

IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES

DDT No. 178/2009

**RONALD WOLHUTER**

Plaintiff

**AMACA PTY LIMITED**

First Defendant / First Cross-Defendant / Cross-Claimant

**ERARING ENERGY**

Second Defendant / Cross-Claimant

**COMCARE**

Third Defendant

**ROLLS ROYCE AUSTRALIA LIMITED**

Second Cross-Defendant

**WALLABY GRIP PTY LIMITED**

Cross-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* ("the Regulations") for a determination of apportionment as between the Defendants and the Cross-Defendants.
2. Regulation 47(1) provides that a reference to a defendant includes a reference to a cross-defendant.
3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standards Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.
4. Pursuant to Regulation 49, I am to have regard to the Plaintiff's Statement of Particulars and the Defendants' replies and thereafter the standard presumptions.

5. In the present matter, Ronald Wolhuter (hereinafter referred to as "the Plaintiff") has brought proceedings by means of a Statement of Claim dated 7 July 2009 against Amaca Pty Ltd (hereinafter referred to as "Amaca"), Eraring Energy (hereafter referred to as "Eraring") and Comcare (hereinafter referred to as "Comcare") in respect of the condition of asbestos-related pleural disease, which is said to have arisen in the following way:

- (a) From about 1947/1948 until 1948/1949, the Plaintiff was employed by his father as an apprentice carpenter and during that period the Plaintiff handled asbestos sheets and worked in the vicinity of others handling asbestos sheets, as a consequence of which he was exposed to and inhaled asbestos dust and fibre. It is alleged that the asbestos sheets were manufactured and distributed by Amaca.
- (b) Between 1950 and 1951 the Plaintiff was employed by Eraring Energy as a carpenter at the Port Kembla Power House and while so employed was exposed to and inhaled asbestos dust and fibre.
- (c) During the period from 1953 to about 1977 the Plaintiff worked as a wharf labourer at the Ports at Port Kembla, Sydney, Cairns, Geelong and Townsville and was exposed to and inhaled asbestos dust and fibre while unloading raw asbestos material from various vessels and from asbestos insulation materials applied to various services, including steam pipes, winches, around places where he worked. The Plaintiff alleges that Comcare is the legal entity responsible for his exposure to asbestos as alleged.

6. On 24 August 2009 the Plaintiff filed a Statement of Particulars which, so far as relevant, provides the following:

1. The Plaintiff suffers from asbestos-related pleural disease, which was diagnosed in 2007.
2. Between 1947/1948 and 1948/1949 the Plaintiff was employed by the Plaintiff's father as an apprentice and was exposed to asbestos. While working for his father between 1947/1948 to 1948/1949 the Plaintiff performed work at Oak Flats and he helped his father line the kitchens, bathrooms and outside toilets with asbestos sheets, which work involved cutting the asbestos sheets to size, using a hand saw or fibro cutter, and hammering into place. The Plaintiff estimates that he worked with asbestos fibro sheets at least two days a week.
3. Between 1948/1949 and 1949/50 the Plaintiff was employed by McDonald Constructions as a carpenter and was exposed to asbestos. While employed by

McDonald Constructions, the Plaintiff worked on the Karingal Hostel and it took approximately twelve months, with the hostel being made of fibro and brick and the Plaintiff helped put up the framework and install the asbestos fibro sheeting, using fibro cutters or hand saws.

