



Compensation for Asbestos-related Diseases in Australia

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Introduction

- Asbestos exposure in Australia occurred as a result of mining, milling, manufacture, product use and environmental exposures.
- As illnesses developed claims for compensation commenced.
- This presentation summarizes the historical course of the litigation process in Australia, the obstacles and problems encountered in achieving compensation for Australian victims and outlines the present systems in place.



Introduction

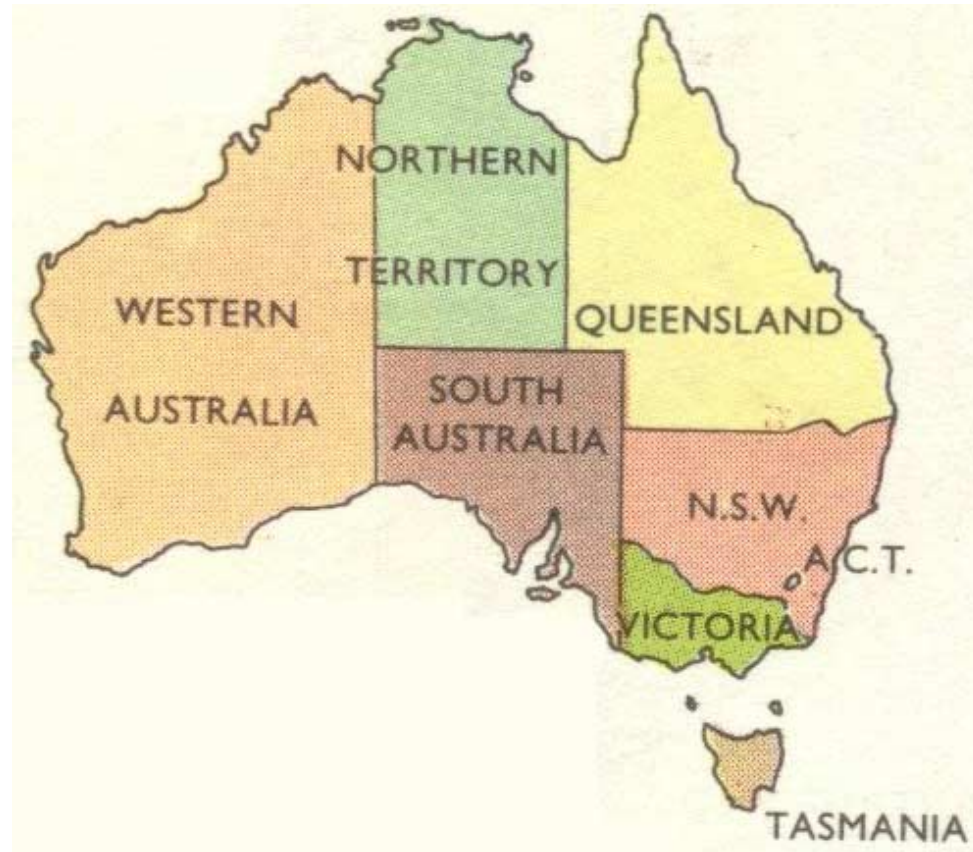
- I completed my legal studies in 1983.
- My introduction to asbestos related disease came about in a brutal fashion.
- In about September October of 1984 my brother in law, who until that time I had never known to be ill, developed a terrible illness that no one seemed to be able to diagnose.
- It was bad not knowing what his illness was but when the illness was named, peritoneal mesothelioma, the news was devastating.



Topics of Discussion

- Australia – a medley of federal and state laws
- Wittenoom – what was it like?
- Early compensation claims
- 1970's
- 1980's
- 1990's - 2000 and beyond

1. Australia – a Medley of Federal and State Laws





Commonwealth

- The Commonwealth no fault benefits scheme covers employees of the Commonwealth Government of Australia e.g. Telecommunications, Postal and Defence employees.
- The no fault benefits scheme which covers these workers is known as Comcare Australia.



Commonwealth

- Common Law entitlements under the Comcare scheme are limited and the scheme requires workers to elect between compensation entitlements under the Comcare Act or Common Law Damages entitlements.
- Biggest obstacle in Comcare claims is the complex legislative framework and the fact that you can't even get into a tribunal or court until claim has been submitted to the government agency for determination and then for reconsideration.



Western Australia

- The no fault benefits workers' compensation scheme is WorkCover Western Australia.
- For many years, workers compensation entitlements were all that asbestos related disease victims could hope to receive because, despite common law damages claims being available, they tended not to be pursued.



