



(b) standard presumptions as to apportionment determined by the Minister for the purposes of this clause by order published in the gazette.”

3. Regulation 47(1) provides: “A reference in this Division to a defendant includes a reference to a cross-defendant.”
4. It can be seen from the above that regard can only be had to the statement of particulars provided by the Plaintiff and replies as filed by the Defendants and Cross-Defendants, and not to any other document (including the statement of claim).
5. 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.
6. Regulation 5 of the Standard Presumption Order provides:

(1) Where defendants, by the requisite time, cannot agree upon an appropriate apportionment between themselves in any one claim, then the apportionment set out in the following Table will apply:

<b>Index</b>	<b>Date of exposure</b>	<b>Standard presumption for each category of defendants 6</b>	<b>Extent of variation for each category of defendant</b>
Period A	Before 1 January 1961 7	Category 1: 75 percent Category 2: 25 percent	An increase or decrease by an amount up to 20 percentage points
Period B	Between 1 January 1961 and 31 December 1978 8	Category 1: 65 percent Category 2: 35 percent	An increase or decrease by an amount up to 20 percentage points
Period C	Between 1 January 1979 and 31 December 1989 9	Category 1: 60 percent Category 2: 40 percent	An increase or decrease by an amount up to 20 percentage points
Period D	After 1 January 1990	Category 1: 40 percent Category 2: 60 percent	An increase or decrease by an amount up to 30 percentage points

**Note:**

6 The standard presumptions are designed, principally, to take account of the relative

state of knowledge that can be attributed to the broad categories of defendants in each period. In Period A, for example, the standard presumption is designed to reflect actual knowledge of the dangers of asbestos for Category 1 defendants and an absence of actual or constructive knowledge for Category 2 defendants. In moving from Period A through to Period D, the standard presumptions are designed to reflect the increasing level of knowledge of Category 2 defendants, to the point that, in Period D, it can be assumed that all defendants (and the community generally) have actual knowledge of the dangers of asbestos.

7 This date reflects the established link between asbestos exposure and mesothelioma set out in the article by Wagner & ors in the *British Journal of Industrial Medicine* : see *Bendix Mintex P/L v Barnes*(1997) 42 NSWLR 307 at 329G.

8 This date reflects the fact that in 1978, James Hardie & Co Pty Ltd first displayed warnings on their products containing asbestos, and the advice of the Australian National Health & Medical Research Council about reduction of exposure to asbestos to a minimum: see *Bendix* at 331 B-C.

9 This date reflects the conclusion of the first calendar year of operation of the DDT, by which time it can be confidently asserted that there was not, or ought not to have been, any knowledge differential within the community.

(2) For the purposes of determining the apportionment, the Contributions Assessor is to determine into which of the two categories each defendant falls (except for any defendant that is to be excluded from the apportionment, as agreed by the defendants). The two categories are:

(a) Category 1 which includes 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 Miners, Manufacturers, Suppliers and/or Installers 10 of asbestos or of products, plant and equipment which contained asbestos 11, and

(b) Category 2 which includes all other defendants. These would ordinarily be all corporations, authorities, and legal entities who engage in a business which relates to the period of exposure and which can be described as Users of asbestos or products, plant and equipment which contained asbestos, Occupiers of Premises which contained asbestos or 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.

**Note:**

10 It is not intended to include retail shops or outlets within the meaning of the term Supplier in Category 1. Retail shops or outlets are included in Category 2. 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.

11 For example, the category of installer would include the designer and manufacturer of particular plant or equipment which included asbestos as part of its design, as well as a company which is engaged to install the plant in accordance with the manufacturer's instructions.

(3) If a defendant, in any particular case, falls within both categories (ie as an installer and employer of the claimant) then a separate share is to be calculated by the Contributions Assessor for the role of that defendant which falls within each category.

(4) If there is more than one defendant in either of Category 1 and Category 2, then the Contributions Assessor is to treat each defendant as equal in contribution to the percent share of that Category unless satisfied that a variable contribution ought apply.

(5) The standard presumptions are intended to take account of, and strike an appropriate balance between the two broad categories of defendants having regard to all of those matters set out in clause 3 (Factual considerations). There will be cases where it is appropriate for the Contributions Assessor to vary the standard presumptions within the variation band specified in Column 4 (Extent of variation for each category of defendant) of the Table to subclause (1). However, a different percentage figure from the standard presumption within the variation band is not to be applied by the Contributions Assessor unless the Contributions Assessor is satisfied that it is appropriate to vary the standard presumptions in the particular circumstances of the individual case. A number may not be determined

which falls outside the variation band specified in Column 4 of that Table 12.

