

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

DDT No. 58/ 2009 and 58/2009/1

BETWEEN:

**JOHN PHILLIP WALLER AS EXECUTOR OF THE ESTATE
OF FREDERICK PHILLIP WALLER**

Plaintiff

AND

STATE OF NEW SOUTH WALES

First Defendant/Cross Claimant

COMCARE

Second Defendant

AMACA PTY LIMITED

First Cross Defendant

WALLABY GRIP LIMITED

Second Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. The Registrar has appointed me as the Contributions Assessor in this matter pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007 (NSW)* (**the Regulations**).
2. The plaintiff is John Phillip Waller (**John Waller**). John Waller is the executor of the estate of Frederick Phillip Waller (**Waller**). Frederick Waller passed away on 17 March 2009. Mr Waller's death certificate, which is annexed to his Statement of Particulars, gives mesothelioma as one of the causes of his death.
3. Mr Waller trained and worked as a meat inspector. He was employed by the NSW Department of Agriculture between 1955 and 1959. The defendant in respect of that claim is the State of NSW (**NSW**). From 1959 to about 1995 he was employed by the Commonwealth Department of Primary Industry. The defendant in respect of that claim is Comcare.
4. NSW has cross claimed against Amaca Pty Ltd (**Amaca**) and Wallaby Grip Ltd (**WGL**) alleging that those companies manufactured and supplied asbestos products used by NSW.

5. All defendants have filed Replies.
6. The determination is to be made by me on the papers, on the assumption that the defendants and cross-defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007 (the Standard Presumptions)*.

Mr Waller's History of Asbestos Exposure

7. Although Mr Waller has passed away I will recount his observations in the first person for ease of drafting and reading.
8. Mr Waller alleges he was employed by NSW from 28 February 1955 to 26 May 1959 (**the NSW Period**) as a trainee meat inspector, known as a “brand boy”. He attaches a Certificate of Service showing this employment period and role.
9. Mr Waller worked at the Homebush Abattoir. The abattoir had steam piping throughout that was lagged with asbestos insulation. The piping that was located near his work station constantly vibrated and this caused asbestos dust to be “released and rained down on workers below”. Mr Waller inhaled the dust.
10. Mr Waller observed that the steam piping was in a constant state of disrepair and there was constant maintenance. When workers undertook maintenance of the lagging it was done adjacent to Mr Waller. Part of the maintenance work involved winding asbestos rope tightly around the piping. Occasionally old sections of the asbestos rope would break away from the piping. The rope hung loosely and dust evolved.
11. Other maintenance work involved creating an asbestos slurry and applying it over the asbestos rope. The asbestos piping remained exposed until the 1980s when it was covered by a galvanised sheet metal cover.
12. Large fans present in the abattoir circulated asbestos dust.
13. After completing his apprenticeship Mr Waller commenced his employment with the Commonwealth Department of Primary Industries. He remained employed by Comcare

from 1959 to 1995 (**the Comcare Period**). He worked at the Townsville abattoir from June 1959 – October 1959. The layout and experience of exposure to asbestos was largely the same as the Homebush abattoir.

14. From time to time Mr Waller was required to board ships and inspect them to ensure carcasses were being stored and transported in hygienic conditions. The hulls had insulated asbestos over piping. The piping was often lagged and in a state of disrepair. He inhaled asbestos dust.
15. For the majority of his time in this role he was employed at the Homebush or Riverstone abattoirs. His experiences of exposure to asbestos at the Riverstone abattoirs were largely the same as at the Homebush abattoir. Similarly, when he worked at abattoirs in Forbes, Goulburn, Dubbo, Moree, Blayney, Bourke, Mudgee, Gosford, Geelong, Townsville and Rockhampton he says he “was exposed to asbestos dust and fibre in the same manner as he was at the Homebush abattoir”.
16. In the early 1980s Mr Waller was promoted to the role of Training Officer and so moved away from the abattoir floors. He still visited abattoirs and was exposed to asbestos dust but the exposure was less in this period.
17. Mr Waller considers he was exposed to asbestos almost daily in both roles. He says that he was mainly exposed to “asbestos powder and slurry and to a much lesser extent asbestos rope”.
18. Mr Waller considers that his exposure whilst employed by NSW constituted 20% of his exposure. His employment with Comcare constituted the balance of his exposure (being 80%).
19. Mr Waller was unable to identify the trade-name, manufacturer or source of the asbestos products he was exposed to. He says that during his career he was exposed to the following types of asbestos:
 - Asbestos rope.
 - Asbestos powder.
 - Asbestos cement sheeting.
 - Asbestos cement corrugate roofing.

