



# Dust Diseases Tribunal of New South Wales

## Year in Review: 2021

**Prepared by:**

Sandy Metcalf - Judicial Support Research Officer, Dust Diseases Tribunal

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## Causation

[Rosanne Cleary as the Legal Personal Representative of the Estate of the late Fortunato \(aka Frank\) Gatt v Amaca Pty Ltd \[2021\] NSWDDT 5](#) (Judge Strathdee)

### Decision date:

6 September 2021

### Key Issues:

- DIAGNOSIS
  - Whether the plaintiff suffered from asbestosis.
- CAUSATION
  - Whether exposure to inhaled asbestos dust and fibre caused or materially contributed the plaintiff's injuries.
    - Level of exposure to respirable asbestos fibres.
    - Whether cumulative airborne exposure sufficient to cause asbestosis.
    - Examination of the casual nexus between asbestos exposure, cigarette smoke and lung cancer.
- EVIDENCE
  - Whether a party can advance a case which contradicts evidence admitted without challenge (the rule in *Browne v Dunn*).

Note: This decision has been appealed to the NSW Court of Appeal.

## Civil procedure

[Janette Lorraine Sheldon v Tenix Properties Pty Limited \[2021\] NSWDDT 2](#) (Judge Strathdee)

**Decision date:**

4 June 2021

**Key Issues:**

- Whether the State Insurance Regulatory Authority (“SIRA”) as manager of the Insurers’ Guarantee Fund (“IGF”) is a proper party to proceedings when the insured is a deregistered company that has not been reinstated.
- Whether plaintiff is entitled to proceed directly against SIRA pursuant to s 236 of the *Workers Compensation Act 1987* (NSW).
- Whether Division 7 of Part 7 of the *Workers Compensation Act 1987* (NSW) permits a claim to be made against SIRA in the absence of a finding of liability against the employer.
- Whether leave should be granted to amend the statement of claim to limit the relevant period of employment to a period for which insurance cover can be established when the insured is a deregistered company that has not been reinstated.

[Jinling McDonald v Denehurst Limited \(Deregistered\) & Ors \[2021\] NSWDDT 4](#) (Judge Russell SC)

**Decision date:**

6 August 2021

**Key Issues:**

- Whether the Dust Diseases Tribunal has jurisdiction to make orders pursuant to s 601AH(2) of the *Corporations Act 2001* (Cth) that ASIC reinstate deregistered companies to the Register.
- Whether the Dust Diseases Tribunal has jurisdiction to declare that Dust Diseases Tribunal proceedings were validly commenced and pending pursuant to s 601AH(3)(c) and (d) of the *Corporations Act 2001* (Cth).
- Whether the Dust Diseases Tribunal is a “Court” or a “court” for the purposes of s 601AH of the *Corporations Act 2001* (Cth).

## Contribution between tortfeasors

[Amaca Pty Ltd v Goodyear Australia Pty Ltd \[2021\] NSWDDT 6](#) (Judge Scotting)

### Decision date:

11 November 2021

### Key Issues:

- CAUSATION — Apportionment between asbestos manufacturer and employer
  - Test to be applied for apportioning contribution between tortfeasors under s 5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).
- EVIDENCE
  - Evidence relied on by parties wholly documentary. All relevant witnesses now deceased.

## Costs

[L & A Fazzini Pty Ltd v Amaca Pty Ltd \[2021\] NSWDDT 1](#) (Judge Scotting)

**Decision date:**

3 February 2021

**Key Issues:**

- COSTS
  - Whether costs should be awarded on an indemnity basis when verdict more favourable than Offer of Compromise.
  - Whether Part 5 of the *Dust Diseases Tribunal Regulation 2019* (NSW) or Part 6 of the *Dust Diseases Tribunal Regulation 2013* (NSW) applied to the Offer of Compromise.
  - Application of clause 90(2) of the *Dust Diseases Tribunal Regulation 2019* (NSW) where plaintiff wholly unsuccessful.