**Note:**

12 For example, a case might arise where the Contributions Assessor considers that the apportionment between an employer and supplier should be adjusted because the employer is considered particularly culpable in this particular instance. The Contributions Assessor could adjust the apportionment in the first index period by up to 20 percentage points, that is from 25 percent to 45 percent, but no higher.

(6) In calculating the appropriate variation, the Contributions Assessor is to have regard to the facts, matters and circumstances which make the case unusual, which may include, but are not limited to, the following facts, matters and circumstances:

- (a) the state of actual knowledge of a Category 2 defendant (but not a Category 1 defendant, which is taken to have had actual knowledge at all times),
- (b) the identity, capacity, size and state of sophistication of a particular defendant, including the industry, and nature of the industry, in which the defendant was engaged,
- (c) the number of defendants identified within each category as being at fault in connection with the claimant's claim 13,
- (d) the steps which the particular defendant took, ought to have taken and/or was capable of taking, to minimise the risks of harm from the manufacture, supply, installation, exposure to and use of asbestos.

**Note:**

13 For example, if there is more than one Category 1 defendant in periods B or C, and only one Category 2 defendant, the Contributions Assessor might wish to increase the collective share of the Category 1 defendants so that their individual shares are larger than the share of the one Category 2 defendant to reflect their greater culpability, if appropriate.

(7) Where the disease the subject of the claim is an indivisible disease (ie mesothelioma or lung cancer), the apportionment above will apply to the whole of the claim unless the Contributions Assessor is satisfied that by reference to the existence of separate periods of exposure, a differential determination of the contribution of each such exposure period ought to be made. If so, a determination will then be made of what proportion to the whole each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period 14. The standard presumptions will then be applied to each separate period. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial 15.

**Note:**

14 An example of one method of such an apportionment is to be found in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor* [1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634 .

15 The Contributions Assessor could decide that an index period is so immaterial that it does not warrant any adjustment. For example, where an exposure occurred for equal periods in index period A and index period B, then the Contributions Assessor ordinarily would adjust the standard presumption accordingly. Where, however, only a small part of the exposure occurred in Period B, the Contributions Assessor might decide to make no adjustment.

(8) Where the disease is a divisible disease (ie asbestosis or pleural disease), the independent Contributions Assessor will first determine (on the basis of the papers) the existence of any separate periods of exposure. A determination will then be made of what proportion to the whole, each separate period of exposure bears having regard to the number of such periods, the length of each such period, and the duration of and intensity of exposure to asbestos within each period 16. The Contributions Assessor is to treat each separate period as equal in contribution to the disease unless satisfied that a variable weighting ought apply. The Contributions Assessor will then apply to each separate period the proportions set out in the table above. Where periods of exposure span the index periods specified in the Table to subclause (1), the Contributions Assessor is to adjust the standard presumptions to reflect the changing apportionments in different index periods, unless one of the periods is immaterial 17.

**Note:**

16 An example of one method of such an apportionment is to be found in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor* [1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634 .

17 See note 15.

7. In the present matter, Royde Murray Uebel (hereinafter referred to as "the Plaintiff") brought proceedings by Statement of Claim dated 17 November 2008 against the State of New South Wales (hereinafter referred to as "the First Defendant") in respect of the Plaintiff's employment between December 1945 and May 1958 (hereinafter referred to as the period of employment") as an employee of the Railways as an apprentice fitter and machinist, fitter, assistant engineer and mechanical engineer having worked at premises located at Chullora and Eveleigh, which premises were owned and occupied by the Railways. In the course of performing his employment, the Plaintiff handled, fit, cut, installed and removed asbestos-containing insulation products and was present while other workers fit, cut, installed and removed asbestos-containing insulation products. The Plaintiff alleges injury in the nature of mesothelioma.
8. By his Amended Statement of Claim filed on 20 November 2008 the Plaintiff repeated the allegations made against the First Defendant and joined Amaca Pty Ltd (hereafter referred to as "Amaca") as a Defendant in that Amaca supplied and distributed asbestos cement building products for use in the home building industry and that additionally in about 1961 the Plaintiff built a garage at his home in North Ryde in the State of New South Wales and in the course of building that garage he handled, manipulated, cut and installed AC building products and was exposed to asbestos emanating from Amaca's products.
9. The First Defendant has issued a Cross-Claim against Wallaby Grip Ltd and Amaca Pty Ltd and relies upon and repeats the Plaintiff's allegations as against the First Defendant and asserts that the asbestos products to which the Plaintiff was exposed by working for the Railways was manufactured and/or supplied by the Cross-Defendants.

