

## Landmark settlement for “third wave” victim of asbestos



*Turner Freeman partner, Tanya Segelov, recently obtained a landmark settlement on behalf of Stephen Wickham, a mesothelioma victim, against Amaca Pty Limited (formerly James Hardie & Coy Pty Limited).*

Mr Wickham was unknowingly exposed to asbestos dust when performing home renovations on his home in Perth in 1994. At the time Mr Wickham had recently emigrated from England, and had been told of the dangers of exposure to asbestos dust in his home country. He did not know however that all fibro sheets manufactured in

Australia prior to 1983 contained asbestos. Mr Wickham therefore performed home improvements on his home including removing corrugated fibro sheets from his garage and replacing part of a fence made from corrugated fibro sheets, exposing himself to asbestos dust. Mr Wickham was diagnosed with the deadly asbestos cancer, mesothelioma, 19 years later.

Mr Wickham brought a claim against James Hardie alleging that James Hardie should have warned him of the dangers of such home handyman work in relation to their product. Specifically, he alleged that James Hardie should have run a public awareness campaign educating the public in relation to how to identify their products which contain asbestos, and how to handle the products safely. Indeed, the “third wave” of asbestos victims are the home handyman performing renovations on their own home. This class of people are still at risk of exposure to asbestos dust, and contracting asbestos related diseases, as a result of this type of work. Mr

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### **Welcome to the winter edition of TF News.**

This edition provides a summary of the case of Wickham vs Amaca Pty Limited

(formerly James Hardie & Coy Pty Limited), a case that Turner Freeman partner, Tanya Segelov, recently ran in the Dust Diseases Tribunal of NSW, and settled after two days of hearing. The case involves exposure to asbestos of a home renovator, the “third wave” of asbestos victims.

We also focus on the area of workers compensation in this edition. Turner Freeman not only specialises in dust diseases litigation but also workers compensation matters. The system is again undergoing review and is

likely to be overhauled within the next 12 months. It is important that anyone injured at work obtain advice in relation to their entitlements to ensure that the best possible outcome is achieved.

We also report on Turner Freeman’s sponsorship and attendance of the Thoracic Society of Australia and New Zealand Conference held in Adelaide in April 2014. The conference was a tremendous success and Turner Freeman were proud to sponsor the event.

As always, we hope that you enjoy the read. If you have any queries or questions in relation to any of the articles, or any other legal matter, do not hesitate to contact the office on 1800 002 066.

**Annie Hoffman**  
Managing Partner  
Turner Freeman Adelaide

**Turner  
Freeman**

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## Entitlements under the Workers Rehabilitation and Compensation Act 1986 (SA)

### PART 1: Weekly payments

*If you have been injured at work you are likely to have various entitlements through the workers compensation system. The legislation which governs those entitlements for workers employed by South Australian employers is the Workers Compensation and Rehabilitation Act 1986 (SA) ("the Act").*

This article is the first in a series regarding workers' entitlements under the Act. The focus of this article is income maintenance, otherwise known as weekly payments.

If you are injured at work and unable to return to your pre injury employment hours you may be entitled to compensation for loss of your employment related income. These weekly payments are referred to as income maintenance.

The amount you will receive in weekly payments is based on your **average (or notional) weekly earnings** with your employer in the

12 months leading to your injury. If your income varied in this period, this may mean that you will receive less in income maintenance than you were receiving immediately before the accident. This is because your weekly payments are based on the average of your earnings in that 12 month period.

Income maintenance payments are made in 3 stages called **entitlement periods**.

- For the first 13 weeks that you are unable to work you are entitled be compensated for 100% of your average weekly earnings.
- For weeks 13 to 26 there is a reduction in your weekly

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**Diego Caruso**

Diego Caruso has recently joined the Turner Freeman Adelaide office as a solicitor in our personal injury and dust diseases team. Diego assists clients with a range of personal injury matters, with a particular interest in motor vehicle accidents and public liability claims.

Diego was admitted as a solicitor in the Supreme Court of South Australia in 2011 and since this time has been practising almost entirely in the area of personal injury law.

Diego has an interest in martial arts, teaching jujitsu and boxing at the North Side Boxing Club. Diego is also fluent in Italian and Greek, having family from both of these backgrounds.

We are sure that Diego's knowledge and experience in the area of personal injury law, coupled with his very personable style, will be an asset to the Turner Freeman Adelaide office.

Please join us in welcoming Diego to the team.