4. Between 1951 and 1952 the Plaintiff was employed by New South Wales Electricity Commission at the Port Kembla Power House and was exposed to asbestos. While working for Eraring the Plaintiff cut, drilled and installed corrugated sheets and worked alongside ladders who mixed up and applied asbestos slurry, cut asbestos sheeting with a saw and applied asbestos rope to pipes. While with Elcom the Plaintiff was involved in construction of the Port Kembla Power Station and he prepared and installed corrugated fibro roof on the Power House, having put up the stanchions and then boxed in the cross-members to pour concrete. The Plaintiff cut the corners of the sheets with fibro cutters or a hand saw then drilled a hole in the fibro and put a hook in it. The sheets were not wet and the Plaintiff was not provided with a mask. Additionally, the Plaintiff worked alongside ladders as they lagged the pipes in the Power House and this involved the ladders opening up boxes of asbestos powder next to the Plaintiff with visible dust being released into the air. The boxes were about 3-ft square. The ladders poured the powder into a wheelbarrow, as they did this thick dust filled the air around the Plaintiff. The powder was mixed with water and worked into slurry and the ladders applied the slurry to the pipes. The ladders also cut asbestos sheets to size with a saw and used asbestos rope to lag the pipes. The Plaintiff asserts that he worked ankle deep in asbestos on occasions. The Plaintiff came home from work each day covered in white dust. The Plaintiff asserts that his exposure to asbestos by working in the Power House was greater than in any of his other jobs.
5. Between 1953 and 1993 the Plaintiff was employed by various companies as a waterside labourer at Ports in Port Kembla, Sydney, Townsville, Cairns and Geelong and was exposed to asbestos. While working as a waterside worker between 1953 and 1993 the Plaintiff had various jobs. Among the work that the Plaintiff performed involved bags of asbestos. Often there was debris in the ship's holds, which debris included asbestos dust and fibre. When loading cargo the Plaintiff sometimes had to move the bags of asbestos fibre that was already in the hold to make room for other cargo and the bags of asbestos were often in bad repair and asbestos spilled out. The asbestos came in hessian bags and sometimes the bags were rotten and

damaged. The asbestos was a whitish grey colour and at the end of a day after working with the asbestos cargos the Plaintiff was very dusty. Until 1968, when the Plaintiff operated winches, the winches were steam powered and had steam pipes, which were insulated with asbestos rope, and often the asbestos insulation broke off and became visible. Repair work to the asbestos insulation was performed in the Plaintiff's presence. The Plaintiff describes having had constant exposure to asbestos dust for 15 years that he drove steam winches. When the winches became electric, the Plaintiff was exposed to asbestos fibres from brake pad linings. The Plaintiff alleges that he came into contact with asbestos as a hatch man up until about the last 10 years of his employment on the waterfront.

6. Between 1950s and 1980s the Plaintiff performed renovations to his home and various friends' homes and changed brake linings and brake pads of cars.
7. The Plaintiff estimates that his exposure to asbestos could be divided in the following percentages:
  - Father – 15%
  - McDonald Constructions – 5%
  - Eraring – 60%
  - Waterside – 15%
  - Non-occupational 5%

7. Thus on the Plaintiff's own case, he can recover only 90% of his overall damages.

8. Eraring filed a Reply on 26 October 2009 which relevantly alleges:

1. The corrugated fibro roof which the Plaintiff installed at the Port Kembla Power Station was manufactured and/or supplied by Amaca and the industrial boilers, turbines, steel piping and associated steam plant at Port Kembla Power Station were insulated, sealed and/or packed with asbestos products manufactured by Amaca.
2. The claim against Rolls Royce relates to the design and construction of the boilers within "Extension E" of the Port Kembla Power Station which were insulated and/or sealed with products containing asbestos fibre and that Rolls Royce is also joined as an occupier of the Port Kembla Power Station.
3. Eraring is unable to admit the Plaintiff's period of employment.

4. Eraring admits occupation or controlling the premises at the time of the alleged exposure but submits that it was not the sole party in occupation/ control and that at times Rolls Royce occupied and controlled the Power Station.
5. Amaca should be placed in Category 1, Eraring should be placed in Category 2, Comcare should be placed in Category 2, and Rolls Royce should be placed in Category 1 and also in Category 2.
6. The Standard Presumption Order should be varied as against Amaca.
7. The following periods should be considered for the purpose of apportionment,

namely:

- (i) Period 1 – 1947/1948 – 1948/1949 – Employment with John Wolhuter = 16.67%.
  - (ii) Period 2 – 1950 – 1951 – Employment with Elcom – 66.66%
  - (iii) Period 3 – 1953 – 1993 – Comcare - 16.67%
- (h) There are two Category 1 parties in Period 2, namely Amaca and Rolls Royce and two Category 2 employers in Period 2, namely Eraring and Rolls Royce, with the final total for Period 2 being:

|             |   |         |
|-------------|---|---------|
| Amaca       | - | 39.996% |
| Rolls Royce | - | 18.332% |
| Eraring     | - | 8.3325% |
| (Total      | - | 66.66%) |

