

Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2007

[2007-142]



New South Wales

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Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2007



New South Wales

I, Robert John Debus MP, the Attorney General, in pursuance of clause 49 of the *Dust Diseases Tribunal Regulation 2007*, make the following Order.

Dated, this nineteenth day of March 2007.

BOB DEBUS, M.P., Attorney General

1 Name of Order

This Order is the *Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2007*.

2 Commencement

This Order commences on the date it is published in the Gazette.

3 Adoption of standard presumptions on apportionment

The presumptions set out in Schedule 1 are the standard presumptions as to apportionment for the purposes of clause 49 of the *Dust Diseases Tribunal Regulation 2007*.

4 Repeal of *Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005*

The *Dust Diseases Tribunal (Standard Presumptions—Apportionment) Order 2005* is repealed.

Schedule 1 Standard apportionment—process and presumptions

(Clause 3)

1 Introduction

- (1) On Tuesday 8 March 2005, the NSW Government Report of the Review of Legal and Administrative Costs in Dust Diseases Compensation Claims (**the Review**) was released.

- (2) The Review found that early settlement of claims ought be encouraged with the result that fewer cases would need to be determined before the Dust Diseases Tribunal (**DDT**).
- (3) It also found upon a review of the files of the DDT that in nearly half of those cases (48 percent) there were two or more defendants. It found, unsurprisingly, that disputes as to contribution between defendants contributed significantly to legal costs. It found that a new claims resolution process was necessary to encourage defendants to resolve their disputes quickly and commercially without delaying the resolution of a claimant's claim.
- (4) The Review identified a reform process which had as one of its key steps the following:

Defendants will seek to agree on apportionment of liability. If they cannot agree, an independent third party will determine the apportionment using standard presumptions. The determination can be challenged, but only after the claimant's case is settled or determined.

2 Legal basis for and approach to apportionment

- (1) Apportionment between joint tortfeasors is governed by the provisions of section 5 of the [Law Reform \(Miscellaneous Provisions\) Act 1946](#). That section is in the following terms:

5 Proceedings against and contribution between joint and several tortfeasors

- (1) Where damage is suffered by any person as a result of a tort (whether a crime or not):

...

- (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought.
- (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to

exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

- (2) The phrase “responsibility for the damage” in section 5 (2) requires a comparison of the relative culpability of each tortfeasor in causing the damage¹. Alternatively put, the Court in making an apportionment is engaged in a consideration of the relative blameworthiness and causal potency of the negligence of each party. These contribution provisions have become notorious for the conceptual and practical difficulties they engender². In practical terms, in most cases a broad-brush approach is undertaken³. The aim is to arrive at an apportionment which is “... just and equitable ...”.

Note—

¹ See Clarke JA in *Macquarie Pathology Service Pty Ltd v Sullivan* (Court of Appeal, Nos 40313/94 and 40289/94, 28 March 1995, unreported).

² See McHugh J in *Amaca Pty Ltd v State of New South Wales*[2003] HCA 44 (7 August 2003) para 17.

³ See Curtis J in *Bitupave Ltd v NSW Associated Blue Metal Quarries Pty Ltd (In Liquidation) & Anor*[1996] NSWDDT 7 (1 November 1996); (1996) 13 NSWCCR 634.

3 Factual considerations

- (1) There are a multitude of factual matters which will impact upon apportionment in each case. They will vary from case to case and they will vary over time. These factors may include, but are not limited to the following:
- (a) the type of disease suffered by the claimant: whether it is a divisible or an indivisible disease,
 - (b) the length and/or intensity of the exposure of the claimant to asbestos,
 - (c) the type of asbestos to which the claimant was exposed,
 - (d) the lag time between exposure and diagnosis of the disease,
 - (e) the year and decade in which the exposure occurred,
 - (f) the relationship between the particular defendant and the claimant eg employer/employee, occupier/entrant, and supplier/user,
 - (g) 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,
 - (h) the number of defendants identified as being at fault in connection with the claimant’s claim,
 - (i) the state of the knowledge of the particular defendant about the risks associated

with the manufacture, supply, installation and use of asbestos,

- (j) the state of the knowledge about the risks associated with the manufacture, supply, installation and use of asbestos of which the particular defendant ought to have been aware,
 - (k) 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 and use of asbestos.
- (2) Notwithstanding this multitude of factors, an analysis of cases decided by the DDT demonstrates a broad consistency of apportionment which can be identified substantially with these factors:
- (a) the knowledge of the defendant, actual or constructive, derived from the nature of the business in which the particular defendant was engaged and the role it was engaged in, in the particular case, and
 - (b) the general state of knowledge, and the knowledge of the defendant, actual or constructive, available throughout the year or years, decade or decades during which the exposure took place.