STAFF PROFILE



## TSANZSRS Conference Adelaide Convention Centre April 2014

The Thoracic Society of Australia and New Zealand held its annual scientific meeting between 1 & 9 April 2014 at the Adelaide Convention Centre. The annual event is a chance for chest physicians and nurses to gather and share ideas in the area of respiratory medicine. Some of the presentations covered asbestos related illnesses. Turner Freeman was pleased to sponsor the event, which was attended by over 600 respiratory physicians, nurses and scientists from around Australia and New Zealand.

Turner Freeman partners, Annie Hoffman (Adelaide), Kacey Wuelfert (Perth), and Fiona Seaton (Sydney) attended the conference. Turner Freeman ran a booth at the conference answering legal questions from delegates about dust diseases claims and how they are run in various jurisdictions around Australia. Turner Freeman also launched its medico-legal newsletter



at the conference, aimed at providing advice to the medical profession in relation to recent decisions, rules in relation to expert evidence and claims procedure affecting the medical profession.

Turner Freeman sponsored the

Asbestos Victims Association (SA) to attend the conference. The AVA ran their booth providing information to delegates in relation to identifying asbestos products, particularly in the home, and the precautions required when handling asbestos.

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Wickham therefore argued that James Hardie had a duty to advise the public at large in relation to such dangers. Thousands of documents produced by James Hardie were to be tendered in the proceedings. Some of the documents demonstrated that James Hardie was spending large sums of money on advertising campaigns in the late 1970s and early 1980s including sponsoring the “Life Be In It” campaign. Mr Wickham argued that the documents showed that James Hardie had the resources and the marketing expertise to run the type of public awareness campaign that James Hardie ought to have run. Mr Wickham argued that had James Hardie run such a campaign, he would never have

carried the renovations which resulted in his contraction of mesothelioma.

In addition to the public awareness argument, Mr Wickham called evidence from one of James Hardie’s previous employees which indicated that James Hardie could have made an asbestos free product from the 1960s had it tried. Mr Wickham alleged that had James Hardie attempted to produce an asbestos free product in the 1960s, he would never have been exposed to asbestos dust in the first place.

Mr Wickham’s case ran for two days in the Dust Diseases Tribunal of NSW. Over these two days a large amount of evidence was tendered and called before the Court which now can be

relied upon by future claimants. This evidence also includes testimony given by David McFarlane, one of James Hardie’s former managing directors, who described the dangers of asbestos as “a media beat up”.

After two days of hearing, the case settled for a confidential sum. Despite the fact that no judgment was delivered, the evidence called in the case will be extremely beneficial to the “third wave” of asbestos victims, being the home renovator. It is these types of cases which reinforce the need to educate the public in relation to the dangers of exposure to asbestos so that renovators such as Mr Wickham can safely avoid exposure to asbestos dust.

## Entitlements under the Workers, Rehabilitation and Compensation Act 1986 (SA)

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payments to 90% of your average weekly earnings.

- After 26 weeks there is a further reduction to 80% of your average weekly earnings.

If you return to work but are not earning more than your average weekly earnings, your entitlement to weekly payments is based on the difference between what you are earning and your average weekly earnings. This is called a top-up payment. For example, in the second entitlement period you would be entitled to receive a top up weekly payment of 90% of the difference between what you are earning and your average weekly earnings.

If you are still receiving weekly payments at 130 weeks your entitlement to income maintenance will be based on assessment of your work capacity. In order for weekly payments to continue, you must make an application to WorkCover and show that:

- You have no current work capacity and that this is likely to continue indefinitely; or
- You are in employment and because of your injury you are, and are likely to continue indefinitely to be, incapable of undertaking further or

additional employment or work which would increase your average weekly earnings.

A range of factors may be taken into account when assessing whether employment is suitable, including the nature of your incapacity and previous employment, your age, education, skills and work experience, your place of residence and your health and ability to perform certain tasks.

If you do not meet at least one of these criteria WorkCover SA is entitled to discontinue your weekly payments after giving you 13 weeks written notice.

Your income maintenance may also be discontinued at any time for the following reasons:

- You have breached "mutuality". This can include failing to attend a medical or rehabilitation appointment, refusing to perform suitable duties for your employer or your employment is terminated on account of serious or wilful misconduct.
- You receive earnings equal to or above your average weekly earnings.
- You reach the age of 65 years; and/or
- You are absent from South Australia for more than 2 months in a year without

consent from your case manager.

If you are unhappy with a decision regarding your weekly payments you may have an entitlement to appeal that decision. A decision by WorkCover regarding your entitlements under the Act is known as a determination. A determination to vary, suspend or discontinue income maintenance can be disputed in the Tribunal. If you wish to dispute a determination, you can do so by lodging a Notice of Dispute in the Workers Compensation Tribunal one month from the date you received the determination.

**If you would like advice in relation to income maintenance entitlements or any other workers compensation matter, please contact the office on 1800 002 066.**