

**IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES**

**DDT No. 296 of 2009**

BETWEEN:

**AMACA PTY LTD (UNDER NSW ADMINISTERED WINDING UP)**  
Plaintiff

**CSR LTD**  
Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. The Acting Registrar referred this matter to me by letter dated 19 April 2011 pursuant Divs 5 and 6 of the *Dust Diseases Tribunal Regulation 2007* (NSW) for a determination of apportionment as between the plaintiff and defendant.
2. These proceedings are a claim brought by one of the defendants to the principal proceedings, Amaca Pty Ltd (**Amaca**).
3. Amaca sues CSR Ltd (**CSR**) seeking contribution or indemnity to liabilities and legal costs discussed below.

**The Principal Proceedings**

4. The principal proceedings were brought by Thomas Flanagan against Comcare and Caltex Refineries (Qld) Pty Ltd (formerly Ampol Refineries Ltd) (**Caltex**) in proceedings No 8245/2008 (**the Flanagan Proceedings**).

5. In the Flanagan Proceedings Caltex filed a cross-claim against Amaca. Mr Flanagan's Statement of particulars is annexed to CSR's Reply. He alleged that:
  - (a) He was employed by Caltex as an operator/senior operator/plant inspector from June 1974 to 31 January 1997.
  - (b) He was exposed to asbestos during this period from lagged machinery including turbines, furnaces, generators, boilers, compressors, pumps, heat exchangers and steam pipes. He worked in the vicinity of tradesmen who removed and replaced lagging on the machinery.
  - (c) He describes that the ladders used "*a variety of asbestos products including asbestos half pipe sections on pipework, asbestos cloth, asbestos rope and asbestos powder*".
  - (d) As plant inspector (from 1983) he was exposed to asbestos insulation on the boilers and surrounding steam pipes. Asbestos would evolve from those pipes when they vibrated during operation.
  - (e) He endured regular and heavy exposure to asbestos up until the late 1980s.
  - (f) 30% of his lifetime exposure occurred at Caltex.
  
6. Judgment was entered for Caltex on its cross claim against Amaca in the sum of \$13,500.

### **Amaca's Claim**

7. Amaca sues CSR on the basis that it was a partner with Amaca and Bradford Insulation Industries Pty Ltd between 28 September 1964 and May 1974 (**the Hardie-BI Partnership**). The Hardie-BI Partnership manufactured products which included:
  - (a) 85% magnesia sections, blocks and plastic;
  - (b) High Temperature Magnesia sections, blocks and plastic;
  - (c) Super High Temperature Magnesia sections, blocks and plastic;
  - (d) K-Lite Calcium Silicate sections and blocks;

- (e) Asbestos millboard;
  - (f) Fibrefil; and
  - (g) Caposite.
8. Amaca filed a Revised Part 8 Reply on 8 February 2010. It is a brief document and can be summarised in the following terms:
- (a) CSR and Amaca are Category 1 parties.
  - (b) Mr Flanagan was exposed to “*a variety of asbestos products including half-pipe sections, asbestos cloth and asbestos rope and powder throughout the course of his employment at Caltex*”.
  - (c) Amaca relies on the decision in *Stavar v Caltex Refineries* where Amaca was found to be 40% liable for as supplier of asbestos products to Caltex (Wallaby Grip was liable for the balance). Mr Stavar commenced was employed at the same time as Mr Flanagan (1974) and Amaca was found to be liable for exposure which occurred even after it ceased manufacturing.
  - (d) On a time on risk basis Amaca calculated that its liability for exposure to all asbestos from 1 January 1974 to 31 December 1988 was 7.38%.
  - (e) Amaca agreed with WorkCover Queensland to “*provide a 9% overall contribution towards Mr Flanagan’s settlement sum. We believe this accurately reflects the higher intensity of exposure to which Mr Flanagan was subject whilst employed by Caltex Refineries as opposed to division of apportionment on the sole basis of time on risk*”.
  - (f) The apportionment between CSR and Amaca is then split equally so that Amaca submits the final apportionment on this claim is 4.5% each.