10. On 2 March 2009 the Plaintiff further amended his Statement of Claim with such amendment being limited to the question of damages.
11. On 2 March 2009 the Plaintiff provided a Statement of Particulars which contained the following relevant allegations:
  - (a) Between 3 December 1945 and May 1958, the New South Wales Government Railways employed the Plaintiff as an apprentice fitter and machinist, fitter, assistant engineer and mechanical engineer and during which time he was exposed to asbestos.
  - (b) The Plaintiff alleges that he was exposed to asbestos while working for the Railways in the erecting shop at Chullora (from about 1946 to about 1948) and also in the running sheds at Enfield from 1948-1949.
  - (c) The work in the running shed was "hot loco" work and involved doing running repairs and maintenance on steam locomotives.
  - (d) The work done in the erecting shop involved total refurbishment and overhaul of steam locomotives.
  - (e) Many parts of the locomotives were insulated with asbestos materials. The boilers were insulated with asbestos blankets or asbestos slurry (which was covered with sheet metal). The pipes from the boilers were lagged with asbestos rope. The flange gaskets on the steam pipes were usually made from asbestos, although occasionally they used soft copper for extreme conditions. The valve and gland packing was also made from asbestos.
  - (f) The Plaintiff's exposure in the erecting shop which occurred particularly because of the work removing and applying asbestos insulation on the locomotives was carried out in his immediate vicinity and the Plaintiff was regularly present when ladders were doing their work on other

locomotives close by. In the erecting shop, 12 or more locomotives were being overhauled at any one time.

- (g) The air in the erecting shop was always very dusty and the areas near the locomotives where repairs were being undertaken were not well ventilated.
- (h) Between 1949 and about 1950 the Plaintiff visited the Ultimo Power Station on several occasions, this being the power station that generated power for use by the Railways. There were steam pipes in the power station that were lagged with asbestos insulation and the Plaintiff was exposed to asbestos dust from this insulation when visiting Ultimo.
- (i) From about 1955 to about 1958 the Plaintiff worked as a mechanical engineer working on electric trains and, during this period, the Railways experimented with Ferodo brake shoes as a replacement to cast iron brake shoes with the experiments being conducted at Wilson Street in Redfern. The Ferodo brake shoes contained asbestos and the Plaintiff was present in the vicinity when these experiments were carried out.
- (j) The Plaintiff never wore a mask while working in the running sheds or in the erecting shop, nor anywhere else. The Plaintiff did not wear any gloves and no precautions were taken to prevent dust and fibre from asbestos insulation from being released into the air from the Plaintiff's workspace.
- (k) In about 1961 the Plaintiff built a garage at his home at Gilder Street, North Ryde.
- (l) The garage had a wooden frame, a tiled roof and was clad externally with asbestos cement sheets. The interior of the garage was not lined. The garage had eaves, which also involved the use of asbestos cement sheets.

- (m) The Plaintiff handled, cut and fixed the asbestos cement sheets using nails to fit the sheets in place including nailing overhead for the eaves. The Plaintiff cut the sheets using fibro cutters and cleaned as he did the work, including picking up bigger off cuts of asbestos cement sheets and sweeping up the dust and debris from these sheets.
  - (n) It took the Plaintiff several weeks to build the garage.
  - (o) The Plaintiff purchased the asbestos cement sheets from Complete Hardware and asserts that Amaca manufactured the asbestos cement sheets.
12. On 15 April 2009 the First Defendant provided a Reply and the relevant facts asserted by the First Defendant are:
- (a) That the First Defendant occupied the Chullora and Eveleigh premises and that the Plaintiff was exposed to asbestos as the premises.
  - (b) That during the period of exposure while employed by the First Defendant, the First Defendant should be categorised as a Category 2, while both Amaca and Wallaby Grip should be categorised as Category 1.
  - (c) For the second period in about 1961 only Amaca is liable for that exposure.
  - (d) The State is not and does not come within the terms of clause 5(2)(a) of the Standard Presumptions Apportionment Order because the State was not engaged in a "business" and, further, that the State did not "engage" with another person to install plant, and therefore did not engage in a business within the meaning of clause 5(2)(a).