The Defendants' Replies

20. Comcare was the first to file its Reply. Comcare has not filed a cross claim.
21. Comcare admits that it employed Mr Waller as alleged. It says that it did not control the premises where Mr Waller was exposed to asbestos. Comcare is undertaking further enquiries as to the circumstances of Mr Waller's alleged exposure.
22. Comcare submits that the Standard Presumptions should not be varied.
23. Comcare's principal submission is based on the identity of the owner of the Homebush abattoir. It says at paragraph 8.8 of its reply:
- "The second defendant understands that during the alleged period of exposure with the Commonwealth Department of Primary Industries (the second period), the State of NSW owned the premises of the Homebush Abattoir.*
- The defendant contends that the State of NSW had a concurrent duty of care during this second period and that the second defendant should therefore be liable for a reduced proportion of damages".*
24. I should note that Comcare's assertion about the ownership of the Homebush abattoir is a bare assertion based on its understanding. It has not annexed, for instance, searches or contemporaneous documents that may have assisted in proving the contention that NSW owned the premises. If there were such material I would have considered it and taken it into account.
25. Comcare submits, based on the ownership of the Homebush abattoir, that the following apportionments should apply:

Period of exposure	Defendant	Period	Exposure	Percentage exposure assessed by plaintiff	Exposure per defendant
Employment with NSW	NSW		Daily	20%	20%
Employment with Comcare	State of NSW (as occupier of Homebush abattoir)	1959 – 1985	Daily	80%	40% (as approx half exposure occurred at Homebush)
	Comcare (for exposure which occurred at Riverstone and other abattoirs)	1959 - 1985	Daily		40%

NSW's Reply

26. NSW admits that it employed Mr Waller. In its reply NSW says that it did not occupy or control the premises where Mr Waller alleges he was exposed to asbestos. It says specifically that the Sydney Olympic Park Authority “*is the legal successor to the liabilities of the Homebush Abattoir*”. Consequently, it says it was not an occupier of the premises.

27. NSW admits that it ought to have known of the dangers of occupational exposure to asbestos and that it owed Mr Waller statutory duties of care.

28. NSW submits that constructive knowledge of the dangers of asbestos can be attributed to the Department of Agriculture. It further says that there are no actual findings against the Department.

29. NSW notes that it was sued only as an employer. It says it was not the occupier of the Homebush abattoir. It also submits that it has not been sued as an occupier in respect of the second employment period attributed to Comcare. It submits that the apportionments between it and Comcare should accord with the plaintiff's estimate of:

NSW	20%
Comcare	80%

30. As between it and the defendants to the cross claim (Amaca and WGL) it says that the asbestos powder and pipes Mr Waller worked with were supplied by Amaca and the rope by WGL. It annexes documents which show that James Hardie's 85% magnesia sections were supplied to the Homebush abattoir, that Amaca and WGL supplied products to the Homebush abattoir and both cross defendants were listed in the Contracts Control Board List of Approved Suppliers.

31. As the exposure occurred in Period A the category 1 defendants assume 75% based on the Standard Presumptions. Applying that apportionment NSW submits liability should be apportioned as follows:

Amaca – 7.5% (being 75/2 of 20%)

WGL– 7.5% (being 75/2 of 20%)

NSW – 5% (25% of 20%)

32. Therefore the final apportionments according to NSW are:

Comcare 80%

NSW 5%

Amaca 7.5%

WGL 7.5%

Amaca's Reply

33. Amaca submits that the products identified by Mr Waller are generic in nature. He referred to asbestos powder, asbestos rope, asbestos pipe sections and asbestos cement sheeting.

34. No product names are identified that directly associate them with Amaca. Further, WGL did manufacture asbestos rope and asbestos powder.

35. In response to NSW's Reply it says the invoice relied upon is dated 1967 and so is irrelevant to the employment period in question (1955 – 1959).

36. Amaca says that if there was any exposure to its cement sheeting and cement corrugate products that such exposure would be *de minimus*.
37. Amaca further says that the harm allegedly suffered by the deceased was not reasonably foreseeable: *CSR Ltd v Amaca Pty Ltd* [2009] NSWCA 338.
38. As to apportionment Amaca submits that each category 2 defendant was large and sophisticated and actual knowledge should be attributed to them. It further says that it is an innocent defendant pursuant to Cl 53 of the Regulations. On the basis that it is an innocent defendant or that its contribution was *de minimus* Amaca makes no submission as to the percentage apportionment between it, NSW and WGL.

