv) He was doing this work 5 days a week on 8 hour shifts and estimated that he worked with asbestos directly at least once each week but was working around people every day who were using it and that the environment was very dusty.
 - (v) He worked at the Broadmeadow Running Sheds for just short of 2 years and left at the end of 1944.
 - (vi) In about 1951 he returned to the New South Wales Government Railways and worked at the Cardiff Workshops where large scale overhauls and maintenance of locomotives was undertaken.
 - (vii) The Plaintiff was employed as a tradesman and did not have any direct exposure to asbestos while at Cardiff but had bystander exposure every day.
 - (viii) He remained at the Cardiff Workshop until about 1956.
 - (ix) There was always dust in the air from other people working upon locomotives.
 - (x) He had daily exposure to asbestos from the people working around him.
7. The Plaintiff filed a "Revised Reply" on 15 July 2009 which asserted the following:
 - (i) The Plaintiff should be placed in Category 2 while the First and Second Defendants should be placed in Category 1.

- (ii) As to being placed in Category 2, the State asserts that:
 - (a) It was sued in proceedings 8228 of 2008 as an employer only and was not sued and it does not in turn sue in any other capacity.
 - (b) It is not alleged that the State was a miner, manufacturer, supplier or installer of asbestos or products, plant and equipment which contained asbestos within the meaning of those terms in clause 5(2)(a) of the Order.
 - (c) The State did not engage in a business.
 - (d) Footnote 11 to clause 5(2) does not apply because the State's predecessors were statutory corporations only, and none was a "company" within the meaning of the *Corporations Act*.
 - (e) To treat an employer as both a Category 1 Defendant and a Category 2 Defendant is to destroy the distinction between the two categories of defendants.
 - (f) There is no reason why the Defendant should also be categorised as Category 1 and 2 Defendants.
- (iii) If the State is a Category 2 Defendant only, then the standard presumption should not be varied.
- (iv) If the State is a Category 1 Defendant and also a Category 2 Defendant, then the standard presumption should be varied.
- (v) Both Defendants were suppliers to the State Rail Authority.
- (vi) If the State is a Category 2 Defendant only, then the apportionment should be: State 25%, Amaca 37.5%, WGL 37.5%.
- (vii) If the State is a Category 1 Defendant and a Category 2 Defendant, then it should be the State 36.6% while Amaca and WGL 31.7% each after a variation of 20%.

8. Amaca Pty Ltd provided a Reply date 30th September 2009 which, so far as is relevant, asserts as follows:

- (i) The use by the deceased of the term "asbestos insulation" is a generic product description and it cannot relate specifically to Amaca.
- (ii) Amaca did not manufacture asbestos tape, asbestos cord, asbestos rope or asbestos blankets, but such products were manufactured under or supplied by Wallaby Grip Ltd.
- (iii) The State has failed to mitigate its damages by bringing a Cross-Claim against Wormalds Pty Ltd.
- (iv) The State should be placed in Category 1 and Category 2, and both Amaca and Wallaby

Grip Ltd should be placed in Category 1.

- (v) Amaca points to paragraph 11 of the deceased's affidavit, pointing out that it was the deceased's job to both remove and install asbestos insulation while working at Broadmeadow and that it occurred at Cardiff Workshop as well where the deceased was a bystander.
- (vi) The standard presumption should be varied to take into account the State's state of knowledge.

9. Wallaby Grip Ltd filed a Reply on 27 October 2009 which asserts, so far as is relevant:

- (i) Wallaby Grip was one of a number of suppliers of asbestos blankets and rope during the relevant period of the deceased's period of employment.
- (ii) In relation to asbestos insulation referred to by the Plaintiff, Wallaby Grip Ltd submits that the reference by the deceased to it was to Amaca's product.
- (iii) Amaca, Wallaby Grip and SRA should be placed in Category 1 and SRA should also be placed in Category 2.
- (iv) The standard presumption should be varied in relation to the State of New South Wales by 20 percentage points against it.
- (v) There should be apportionment taking into account a party not the subject of the proceedings, namely Wormalds, which would result in 30% not being covered by the present proceedings but leaving 10.5% to Amaca, 10.5% to Wallaby Grip Ltd and 49% to the State of NSW both as a Category 1 and as a Category 2 employer.

10. On the information presently before me, I am unable to determine whether there is any basis for the assertion as made by the State of New South Wales as to Amaca Pty Ltd or Wallaby Grip Pty Ltd being Category 2 Defendants as well.

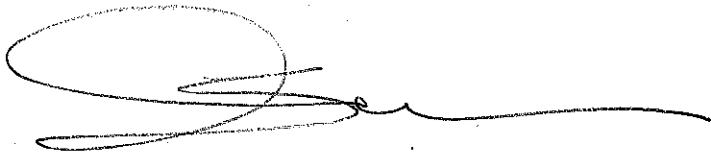
11. Under Regulation 49 of the Regulations I am only able to determine the contribution that each Defendant is liable to make (and in this case this includes the Plaintiff) and I am to do so solely on the basis of Particulars and Replies. For whatever reason, Wormald is not a party to these proceedings.

12. The deceased's condition was a mesothelioma and is indivisible.

13. Accordingly, I will proceed to determine apportionment without regard to any contribution that may have occurred from Wormalds' period of exposure.
14. Initially I must determine the existence of any separate periods of exposure pursuant to clause 5 (8) and make a determination of what proportion of the whole each separate period bears, having regard to the number of such periods, the length of each period, the duration of and the intensity of exposure to asbestos present in each such period. So far as the present matter is concerned, all periods of exposure occurred within period A (before 1 January 1961). Accordingly under the Standard Presumptions Order, Category 1 Defendants are liable for 75% and Category 2 Defendants liable for 25%. The standard presumptions can be varied by an amount of up to 20 percentage points.
15. Notwithstanding the submissions made by the Plaintiff, I determine on the basis of the material before me that the Plaintiff falls into both Category 1 and 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.
16. I determine that Amaca Pty Ltd and Wallaby Grip each fall into Category 1.
17. Insofar as Category 1 Defendants are concerned, the liability should be divided equally.
18. The question then arises as to whether the contributions between Category 1 and Category 2 Defendants should be varied.
19. In the present case the standard presumptions take into account the various aspects of the liability of the Plaintiff and Amaca Pty Ltd and Wallaby Grip Ltd and, accordingly, there should be no variation of the standard presumptions. Thus, the following calculations as to liability can be made:
 - (i) The Plaintiff bears one-third of the 75% of the liability as a Category 1 Defendant, plus 25% as a Category 2 Defendant, and thus the total are 50%.
 - (ii) Amaca is liable for one-third of the 75% as a Category 1 Defendant.
 - (iii) Wallaby Grip Ltd is liable for one-third of the 75%, which totals 25%.

20. Therefore I determine the total liability of the Defendants and Cross-Defendants as follows:

Plaintiff	50%
Amaca Pty Ltd	25%
Wallaby Grip Ltd	<u>25%</u>
Total	100%



J.L. SHARPE

Contributions Assessor

3 November 2009