4 Methodology

- (1) The following is a brief summary of the procedures which generally apply in relation to apportionment. It should also be noted that modified procedures apply in relation to apportionment where an original defendant commences cross-claims against other defendants that were not part of the original proceedings with the claimant after the claimant's proceedings have been settled by the parties or determined by the DDT (see Division 6 of Part 4 of the [Dust Diseases Tribunal Regulation 2007](#)).
- (2) Defendants against whom proceedings have been commenced by a claimant, or against whom cross-claims have been filed by original defendants, are required to identify in their reply filed in the proceedings, any matters, including those matters which have either been found in other proceedings or to which the provisions of sections 25 (3), 25A and 25B of the [Dust Diseases Tribunal Act 1989](#) would apply, which relate to other defendants⁴ (see Part 8 of the prescribed form set out in Form 2 of Schedule 2 to the [Dust Diseases Tribunal Regulation 2007](#)). They are also required to identify the reasons for and the extent to which they contend that the standard presumptions ought be varied in the particular claim.

Note—

⁴ The term is used here to refer to all responsible identified parties other than the claimant whether they be the original defendants identified by the claimant or else cross defendants identified by original defendants. Where cross-claims are commenced while the claimant's proceedings are pending, these responsible identified parties are only those joined to the claimant's proceedings. Where cross-claims are commenced after the claimant's proceedings have been settled or determined, in addition to those responsible identified parties that were joined to the claimant's proceedings while they were still pending,

responsible identified parties also include the cross defendants against whom proceedings are commenced in separate proceedings by an original defendant after the claimant's proceedings have been settled or determined.

- (3) During the period limited by the claims resolution process⁵ following the filing of replies, it is open to the defendants, and they are encouraged to, meet together for the purpose of agreeing between themselves what apportionment is appropriate to the particular claim.

Note—

⁵ The period will vary according to the state of health of the claimant.

- (4) Failing agreement by the requisite time, the papers which include the material filed by the claimant and the replies filed by the defendants will be referred to an independent Contributions Assessor (see clause 49 (1) of the [Dust Diseases Tribunal Regulation 2007](#)). The task of the independent Contributions Assessor will be, upon the basis of the papers, to apply the standard presumptions with such variations as are appropriate to the particular case but within the permitted range (see clause 49 (4) of the [Dust Diseases Tribunal Regulation 2007](#)). When determining the apportionment for the claim, the Contributions Assessor is to assume that each defendant is liable, unless the defendants agree that a particular defendant should not be assumed to be liable, in which case that particular defendant is to be excluded from the apportionment (including the standard presumptions) by the Contributions Assessor (see clause 49 (5) of the [Dust Diseases Tribunal Regulation 2007](#)).
- (5) The apportionment is thereby determined for the claimant's case by the Contributions Assessor. Where the apportionment is determined by the Contributions Assessor while the claimant's proceedings are still pending, judgments as to apportionment are to automatically follow the final determination by entry of judgment (either by consent or after a hearing) in favour of the claimant (see clause 52 (1) of the [Dust Diseases Tribunal Regulation 2007](#)). Where the apportionment is determined by the Contributions Assessor after the claimant's proceedings have been settled or determined, judgments as to apportionment automatically follow the apportionment by the Contributions Assessor. Any defendant has a right to seek a review of the Contributions Assessor's apportionment by a formal hearing and determination by the DDT of the question of apportionment, but any such hearing will not proceed until after the conclusion of the claimant's claim (either by settlement or entry of judgment after hearing) (see clause 52 (2) of the [Dust Diseases Tribunal Regulation 2007](#)).

5 Standard presumptions

- (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:

Index	Date of exposure	Standard presumption for each category of defendants ⁶	Extent of variation for each category of defendant
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 Installers¹⁰ of asbestos or of products, plant and equipment which contained asbestos¹¹, 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 Table¹².

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 claim¹³,
- (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 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 period¹⁴. 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 immaterial¹⁵.

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 period¹⁶. 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 immaterial¹⁷.

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.