- (e) It is pointed out by the First Defendant that footnote 11 to clause 5(2) indicates that installers under Category 1 includes "a company which is engaged to install the plant in accordance with the manufacturer's instructions". The First Defendant's predecessors were statutory corporations only and none was "a company" within the meaning of the *Corporations Act 2001* and any previous corporate legislation, and that therefore footnote 11 does not apply to the First Defendant.
- (f) That while it is an inherent characteristic of an employer whose employees use asbestos products that the employees will install the products and that 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 which the legislator intended when enacting the order.
- (g) That there should be no variation to the standard presumptions.
- (h) That for exposure occurring in and after March 1950 the First Defendant had actual knowledge and prior to March 1950 constructive knowledge, whereas both Amaca and Wallaby Grip are both found to have actual knowledge.
- (i) That the First Defendant relies upon the decisions of the Dust Diseases Tribunal in (*Re Nikola Woelfl*) *State Rail Authority of New South Wales v Amaca Pty Ltd and Wallaby Grip Ltd* (29 May 2006) and *State Rail Authority of New South Wales v Wallaby Grip Ltd* (1999) NSWDDT 12 ("Rayner").
- (j) If the standard presumptions are applied without variation, then apportionment is Category 1 Defendants 75% and Category 2 Defendants 25%, and thus, in the present case, the First Defendant should be apportioned with 25% and Wallaby Grip Ltd 37.5% and Amaca 37.5%.

- (k) But if the First Defendant is a Category 1 defendant and also a Category 2 defendant, the apportionment should be the State 30%, Wallaby Grip 35% and Amaca 35% by reason of a variation being applied to the State of the maximum amount permissible.
13. Amaca provided an Amended Reply filed on 28 April 2009 which asserts the following:
- (a) The Plaintiff only refers to asbestos cement sheets and no other product or product identification is supplied.
  - (b) Amaca admits that it manufactured asbestos cement sheets of various types, names and descriptions in and before 1961. It does not admit that it manufactured the specific sheets allegedly used by the Plaintiff.
  - (c) That the Plaintiff's allegation is of a much more significant exposure in his employment which is alleged to be the more probable cause of the mesothelioma. Any exposure from building his garage is likely to have been insignificant and not causative.
  - (d) That the First Defendant should be placed in Category 1.
  - (e) That Amaca should be placed in Category 1.
  - (f) That Wallaby Grip should be placed in Category 2 [sic].
  - (g) That Amaca adopts the submissions of Wallaby Grip in their Reply filed on 16 April 2007.
  - (h) Annexed to the Reply is a copy of a letter of 17 April 2009 from the First Defendant's lawyers alleging that the products of the Second Defendant included:
    - (i) 85% magnesia blocks and composition;

(ii) Mill board;

(iii) Sectional pipe coverings.

The First Defendant concedes that Amaca did not manufacture asbestos rope, asbestos blankets, flange gaskets and valve and gland packing.

14. Wallaby Grip has filed a Reply dated 16 April 2009 and relevant facts asserted are as follows:

- (a) Because the Plaintiff asserts that he was required to do running repairs and maintenance on steam locomotives, then his exposure would have been to asbestos blocks, which were a product provided by Amaca.
- (b) In relation to the manufacture of asbestos rope, Wallaby Grip says it has no knowledge, information or belief as to the source of that material, but does not believe that it manufactured asbestos rope during the relevant period and does not admit that it supplied asbestos rope to the First Defendant.
- (c) Wallaby Grip denies that it manufactured asbestos blocks.
- (d) Wallaby Grip denies that it manufactured asbestos brakes.
- (e) Wallaby Grip admits that it supplied asbestos blankets to the First Defendant.
- (f) Wallaby Grip admits that it supplied asbestos blankets to the First Defendant.
- (g) Wallaby Grip does not admit that it supplied asbestos slurry to the State of New South Wales.

- (h) Wallaby Grip admits it manufactured flange gaskets and valve and gland packing, but does not admit that supplied flange gaskets and valve and gland packing to the First Defendant.
- (i) Wallaby Grip denies that it manufactured steam pipe sectional lagging but denies supplying sectional lagging to the State of New South Wales, believing that Amaca was the sole manufacturer of sectional steam pipe lagging.
- (j) Wallaby Grip denies that it manufactured asbestos cement sheeting and that such sheeting was manufactured solely by Amaca.
- (k) During the relevant period Wallaby Grip did not have actual knowledge of the dangers of the use of asbestos products.
- (l) Wallaby Grip should be placed in Category 1.
- (m) Amaca should be placed in Category 1.
- (n) The First Defendant was an installer of asbestos products and relies upon Part 5(2)(a) of the Standard Presumptions Order in asserting that the First Defendant employed numerous ladders to undertake asbestos insulation work.
- (o) Reliance is placed upon the affidavit of Mr Woelfl and his affidavits sworn 16 April 1998, which describes Mr Woelfl's role of installing asbestos material on State of New South Wales locomotives and equipment.
- (p) That reliance is placed upon the contributions assessment in the matter of Terrence Martin where the First Defendant was categorised as a Category 1 and Category 2 defendant.

