



## HIGH COURT OF AUSTRALIA

Public Information Officer

7 December 2004

BHP BILLITON LIMITED v TREVOR JOHN SCHULTZ, WALLABY GRIP LIMITED,  
WALLABY GRIP (BAE) PTY LTD (in liquidation), WALLABY GRIP (NSW) PTY LTD (in  
liquidation), AMACA PTY LTD (formerly James Hardie and Co Pty Ltd)

The South Australian Supreme Court was the appropriate forum in which to determine damages for Mr Schultz's asbestos-related personal injuries, the High Court of Australia held today.

Mr Schultz, who lives in SA, suffers from asbestosis and asbestos-related pleural disease. He worked at the BHP shipyard in Whyalla from 1957 to 1964 and from 1968 to 1977. In 2002 he commenced proceedings in the New South Wales Dust Diseases Tribunal (DDT) against BHP, claiming negligence, breach of contract and breach of statutory duty. Mr Schultz also took action against the other corporations for negligent manufacture and supply of materials used in Whyalla. These other companies took no part in the NSW Supreme Court or the High Court, but there are cross-claims between them and BHP. Subject to proof of Mr Schultz's exposure and diagnosis, liability of the companies is not in issue and the trial will be limited to assessment of damages.

BHP unsuccessfully applied to the Supreme Court before Justice Brian Sully to remove the matter from the DDT into that Court pursuant to the *Jurisdiction of Courts (Cross-vesting) Act* and then to transfer the matter to the SA Supreme Court under section 5. The law of SA would be the substantive law governing Mr Schultz's claim and the lay witnesses and most medical witnesses are in SA. Mr Schultz argued that NSW law could govern some of the claims against the other companies and the cross-claims. Section 11A of the *Dust Diseases Tribunal Act* provides that the DDT may award damages at a future date if the injured person develops another dust-related condition. Mr Schultz sought an order from the DDT preserving his right to make such a future claim. Under section 30B of the *SA Supreme Court Act*, there is only one assessment of damages, although there is scope for an interim payment.

Under section 5 of the *Cross-vesting Act*, the court in which proceedings are to be determined is dictated by the interests of justice. It is not necessary that the first court should be a clearly inappropriate forum, rather that the second court is more appropriate. The capacity of a court to deal with a case expeditiously may be in the interests of justice. Justice Sully refused BHP's application, holding that the interests of justice did not require the making of orders for the removal and cross-vesting of the proceedings. He held that the choice of forum of the plaintiff (Mr Schultz) was not to be lightly overridden and that he should retain the advantages of section 11A of the *DDT Act*. BHP appealed to the High Court. (No appeal lay to the NSW Court of Appeal.)

The Court unanimously allowed the appeal. It held that the emphasis given to both Mr Schultz's choice of forum and section 11A as factors against making the transfer order involved error in the application of section 5 of the *Cross-vesting Act*. By a 4-3 majority the Court held it need not remit the matter to the NSW Supreme Court for reconsideration, instead ordering that Mr Schultz's case be removed from the DDT into the Supreme Court and then transferred to the SA Supreme Court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*