- (i) Period 3 should be borne by Comcare, namely 16.67%
- (j) With a total rounded up position of:

|             |   |       |
|-------------|---|-------|
| Amaca       | - | 56.7% |
| Comcare     | - | 16.7% |
| Rolls Royce | - | 18.3% |
| Eraring     | - | 8.3%  |
| (Total      | - | 100%) |

9. On 26 October 2009 Eraring issued a Cross-Claim against Amaca and Rolls Royce Australia Limited (hereinafter referred to as "Rolls Royce") claiming contribution from Amaca under s.5 (1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* in respect of the Plaintiff's employment at the Port Kembla Power Station and as against Rolls Royce under s.5 (1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* in respect of the Plaintiff's employment at the Port Kembla Power Station.

10. Amaca filed a reply on 4 November 2009 which, relevantly, alleges:
1. Amaca did not manufacture and/or supply asbestos rope, that Wallaby Grip manufactured this product.
  2. Asbestos lagging and asbestos slurry were products manufactured and/or supplied by both Amaca and Wallaby Grip.
  3. Amaca, Wallaby Grip, Rolls Royce should each be placed in Category 1 and Rolls Royce, Eraring and Comcare should be placed in Category 2.
  4. There should be no variation in the Standard Presumption Order.
  5. Amaca submits that apportionment should be made between the Defendants for any claim available by the Plaintiff against them in the proportion of:

|              |   |       |
|--------------|---|-------|
| Amaca        | - | 40%   |
| Eraring      | - | 15%   |
| Comcare      | - | 15%   |
| Wallaby Grip | - | 15%   |
| Rolls Royce  | - | 27.5% |
| Total        | - | 100%  |

11. On 29 October 2009 Amaca issued a Cross-Claim against Wallaby Grip Limited (hereinafter referred to as "Wallaby Grip") claiming under the provisions of s.5 (1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* in respect of the period of employment by the Plaintiff by Eraring.
12. On 6 October 2009 Comcare filed a Reply which alleges relevantly:
1. By his Statement of Claim the Plaintiff alleges exposure between the periods 1953 to 1977, whereas the Statement of Particulars alleges the period of employment and exposure from 1953 to 1993.
  2. That the Plaintiff was a registered waterside worker from 11 August 1953 to 4 December 1977 and was employed at Port Kembla at the time of deregistration.
  3. That Amaca should be placed in Category 1, Eraring should be placed in Category 2, as should Comcare.
13. On 10 December 2009 Rolls Royce filed a Reply which relevantly alleges:

1. That Amaca, Wallaby Grip, Eraring and Rolls Royce should be placed in Category 1; and additionally, Eraring and Comcare should be placed in Category 2 (all of the above is on the assumption that there was asbestos used in the installation of the boilers).
2. Rolls Royce disputes that it has been categorised as both a Category 1 and Category 2 Defendant.
3. The Plaintiff was exposed to asbestos on that part of the Port Kembla Power Station that Eraring occupied and not in any area that was occupied by Rolls Royce as a constructor.
4. That the resources available to Eraring were extensive, given the size of its operation and the nature of its operation, the Standard Presumption Order should be varied, particularly having regard to the fact that Eraring was a very large enterprise with a team of highly qualified engineers and consultants.
5. That the apportionment should be
 

|   |     |
|---|-----|
| Period 1 (Employment with father)               | 15% |
| Period 2 (Employment by McDonald Constructions) | 5%  |
| Period 3 (Employed by Eraring)                  | 60% |
| Period 4 (Employed as a waterside worker)       | 15% |
| Period 5 (Non-occupational exposure)            | 5%  |
6. Since no party has been joined in respect of periods 2 and 5, these should be disregarded for the Contributions Assessment.