WGL's Reply

39. WGL admits that it manufactured asbestos composition (called "powder" by Mr Waller) and asbestos rope in the period 1955 – 1959. WGL denies that it manufactured asbestos pipe sections and submits that asbestos pipe sections were supplied by James Hardie & Coy. WGL notes that it did not manufacture AC sheeting and that any AC sheet products used at the Homebush abattoir were supplied by Amaca.
40. WGL does not know and cannot admit the circumstances of Mr Waller's exposure.
41. WGL admits that it ought to have had knowledge of the dangers of asbestos at the time of Mr Waller's exposure.
42. WGL contends that the Standard Presumptions should be amended based on NSW's knowledge of the dangers of asbestos and on its size and sophistication. As to the latter WGL submits that the large profits and significant workforce support an increase in the Standard Presumptions by 20%.
43. Next WGL submits that NSW's failure to provide protective equipment, failure to advise him to use safety measures or to take precautions to prevent the dissemination of asbestos dust mean that the Standard Presumptions should be increased by 20%.
44. WGL submits that as there is no cross claim by Comcare its liability should not be varied or reduced from the estimate given by Mr Waller of 80% of his lifetime exposure.

45. As to the NSW Period WGL, applying the variation of 20% to NSW, gives the following proposed apportionments:

Party	Category	Calculation	Total
Amaca (supplier)	1	$(55\%/2) \times 20\%$	5.5%
WGL (supplier)	1	$(55\%/2) \times 20\%$	5.5%
NSW (employer)	2	$45\% \times 20\%$	9%
Total			20%

Categorisation of Defendants

46. I categorise the parties as follows:

Category 1 – Amaca and WGL.

Category 2 – NSW and Comcare.

Application of the Standard Presumptions

47. In making this determination I must assume that each defendant is liable: Regulations Reg 49(4), unless the defendants agree that a particular defendant should not be assumed to be liable: Regulation 49(5).

48. In its Reply Amaca submits that it should assume no liability in respect of the cross claim because Mr Waller could not name the products he was exposed to and the references to asbestos products are generic only. On the other hand there is some evidence that Amaca supplied products for use in the Homebush abattoir, although not in respect of the NSW Period but for the 1960s. Whether or not Amaca is an “innocent defendant” for the purpose of Clause 53 is a matter for determination by the Tribunal. I have to assume Amaca is liable.

49. I reject the submission that any exposure to Amaca products was de minimus. Mr Waller did identify one of the products used as asbestos piping and Amaca did supply 85% magnesia pipes. Amaca was also a manufacturer of asbestos composite at the time.

Findings

50. Applying Clause 3 of the Standard Presumptions the relevant factual considerations are:
- (a) The disease suffered was mesothelioma. That is an indivisible disease.
 - (b) Exposure to asbestos occurred in 2 periods of employment from 1955 – 1959 and 1959 – 1995.
 - (c) The exposure was daily and reasonably constant at least until the mid 1980s.
 - (d) Mr Waller's exposure was largely to asbestos pipe, asbestos composition and asbestos rope. There may have been some small exposure to asbestos cement sheeting.
 - (e) No effective steps were taken to minimise Mr Waller's exposure to asbestos or to warn him of the dangers of exposure to asbestos.
51. I accept and apply Mr Waller's estimate of his exposure to asbestos for the NSW Period (20%) and the Comcare Period (80%).
52. In the absence of supporting documentation or other evidence I am not satisfied by Comcare's contention that NSW "*owned the premises of the Homebush Abattoir*". In its Reply NSW denies that it was the owner and points to the Sydney Olympic Park Authority as the legal successor to the Homebush Abattoir's liabilities. There is at least one Contributions Assessment where the Sydney Olympic Park Authority is on risk in respect of exposure to asbestos at Homebush Abattoir that I am aware of. That may be an avenue of enquiry that Comcare wishes to pursue.
53. Comcare has not cross claimed against any suppliers for the exposure that occurred in the Comcare Period. On the basis that there are no other entities to further defray its liability Comcare bears 80% of the liability.
54. In respect of the NSW Period I have found it difficult to determine whether the Standard Presumptions should be amended. On the one hand there is no evidence as to the state of knowledge of the Department of Agriculture in the period 1955 – 1959 although NSW appears to accept that it should have had constructive knowledge. On the other hand I accept that it was a large and sophisticated organisation and it took no steps to warn Mr Waller of the dangers of asbestos or provide protective equipment. I consider that, on the facts of this case, it is appropriate to increase NSW's liability by 5%.
55. Therefore the apportionments for the NSW Period are:

Party	Category	Calculation	Total
Amaca (supplier)	1	$(70\%/2) \times 20\%$	7%
WGL (supplier)	1	$(70\%/2) \times 20\%$	7%
NSW (employer)	2	$30\% \times 20\%$	6%
Total			20%

56. Accordingly the final apportionments are as follows:

Comcare	80%
NSW	6%
Amaca	7%
WGL	7%

57. I have been asked to appoint a Single Claims Manager. Applying Reg 61(4) I appoint Comcare as the Single Claims Manager.

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David Jay

Contributions Assessor

26 August 2010