[Kingston Industries Pty Limited v Place Management NSW and CPB Contractors Pty Limited \[2021\] NSWDDT 3](#) (Judge Scotting)

**Decision date:**

17 June 2021

**Key Issues:**

- COSTS
  - Whether costs follow the event when Offer of Compromise made by the cross-defendants exclusive of any provision for costs accepted by cross-claimant.
  - Court's discretion to make an order in relation to costs.
  - Whether failure to "materially improve" position is disentitling conduct.

[Rosanne Cleary as the Legal Personal Representative of the Estate of the late Fortunato \(aka Frank\) Gatt v Amaca Pty Ltd \[2021\] NSWDDT 7](#) (Judge Strathdee)

**Decision date:**

1 December 2021

**Key Issues:**

- COSTS
  - Whether to impose a personal costs order against the plaintiff's solicitor.

- Whether the defendant should pay the plaintiff's costs on an indemnity basis.
- STAY OF PROCEEDINGS
  - Whether to grant a stay of proceedings pending the outcome of the defendant's appeal of the Tribunal's decision.

Note: This decision has been appealed to the NSW Court of Appeal.

## Court of Appeal Proceedings

[Allianz Australia Insurance Ltd v Viksne \[2021\] NSWCA 268](#)

### Decision date:

4 November 2021

### Background:

- Two separate proceedings were commenced in the Dust Diseases Tribunal against deregistered companies seeking damages for dust diseases, prior to the plaintiffs' deaths.
- Proceedings were subsequently brought in the Supreme Court seeking reinstatement of the deregistered companies ([In the matter of Austral Bronze Pty Limited;; In the matter of John Darlington Pty Limited;; In the matter of John Darlington Pty Limited \[2020\] NSWSC 1491](#)).
- The Supreme Court made orders for reinstatement of the deregistered companies and ordered pursuant to section 601AH(3)(c) and (d) of the *Corporations Act 2001* (Cth) that the Dust Diseases Tribunal proceedings were validly commenced and pending as against the deregistered companies as at the time of the respective plaintiff's deaths.
- The decision of the Supreme Court was appealed to the Court of Appeal.

### Key Issues:

- Whether it was just that the deregistered companies be reinstated.
- Whether proceedings in the Dust Diseases Tribunal were validly commenced as a legal consequence of reinstatement for the purposes of section 12B of the *Dust Diseases Tribunal Act 1989* (NSW).
- Whether it was necessary to make an ancillary order pursuant to section 601AH(3) of the *Corporations Act 2001* (Cth) that the Dust Diseases Tribunal proceedings were validly commenced and pending at the time of death.

[L & A Fazzini Pty Ltd v Amaca Pty Ltd \[2021\] NSWCA 313](#)

### Decision date:

14 December 2021

### Background:

- Both parties were original defendants to proceedings brought in the Dust Diseases Tribunal. The plaintiff's claim was settled at mediation and a Consent Judgment was entered without admission of liability and with payment to the plaintiff to be made in accordance with the Contribution Assessor's Determination ("CAD").
- Following entry of the Consent Judgement the plaintiff was cross-examined before the



mediator and gave evidence that he did not know if he was exposed to asbestos whilst employed by L & A Fazzini Pty Ltd (“Fazzini”).

- Fazzini subsequently filed a cross-claim against Amaca Pty Ltd (“Amaca”) seeking restitution. Fazzini also filed a separate claim seeking contribution pursuant to s5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).
- The cross-claim was dismissed ([L & A Fazzini Pty Ltd v Amaca Pty Ltd \[2020\] NSWDDT 12](#)).
- Fazzini appealed to the Court of Appeal.

#### **Key Issues:**

- RESTITUTION
  - Which party bears the onus of proof in a cross-claim seeking restitution as between original defendants, where:
    - payment was made to the plaintiff on a ‘without admission of liability basis’ in accordance with the CAD; and
    - the defendant seeking restitution does not admit it is a tortfeasor liable to the plaintiff; and
    - the other defendant admits it is a tortfeasor liable to the plaintiff.