Western Australia

- For common law claims asbestos related disease victims faced harsh statute of limitations period with no extension provisions beyond 6 years.
- In 1983 amendments introduced to allow claims for asbestos related disease.
- Since 1993 workers (not just asbestos related disease victims) have seen restrictions on the previously unrestricted right to bring common law claims for damages against negligent employers.



New South Wales

- The no fault workers' compensation scheme is WorkCover NSW.
- For Dust Diseases workers' compensation claimable from Dust Diseases Board.
- Specialist Dust Diseases Tribunal set up in 1989 to hear asbestos related disease common law claims.



New South Wales

- 1998 amendments introduced provisions abolishing the statute of limitations in dust disease matters and other beneficial amendments including the introduction of amendments to survivorship legislation to ensure that entitlements to general damages survive for benefit of family of deceased if victim is unable to see his/her claim through to resolution in own lifetime.



Other States – Victoria, South Australia and Queensland

- Each state has own workers' compensation act and own limitation provisions.
- Like Western Australia no special court or tribunal for asbestos related disease claims but procedures have evolved for fast tracking urgent claims.



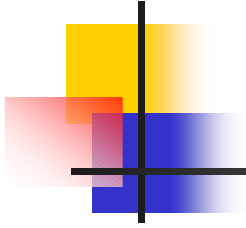
Other States – Victoria, South Australia and Queensland

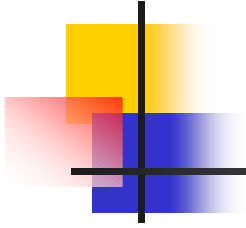
- Victoria has right to jury trial in common law damages claims.
- Victoria has followed NSW's lead in relation to introduction of amendments to survivorship legislation to preserve entitlements to general damages for benefit of family of deceased if victim dies before his/her claim through to resolution in own lifetime.

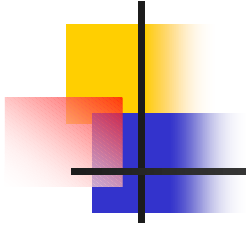
2. Wittenoom - what was it like?

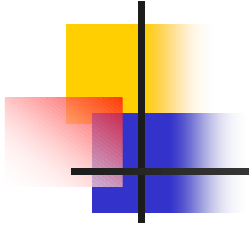


- Almost 1,500 kms from Perth, Western Australia.
- Isolated, harsh, hot and inhospitable.
- 1943 CSR Limited through a subsidiary company, ABA Limited, commenced mining and milling blue asbestos at Wittenoom.









- Over the 23 years of its operation from 1943 to closure of the Wittenoom Blue mine in December 1966, thousands of workers and their families lived and worked at Wittenoom.

The First Mill at Wittenoom





Working in the Mine



The Mill



Mill Workers



Recreational Days





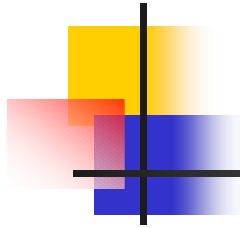
3. Early Compensation Claims

- The only claims made in the early years by asbestos related disease sufferers were workers' compensation claims.
- The earliest reported decision of which I am aware in Australia was a workers' compensation claim in 1939 against James Hardie.
- Workers' compensation entitlements have always been restricted in nature.

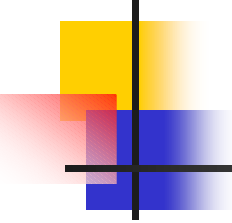


4. 1970's

- Australia lagged behind other countries such as the United Kingdom and the United States in terms of both regulation of asbestos industries and in terms of common law claims on behalf of asbestos related disease victims where claimants alleged that exposure to asbestos arose out of negligence of an employer and sought damages.



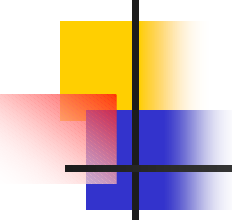
- In the 1970's the Wittenoom mesothelioma toll was rising.
- The obstacles facing anyone contemplating bringing a claim were overwhelming.
- Victims and their legal advisers were in an unenviable position.
- Claims were probably barred by the Statute of Limitations.
- There was a dearth of information available to anyone contemplating bringing a claim.