- (q) That reliance is placed upon the contributions assessment in the matter of Leslie Frank Goodin where the First Defendant was categorised as a Category 1 and Category 2 defendant.
- (r) That reliance is placed upon the contributions assessment in the matter of James Juleff where the First Defendant was categorised as a Category 1 and Category 2 defendant.
- (s) That reliance is placed upon the contributions assessment in the matter of Gerard Patrick Atkinson where the First Defendant was categorised as a Category 1 and Category 2 defendant.
- (t) Additionally, the First Defendant should be placed in Category 2, and in this regard relies upon clause 5(3) of the order.
- (u) The standard presumption should be varied against the First Defendant based on the First Defendant's actual knowledge of dangers of asbestos based on the First Defendant's size and sophistication during the relevant period.
- (v) That the First Defendant has actual knowledge from 1950 (see *Re Nikola Woelfl* per Walker J, 29 May 2006).
- (w) That the First Defendant used asbestos insulation in large quantities as insulation of locomotives.
- (x) Provided is a copy of the Department of Railways Report of the Commissioner for the year ended 30 June 1951, which indicated that the average number of staff employed in the financial year was 59,526.
- (y) Also annexed is a copy of the Department's Report of the Commissioner of 30 June 1953, which reported that in the financial years 1952/53 the average number of staff employed was 57,348.

- (z) Also annexed is a copy of the Department's Report of the Commissioner of 30 June 1959, which reported that in that financial year the average number of staff employed was 51,933.
  - (aa) That the inference that can be drawn during the relevant period up to 1958 was that the First Defendant met the requisite size and sophistication referred to under the standard presumption.
  - (bb) That the standard presumption should be varied as against the First Defendant.
  - (cc) That the period of employment with the First Defendant should be allocated with 90% of the overall liability and 10% of the overall liability should be attributed to the time when the Plaintiff built his garage.
  - (dd) That the standard presumption should be varied so that period A apportionment between Category 1 and Category 2 defendants should be 55/45. The State of New South Wales should be apportioned 45% for the Category 2 liability and the 55% Category 1 liability should be equally borne by the First Defendant Amaca and Wallaby Grip which provide to the 90% a total of 40.5% for the First Defendant, Amaca 16.5%, Wallaby Grip 16.5%, State of New South Wales as installer 16.5%, with Amaca getting 10% in respect of the garage building period producing the end result of an apportionment State of New South Wales 57%, Amaca 26.5% and Wallaby Grip 16.5%.
15. Initially, the Contributions Assessor 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 prevents each such period.

16. Based upon the material available to me, I determine the contribution between the two periods to be:
  - (a) The period of employment whilst employed by the First Defendant – 90%.
  - (b) The period of garage building – 10%.
17. In respect of the period of employment, this falls within period A of the Standard Presumptions Order and, thus, the Category 1 defendants are presumed to be 75% liable and the Category 2 defendants 25% liable.
18. Notwithstanding the submissions made by the First Defendant, I determine on the basis of the Statement of Particulars and the Replies that the First Defendant falls into both Category 1 and Category 2. The First Defendant comes within the terms “corporations, authorities and legal entities”, and while the terms “business” is used, it clearly encompasses the First Defendant’s operations.
19. Insofar as Amaca is 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 First Defendant, and that as between Amaca and Wallaby Grip, the supply of asbestos materials was approximately equal.
20. I determine that the First Defendant, Amaca, and Wallaby Grip each fall into Category 1 and that, additionally, the First Defendant falls into Category 2.
21. Insofar as the Category 1 defendants are concerned, the liability should be divided equally.
22. 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%.

23. In the present case, the standard presumptions take into account the various aspects of the liability of the First Defendant and Amaca and Wallaby Grip and, accordingly, there should be no variation in the standard presumptions.

24. Thus, the following calculation as to liability can be made:

(a) The First Defendant bears one-third of the 75% of the 90% liability as a Category 1 defendant, plus 25% of the 90% as a Category 2 defendant and thus a total of 45%.

(b) Amaca is liable for one-third of the 75% of the 90% as a Category 1 defendant (22.5%) plus the whole of the 10% liability for the garage erection and thus a total of 32.5%.

(c) Wallaby Grip is liable for one-third of the 75% of the 90%, which totals 22.5%.

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

First Defendant	45%
Amaca	32.5%
Wallaby Grip	22.5%
<b>Total</b>	<b>100%</b>

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

  
J.L. Sharpe

30 April 2009