### **CSR’s Reply**

9. CSR admits that it was Amaca’s partner in the Hardie-BI Partnership and that that partnership existed in the period 28 September 1964 to 26 June 1974.

10. CSR disputes the foundation of Amaca's claim on the basis that Mr Flanagan did not identify any manufacturers or suppliers of asbestos containing products nor did he identify any products by trade name. CSR notes that of those products Mr Flanagan says he was exposed to it did not manufacture and/or supply asbestos cloth, asbestos rope or asbestos powder. CSR says the evidence provided by Mr Stavar is equivocal in identifying the products he was exposed to or showing they were manufactured and supplied by the Hardie-BI Partnership.

11. CSR notes, in particular, that no supporting evidence has been supplied by Caltex or Amaca in the nature of invoices or purchase orders showing Hardie BI products were supplied to Caltex.

12. CSR then makes primary and secondary submissions on its liability:

- (a) **Primary Submission** – there is no direct evidence that Mr Flanagan was exposed to partnership products and therefore its liability should be nil.
- (b) **Secondary Submission** – applying a time on risk analysis of Mr Flanagan's exposure (1 Jan 1974 – about 1998) was only 177 days for that period as the Hardie-BI Partnership ceased manufacture and supply on 26 June 1974. CSR's calculates the apportionments to be:

Amaca	8.875%
CSR	0.125%

### Reasons

13. To my mind Stavar is a very different case to this one. Mr Stavar had exposure to asbestos from 1964 to 1990. At times he was employed by Caltex at the refinery and for another lengthy period he was employed by a third party but worked at the Caltex Refinery. Three products were identified as the source of asbestos exposure in that case – asbestos rope, 85% magnesia half pipe sections and a "powder

compound called “301””. The majority of his exposure was to asbestos rope which was the reason why Wallaby Grip assumed the greater preponderance of liability. No manufacturer of 301 powder was identified. There was no issue that Amaca and CSR were suppliers of 85% magnesia half pipe sections and so there was some liability from at least 1964 which continued beyond 1974.

14. Mr Stavar did, however, identify 85% magnesia half pipe sections as a product he was exposed to and I consider it reasonable to infer that that product equates to what Mr Flanagan describes as “*asbestos half pipe sections on pipework*”. Accordingly, I reject CSR’s Primary Submission that it can have no liability at all to Amaca.
15. I accept that the evidence of CSR’s liability as a partner of the Hardie-BI Partnership is thin. Amaca’s claim would evidently have been bolstered by evidence of invoices or purchase orders or other correspondence to support the contention that it was a supplier of products to Caltex. That is easier said than done as the partnership ceased over 35 years ago.
16. I do not accept CSR’s time on risk analysis in the circumstances of this case. The nature of the asbestos half pipe product was that it was installed and stayed in situ for many years so that the potential for exposure did not cease on the day manufacturing ceased.
17. Further whilst it may be that there was no further supply of particular products beyond June 1974 Mr Flanagan was in all likelihood exposed to products that had already been installed and were at the Caltex Refinery when he commenced working there in January 1974.
18. Mr Flanagan’s description of his exposure to asbestos in paragraph 5(d) above indicates his exposure to asbestos insulation products continued for some time.

19. Taking each of those matters into account I consider that CSR must bear some but not half of Amaca's liability. The only product identified as a Hardie-BI Partnership product is the half pipe section. It didn't manufacture or supply cloth, rope or powder products. I reach that conclusion on the basis that with more substantial evidence there may have been reason to conclude CSR's contribution to Mr Flanagan's liability was greater. Also, Amaca appears to have made a commercial decision to contribute 9%, which is slightly more than the strict time apportionable calculation of 7.38%.

20. Accordingly, I consider CSR should contribute 3% of the total.

21. I have not been asked to appoint a Single Claims Manager.

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David Jay

Contributions Assessor

28 April 2010