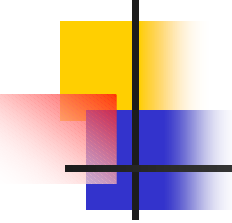
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- Fortunately the obstacles were not enough to put off all claimants.
 - In 1977 first common law writ issued by an ex Wittenoom employee (Cornelius Maas died before the claim proceeded).
 - Documents that surfaced more than 10 years later reveal how the corporate end dealt with news of the claim.
 - In 1979 a second claim was brought, this time by Mrs Joan Joosten.

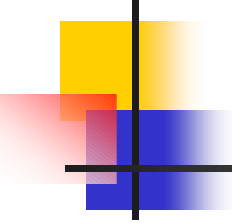


5. 1980's

- Mrs Joosten's appeal was due to be heard on 10 March 1980. She died just before her appeal commenced.
- After Mrs Joosten's death the obstacles seemed insurmountable.
- The cause on behalf of the victims was down but not out; lobbying continued and some critical progress was made with the introduction of the 1983 amendments to the Limitation Act.

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- In 1984 the “missing” documents surfaced.
 - In Australia winning a claim for common law damages was beginning to appear impossible and Defendants such as CSR must have been thinking their decision to litigate rather than look for a compromise had been the right decision.

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- The first “break” did not happen in Western Australia but in Victoria. In September 1985 Slater & Gordon achieved the first successful verdict for damages at common law in *Pilmer -v- McPhersons Ltd.*
 - In the Wittenoom context other cases had been issued in Western Australia. One was for Oscar Penetta (asbestosis) another for Rino Pedrotti (mesothelioma) and another for Wally Simpson (asbestosis).
 - All in all however few people were taking advantage of the 1983 Limitation Act Amendments to issue proceedings.

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- Pedrotti died on 10 February 1986, the day that he was to have given evidence in his claim.
 - Penetta was advised by his lawyers not to proceed.
 - Wally Simpson's case proceeded, commencing on 15 July 1987 and occupying 40 days of Court hearing time. Simpson's claim was against Midalco.
 - As the Simpson case proceeded two additional claims were prepared for trial for mesothelioma victims Tim Barrow and Peter Heys. Their claims included CSR as a Defendant.
 - The Heys and Barrow trials commenced on 19/11/87.



Heys & Barrow

- Heys & Barrow ran for more than 130 court sitting days over 8 months. Case concluded 14/7/88. A decision was handed down on 4/8/88.



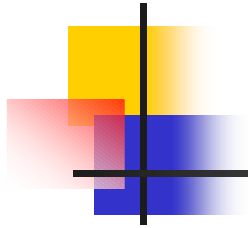
Rabenault

- While Heys and Barrow proceeded in the Supreme Court of WA another mesothelioma claim arising out of Wittenoom was run before a judge and jury in the Victorian Supreme Court from 7/4/88 to 23/5/88. On 24/5/88 the jury found in favour of Mr Rabenault - the first Wittenoom common law victory.



Watson

- In the Supreme Court of WA Colin Watson brought a claim for common law damages for asbestos related disease against the State of WA - his exposure was at Point Samson. His claim ran for 18 sitting days from 21/3/88 - 29/4/88. On 27/5/88 the judge found in favour of Mr Watson.

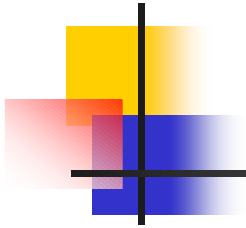


- Finally in 1988 the tide turned.
- For the first time ever asbestos related disease victims who had had to struggle so long against so many adversities had a chance to receive common law damages.
- In late 1988 and 1989 settlements started to occur.



6. 1990's 2000 and Beyond

- In Australia, after the 1980's, the focus shifted. The battles continued but they tended to be on more discrete issues.
- There have been many significant decisions including:
 - 1994 - Olsen -v- CSR and Midlaco (DDT)
 - 1994 - Bodsworth -v- City of Nunawading (Vict)



- One of the most recent breakthroughs has been in litigation on foot for waterfront asbestos victims (Crimmins - v- Stevedoring Industry Finance Committee)

Strategies To Defeat the Obstacles



- Never give up
- Have strong lobby groups
- Get the issues aired in the press
- Outthink the defendants – persistence, hard work and determination
- Keep a focus on the big picture, if there are losses along the way don't let them crush you; keep going and aim to win the war
- Remember why you are fighting – the asbestos victims, their courage and determination provides endless inspiration to achieve on their behalf

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