14. Wallaby Grip filed a Reply on 21 December 2009 which relevantly alleges:

1. Wallaby Grip denies manufacture and/or supply of asbestos sheets, boards, capping strips or downpipes.
2. Between 1951 and 1952 Wallaby Grip admits that it was one of a number of suppliers of the Amaca range of 85% magnesia, K-lite and high temperature runs of composition.
3. That between 1951 and 1952 Wallaby Grip was one of a number of manufacturers and suppliers of asbestos rope and millboard.
4. Amaca, Wallaby Grip, Rolls Royce should each be placed in Category 1 and Eraring and Comcare should be each placed in Category 2.
5. Apportionment should be:
 

|         |     |
|---------|-----|
| Comcare | 15% |
|---------|-----|

|              |   |     |
|--------------|---|-----|
| Eraring      | - | 10% |
| Amaca        | - | 40% |
| Wallaby Grip | - | 5%  |
| Rolls Royce  | - | 30% |

15. It is clear from the material referred to above that the Plaintiff has chosen not to join or to sue in respect of the period while he was employed by McDonald Constructions or in respect of work performed for other persons, being of a domestic nature. The apportionment being conducted by me relates to the periods of claim in which the parties have been joined to the proceedings.
16. The Plaintiff's condition is a divisible one.
17. 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 and intensity of exposure to asbestos present in each such period.
18. Based on material available to me, I determine the contribution between the three periods upon which a claim is brought, namely:

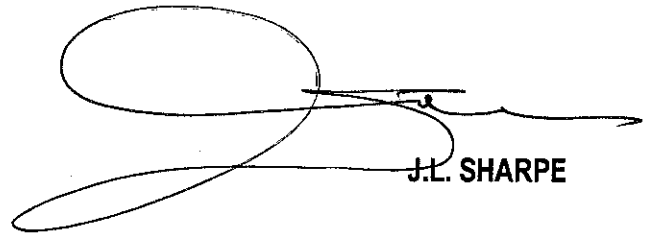
|          |   |                                  |          |
|----------|---|----------------------------------|----------|
| Period 1 | - | $\frac{15\% \times 100\%}{90\%}$ | = 16.67% |
| Period 3 | - | $\frac{60\% \times 100\%}{90\%}$ | = 66.66% |
| Period 4 | - | $\frac{15\% \times 100\%}{90\%}$ | = 16.67% |

19. In respect of Periods 1 and 4 there is only one Defendant and thus there is no need to consider any further matters relating to apportionment, in respect of those periods.
20. Notwithstanding the submissions made that Eraring should be treated as a Category 1 and a Category 2 Defendant, I have concluded that in the present case Eraring should be considered only as a Category 2 Defendant. Additionally, I have determined that Rolls Royce should only be considered to be a Category 1 employer.

21. I determined that Amaca, Comcare, Rolls Royce, Wallaby Grip, should be placed into Category 1 and Eraring should be placed into Category 2.
22. Insofar as the Category 1 Defendants are concerned, in Period 2 they should be divided equally.
23. The question then arises as to the contributions between Category 1 and Category 2 Defendants, which, according to the Standard Presumptions are on the basis of 75% : 25% in the relevant period (Period 3).
24. In the present case the Standard Presumptions should be varied insofar as Eraring is concerned, by the sum of 15%, having regard the size, nature and extent of Eraring's operation and involvement. This is particularly so, given that Eraring was the sole occupier of the areas where the Plaintiff was working.
25. Thus, the following calculation as to liability can be made [with rounding off]:
  - Amaca bears 16.67% [Period 1] +  $20\% \times 66.66\% = 13.33\%$  [Period 3] = Total 30.00%
  - Eraring bears  $40\% \times 66.67\% = 26.67\%$  [Period 3]
  - Comcare bears 16.67% [Period 4]
  - Rolls Royce bears  $20\% \times 66.66\% = 13.33\%$  [Period 3]
  - Wallaby Grip bears  $20\% \times 66.66\% = 13.33\%$  [Period 3]
26. I therefore determine the total liability of the Defendants and Cross-Defendants as follows:

|              |        |
|--------------|--------|
| Amaca        | 30%    |
| Eraring      | 26.67% |
| Comcare      | 16.67% |
| Rolls Royce  | 13.33% |
| Wallaby Grip | 13.33% |
| Total        | 100%   |

27. Pursuant to clause 61 of the Regulations, I appoint Amaca as the Single Claims Manager as it is the primary defendant as defined under clause 61(9)



J.L. SHARPE

22 January 2010